

STUDY

Requested by the AFCO committee



# The Implementation of Enhanced Cooperation in the European Union



Policy Department for Citizens' Rights and Constitutional Affairs  
Directorate General for Internal Policies of the Union  
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# The Implementation of Enhanced Cooperation in the EU

STUDY

## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs, examines – against a historical backdrop – the legal provisions governing Enhanced Cooperation as well as the so far very limited number of implemented Enhanced Cooperation initiatives. Based on these insights, concrete ideas are formulated on how to optimise this 'standardised and generalised framework' of differentiated integration, touching upon questions of efficacy, efficiency and legitimacy.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

<b>AFSJ</b>	Area of Freedom, Security and Justice
<b>Benelux</b>	Belgium, Netherlands and Luxembourg
<b>CFSP</b>	Common Foreign and Security Policy
<b>CJEU</b>	Court of Justice of the European Union
<b>CSDP</b>	Common Security and Defence Policy
<b>EC</b>	European Commission
<b>EDA</b>	European Defense Agency
<b>EEAS</b>	European External Action Service
<b>EMS</b>	European Monetary System
<b>EMU</b>	European Monetary Union
<b>EnC</b>	Enhanced Cooperation
<b>EP</b>	European Parliament
<b>EPO</b>	European Patent Office
<b>EPPO</b>	European Public Prosecutor's Office
<b>EPRS</b>	European Parliamentary Research Service
<b>FTT</b>	Financial Transaction Tax
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>HR</b>	High Representative of the Union for Foreign and Security Policy
<b>JHA</b>	Justice and Home Affairs
<b>JU</b>	Joint Undertakings
<b>MEP</b>	Member of the European Parliament
<b>MS</b>	Member States
<b>NATO</b>	North Atlantic Treaty Organization
<b>OLP</b>	Ordinary Legislative Procedure
<b>Opt-ins/'Ins'</b>	Member States participating in a subgroup project
<b>Opt-outs/'Outs'</b>	Member States not participating in a subgroup project
<b>PASE</b>	Problem, Analysis, Solution Process and Evaluation
<b>PESCO</b>	Permanent Structured Cooperation
<b>QMV</b>	Qualitative Majority Voting
<b>R&amp;D</b>	Research and Development
<b>SWOC</b>	Strengths, Weaknesses, Opportunities and Constraints
<b>TEC</b>	Treaty of the European Communities
<b>TEU</b>	Treaty of the European Union
<b>TFEU</b>	Treaty of the Functioning of the European Union
<b>UN</b>	United Nations
<b>UPC</b>	Unified Patent Court

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## EXECUTIVE SUMMARY

### Background

Given differences in the interests of Member States to use the Union for solving their problems, differentiation in various forms was, is and will be an issue of high salience. Trying to solve the fundamental dilemma of (subgroup) problem-solving instinct and Community orthodoxy, the promise of the Enhanced Cooperation (EnC) framework, introduced in the Amsterdam Treaty and revised under the Nice and Lisbon Treaty, has been the following: *Political unity, legal homogeneity and institutional coherence can substantially be preserved and pursued by an institutionally embedded and substantially constrained flexibility.*

Analysing the scarce empirical evidence from less than a handful of successful cases, the achievements of EnC – envisaged as *the* standardised and generalised framework of differentiated integration in the EU – are rather sobering.

### Aim

Against this backdrop, the aim of this study is to answer the following questions:

- How is EnC governed under the Lisbon provisions?
- How has EnC been implemented until today?
- Why has it failed to live up to its original promise?
- What changes can and should be made to unblock the framework's full potential?

The answer to the latter one will be realised in form of an 'Institutional Toolbox', synthesising the previous results in concrete recommendations of how to optimise and streamline the EnC framework without and/or with Treaty revisions.

### KEY FINDINGS

- The 'administrative offers' of EnC have not prevented Member States from pursuing their problem solving outside the EU Treaties (e.g. fiscal compact).
- Analysing the relevant Treaty provisions, clear procedural and substantive 'bottlenecks' can be identified, streamlining EnC towards special legislative procedures and policies related to Justice and Home Affairs.
- In its current procedural setup, EnC implies a protracted legislative procedure (durations between 4-12 years for the implemented initiatives).
- Apart from two 'conflict-of-law solution schemes' (Rome III and Property Regime Rules), the empirical material for an impact assessment of EnC projects is rather scarce.
- The impact of the framework as a whole can be best described as an 'evolutionary normalisation' of differentiated integration – in contrast to a 'revolutionary magic formula'.
- Mirroring the 'no representation without taxation' rationale applied in the Council (i.e. voting rights only for participating Member States), an EnC committee format in the European Parliament should be established in order safeguard the linkage between the decision-makers and the affected citizens.

## 1. INTRODUCTION: ENHANCED COOPERATION – A MAGIC FORMULA FOR A FUNDAMENTAL DILEMMA?

*“We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible.” (Rome Declaration, 2017)<sup>1</sup>*

To reconcile the first with the second sentence of this cumbersome compromise formula, taken from the 2017 Rome Declaration, wishful thinking might not be enough. Often regarded as an ‘unsolvable conundrum’, “different paces and intensity” and a “Union [...] undivided and indivisible” can be regarded as ‘two sides of the same coin’ only in so far as one is dealing with an **‘either-or question’**. 20 years earlier, when the idea of Enhanced Cooperation (EnC), called **‘Closer Cooperation’** at that time, was legally spelled out in the Treaty of Amsterdam, not few<sup>2</sup> expected this newly established mechanism to make the **‘coin of differentiated integration’** – almost *magically* – land on its edge, and thus to dissolve the **dilemma of sub-group problem-solving vs. Community orthodoxy**.

*The dilemma’s underlying challenge*

Based on the underlying challenge of reconciling the propensity of some Member States (MS) to tackle certain problems together (**‘problem-solving instinct’**)<sup>3</sup> with the resistance of others opposing at the same time the policy itself *and* the danger of being left behind, this dilemma can be considered an ‘evergreen’ in the history of the European Union (EU), steadily intensified with every enlargement. The **‘Community orthodoxy’** – often invoked not only by potential outsiders – is based on three main pillars, namely **political unity, legal homogeneity** based on *one* *acquis communautaire* and **institutional coherence** and revolves around the aspiration of the **same rights and the same obligations** for all MS (see figure 1). Flexibilisation and differentiation in the name of the **‘second-best solution’** for transnational problems – when consensus with all MS cannot be achieved – puts this orthodoxy into question and thus poses itself a particular challenge for the European integration project as a whole. The main channel of the MS to pursue the problem-solving instinct and in this vein to conceive and construct several and different forms was **the leaders’ institution, the European Council**.

In the light of and in response to the – at this point in time – already quite **extensive history of ‘improvised’ differentiated integration** (e.g. opt-outs, agreements outside the Treaties, etc.), a **generalised**, i.e. applicable to a large number of policy fields, and **standardised**, i.e. providing a uniform and transparent procedure, **framework of ‘controlled’ differentiated integration** was introduced by the MS in the Amsterdam Treaty in 1997/99. Offering room for flexible subgroup integration, while at the same time keeping the ‘pioneers’/‘avant-garde’ and their projects **within the institutions** and thereby within the Treaties, **the promise of EnC** remained the same over all subsequent Treaty reforms:

Political unity, legal homogeneity and institutional coherence can substantially be preserved and pursued by a certain **flexibility** – even if it implies a **complex procedure** leading in itself to an **inflexibilisation of the supposed flexibility clause**.

‘Fencing in’ the dynamics of differentiated integration by, firstly, a **common procedural setting** and, secondly, **substantive limits of application and range**, can hereby be considered as the main ingredients of EnC’s ‘magic formula’.

<sup>1</sup> General Secretariat of the Council, *The Rome Declaration*, Statements and Remarks 149/17, 25 March 2017. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf> (consulted on 1 October 2018).

<sup>2</sup> See Françoise de la Serre and Helen Wallace, “Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?”, *Notre Europe*, Research and Policy Papers, no. 2 (revised version), September 1997, p. 5. Available at: <https://institudelors.eu/wp-content/uploads/2018/01/etud2-delaserrewallace-en.pdf> (consulted on 1 October 2018).

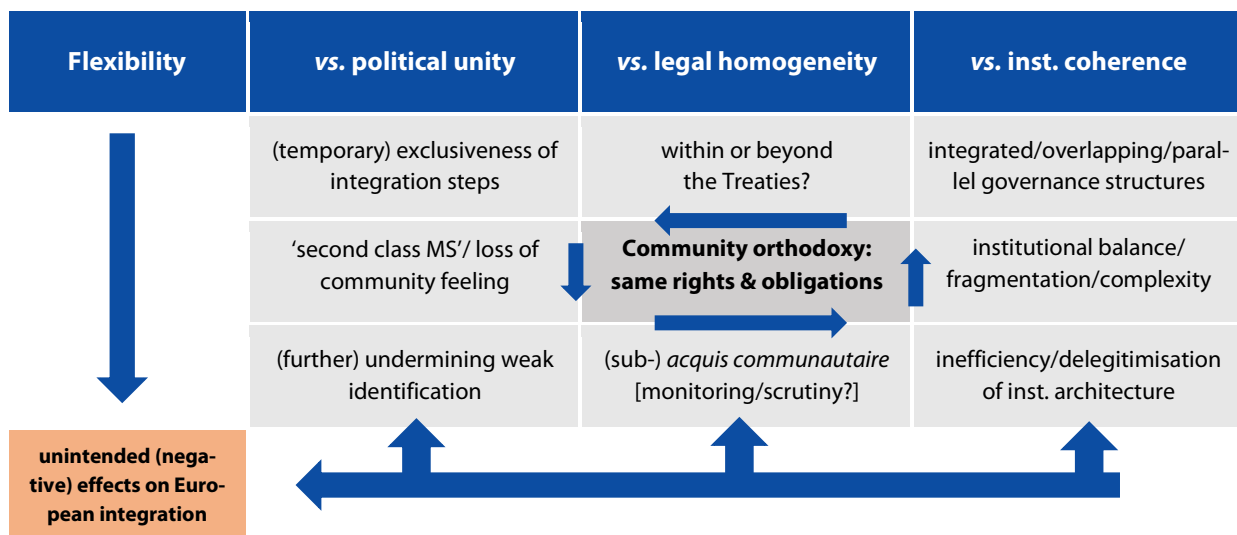
<sup>3</sup> See for example Wolfgang Wessels, *The European Council*, Palgrave Macmillan, Basingstoke, 2016, p. 19.

*Aspects to be taken into account*

More concretely, defining a procedural setting and the substantive limits of such an ambitious framework must consider the following aspects:

- the interests of the opt-out countries, mainly not to suffer from negative extra-territorial effects from the EnC (**'negative spillovers' for the opt-outs**);
- the interests of the opt-in countries not to suffer from negative extra-territorial effects, mainly **free riding** of the opt-out countries to the damage of the opt-ins (**'negative spillover' for the opt-ins**);
- (allegedly) **objective differences between the MS** with regard to the capabilities to take up obligations (**'willing' and 'able'**) and the correspondent formulations of **'opt-in conditions'**;
- the role of the European Commission (EC), the European Parliament (EP) and the European Court of Justice (CJEU) with regard to the **institutional balance of the Community**;
- the worries that steps ahead by a subgroup would lead **'two-class EU'** based on an extensive set of different Treaty obligations and thereby **'hollow out' the Community acquis**;
- therefore, to keep the **opt-outs informed and involved** to safeguard the **feeling of being in a community**.

**Table 1: Core challenges of differentiation**



Source: Own elaboration

With only **4½ cases in almost two decades**,<sup>4</sup> ongoing and – since the financial and sovereign debt crisis – even accelerating **institution-building outside the Treaties**,<sup>5</sup> combined with low expectations that EnC’s **'structured flexibility'** will be the way forward regarding the Union’s major challenges in the future, the magic of this **'generalised' and 'standardised' framework** of differentiated integration is – at least for the moment – gone.

*Research questions, focus and outline of the study*

Against this backdrop this study tries to answer four major questions:

- How is EnC governed under the Lisbon provisions?

<sup>4</sup> The first legislation within the EnC framework was adopted not earlier than 2010, after the coming into force of the Lisbon Treaty.

<sup>5</sup> See for example Steven Peers, "Towards a New Form of EU Law", in: *European Constitutional Law Review*, vol. 9, no. 1, 2013, pp. 37-72.

- How has EnC been implemented until today?
- Why has it failed to live up to its original promise?
- What changes can and should be made to unblock the framework's full potential? (→ development of an 'institutional toolbox')

To adequately deal with these questions in the main part of our study, we will offer a short contextualisation of the status quo with regard to long-discussed ideas (chap. 2.1.) and '**archetypes of differentiated integration**' (chap. 2.2.), followed by tracing of the **legal evolution of EnC** since the Treaty of Amsterdam (chap. 2.3.).

Based on this historical overview, the Treaty provisions governing EnC and other forms of differentiated integration since Lisbon will be in the centre of chapter 3. Analysing and graphically illustrating the relevant procedures, with special emphasis on '**bottlenecks**', '**institutional drivers**' and '**gatekeepers**' (see glossary of terms, table 2) for each of the **four phases** (pre-phase, authorisation stage, implementing act(s) and aftermath), this section will – in a first step – focus on Art. 20 TEU and Art. 326-334 TFEU (chap. 3.1.). In a second step, the special EnC provisions in the field of the Common Foreign and Security Policy (CFSP) will be compared to Permanent Structured Cooperation (PESCO), in order to contrast EnC with a (policy field-specific) **alternative within the Treaties**. Taking EnC in the field of Research and Development (R&D) as the reference point, this comparison will – through the lenses of differentiated integration as problem-solving – be extended to the lately widely discussed Treaty provisions on Joint Undertakings (JU). In a third step, this picture will be rounded off by discussing '**satellite treaties**' as alternative **problem-solving beyond the EU legal framework** (chap. 3.3.).

Turning to the '**real world**' of EnC, chapter 4 starts with an overview of the so far very limited number of cases, including the authorised but never adopted Financial Transaction Tax (FTT). Subchapter 4.2. will provide a short outline of our analytical approach, namely the application of a uniform **PASE-scheme** (Problem – Analysis – Solution Process – Evaluation) to all '**4 ½ cases**' (chap. 4.3. - 4.6.). As its components indicate, our scheme is based on two legs, a descriptive-analytical (background, procedure, implementation, governance, etc.) and an evaluative one (impact, efficiency, challenges, etc.), while zooming in on each case separately.

Taking a broader perspective by abstracting from the case-by-base results, chapter 5 will synthesise these insights in **three interdependent dimensions**: The **evolution of EnC** from 'Rome III' to 'EPPO' (chap. 5.1.), a **Strength-Weaknesses-Opportunities-Constraints Analysis (SWOC-Analysis)**, chap. 5.2.) and, most importantly, the possibilities for future improvement, i.e. **recommendations for the optimisation of EnC** (chap. 5.3.). The latter point – based on our SWOC-Analysis – will be realised in form of an '**institutional toolbox**', indicating the concrete conditions under which EnC can unblock its full potential regarding the above-mentioned dilemma of differentiated integration. As a standard list of procedural and substantive conditions to be 'ticked' every time a new EnC initiative is discussed, this toolbox aims at **improving, streamlining, optimising and facilitating** the use of EnC within and beyond the current legal framework. Finally, we dedicate the last part of our in-depth analysis to the internal procedures of the EP (chap. 5.4.). To combine both, the cohesion of the EP as a supranational actor and the **reasonable claim of 'no representation without taxation'** on the second stage of implementing acts, we suggest the setup of an **additional EP committee format granting voting rights only to MEPs from the MS participating in the EnC**, while equipping the other MEPs in the committee with the right of participating in the consultations at every stage.

Furthermore, this study will extensively make use of tables and figures to facilitate the understanding of the most important aspects.

**Table 2: Glossary of terms**

Analytical term	Explanation
<i>differentiation</i>	any form of applying primary or secondary law unequally with regard to substance, scope, time or geography [e.g. transition periods for new MS]
<i>differentiated integration</i>	any kind of differentiation in which not all EU MS participate in decision-making procedures, leading to outcomes only binding to the voting subgroup [e.g. the opt-outs for Denmark in the area of Justice and Home Affairs (JHA)]
<i>veto player</i>	an individual or institutional actor able to block a decision-making procedure at one or several stages [e.g. the EP in the Ordinary Legislative Procedure (OLP)]
<i>bottleneck</i>	a particular formal or informal constraint filtering and streamlining strategies, decisions or outcomes in one specific direction
<i>(institutional) driver</i>	(institutional) actor equipped with the competences and/or resources to push for or facilitate progress within a procedure [e.g. the role of the European Commission (EC) in the OLP]
<i>gatekeeper</i>	(institutional) actor with the discretionary power to halt and/or hamper the initiation and/or progress of a procedure [e.g. national parliaments acting collectively in the Early Warning Mechanism]
<i>governance</i>	all institutions, instruments or acts related to implementing, enforcing, monitoring and/or controlling of a legal act [e.g. EU agencies]

Source: Own elaboration.

## 2. CONCEPTUAL APPROACHES AND HISTORICAL ATTEMPTS

### 2.1. Differentiating Ideas of Differentiated Integration

Differentiation is interestingly one of the few approaches the majority of both camps, ardent supporters and strong sceptics of European integration, can agree on: Politically, and probably even more in the realm of academia, differentiation can be framed in a wide range, either as the **way out of an integrationist deadlock** or as an **escape rope out of an integrationist dynamic**, including all nuances in between. In this sense (at least potentially) always **servicing several masters** with fundamentally different ideas on European integration, differentiated integration itself can be regarded as a compromise solution to a problem the various sides could not agree on in the first place (often boiled down to **'too much' vs. 'too little Europe'**). What both camps – at least tacitly – agree on is that **Community orthodoxy is (if at all) of second rank**, demonstrating a clear choice within the above-described dilemma setting.

Taking a step back and looking at the very beginning of the European integration process after World War II, one could argue the European Coal and Steel Community (ECSC) itself was a **sector-specific integration project by a subgroup** of the 1948 established Council of Europe.<sup>6</sup> From this perspective, Belgium, France, West-Germany, Italy Luxembourg, the Netherlands constituted a **'core Europe'** with a supranational and – in the long-term – even federal ambition. The 'Community orthodoxy' enshrined in the Treaties of 1951 and 1957, presented as the antithesis to flexible integration, must therefore be considered itself as a **product of fragmentation** within the nascent (intergovernmental) European system after 1945.

While the **openness to new members** constituted – at least after the establishment of European Economic Community (EEC) with the Rome Treaties in 1957/58 – a key tenet of these early structures, the **political discretion** of the insiders (EEC6) to **define, guide or – in the end – even halt the accession procedure** of outsiders by their individual veto was deemed compatible with this ideal.<sup>7</sup> Ever since, the idea of **openness based on the fulfilment of criteria**, assessed objectively and impartially, has come **with veto rights** of MS as the **de facto gatekeepers of the in-group**.<sup>8</sup>

The discussions about a 'core group' within the EU, prominently **emerging in the 1970s** with the creation of the European Monetary System (EMS) and later, in the 1990s, when selecting the founding members of the European Monetary Union (EMU),<sup>9</sup> as well as in the light the Union's large-scale enlargement to the East, emphasised the **inclusivity of the core** (or the 'pioneers'),<sup>10</sup> often referring to the ideas of **'two-speed' or 'multi-speed'** which were firstly introduced by Leo Tindemans in 1975. In his famous report presented to the European Council he underlined that it is the "timescales for achievements that vary",<sup>11</sup> upholding the idea of **a shared objective and a common 'end state' in the long run**.

Differentiation "as a transitional phenomenon in response to allegedly objective distinctions"<sup>12</sup> stands in this regard opposite to the concept of **'Europe à la carte'**.<sup>13</sup> Proponents of 'Europe à la carte' don't think of differentiated integration as **concentric cycles centripetally moving inwards** over time but

<sup>6</sup> See Daniel Thym, "Supranational Differentiation and Enhanced Cooperation", in: Robert Schütze and Takis Tridimas, *The Oxford Principles of European Union Law – Volume I: The European Union Legal Order*, Oxford University Press, Oxford, 2018, p. 849.

<sup>7</sup> Painfully experienced for the first time by the United Kingdom (UK) after De Gaulle's 'double non' in 1961/67.

<sup>8</sup> A good example of this is the protracted EU accession of Croatia due to a border dispute with Slovenia.

<sup>9</sup> Wolfgang Schäuble and Karl Lamers, "Überlegungen zur Europäischen Politik", Internal paper of the CDU/CSU parliamentary group in the German Bundestag, Berlin 1 September 1994.

<sup>10</sup> See for example Jacques Chirac, *Notre Europe*, Speech in the German Bundestag, Berlin, 27 June 2000.

<sup>11</sup> Leo Tindemans, *European Union – Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council*. Bulletin of the European Communities, Supplement 1/76, Brussels, 1976.

<sup>12</sup> Daniel Thym, 2018, *op. cit.*, p. 849.

<sup>13</sup> See for example Ralf Dahrendorf, *A Third Europe? Third Jean Monnet Lecture by Professor Ralf Dahrendorf*, Florence, 26 November 1979.

as a **‘spaghetti bowl’ of overlapping groupings**, constituted by project-specific opt-ins and opt-outs and based on national interests only. With the end of the permissive consensus at the time of the Maasticht Treaty the idea of a **‘pick-and-choose’ approach** gained (common) currency particularly within the emerging Eurosceptic movements.

For the sake of this in-depth analysis we will limit the understanding of differentiated integration to what is often called **‘variable geometry’**: “[L]egal arrangements whereby less than all MS participate in decision-making and whereby the legal norms thus adopted apply only to the States that participated in the decision.”<sup>14</sup>

## 2.2. ‘Archetypes’ of Differentiated Integration

As one could expect, presenting the long history of differentiated integration in the EU in a complete and coherent way is an impossible task. Best described as **‘pragmatic sleepwalkers’** deciding tactically on a case-to-case basis, the MS were not driven by a single leitmotif, concept or strategy when allowing for asymmetry in the integration process.<sup>15</sup> With regard to our fundamental assumption, the dilemma between **(sub-group) problem-solving vs. Community orthodoxy**, we will therefore present three rather **spontaneously emerged ‘archetypes’** of differentiated integration, i.e. **style-defining ‘solutions’** of concrete problems the MS tried to clear away by moving into different directions of differentiated integration.

### 2.2.1. The Benelux Clause

Right in the beginning of the history of European integration, when the European Economic Community (EEC) was founded in 1957/58, several questions arose concerning bilateral agreements of MS with third countries or obligations within existing multilateral frameworks (e.g. GATT).<sup>16</sup> However, there was also an internal dimension of this challenge: While building the new construction alongside the European Coal and Steel Community (ECSC) did not pose a major problem,<sup>17</sup> the historically close cooperation between Belgium, the Netherlands and Luxembourg (Benelux) raised the question of a **(geographically limited) core group** within the Treaty construction for the first time. The answer was straightforward and – from a Community orthodoxy point of view – in all respects generous:

Article 233, EEC Treaty (1957) [~ Art. 350 TFEU]

*“The provisions of this Treaty shall **not be an obstacle to the existence or completion of regional unions** between Belgium and Luxembourg, and between Belgium, Luxembourg and the Netherlands, in so far as the objectives of these regional unions are not achieved by application of this Treaty.” (accentuation by the author)*

Hence, **special Treaty provisions for particular MS** were ‘born’ together with the Treaties themselves. The ‘Benelux clause’ countries did not only ensure the preservation of the bi- and trilateral treaties in this highly interconnected region but allowed for a further **deepening of integration outside the Treaties**, constituting an archetype and reference point for all future discussions and negotiations about **special treatments embedded in primary law**. As a pointed side note, today’s Art. 350 TFEU provides the Benelux countries with a **‘sub-group problem-solving mechanism deluxe’**, consisting

<sup>14</sup> Bruno de Witte, “An Undivided Union? Differentiated Integration in Post-Brexit Times”, in: *Common Market Law Review*, vol. 55, no. 3, 2018, p. 228.

<sup>15</sup> Daniel Thym, 2018, *op. cit.*, p. 855.

<sup>16</sup> See for example, Francine McKenzie, “The GATT–EEC Collision: The Challenge of Regional Trade Blocs to the General Agreement on Tariffs and Trade, 1950–67”, in: *The International History Review*, Vol. 32, No. 2, 2010, pp. 229-252.

<sup>17</sup> Since there was a 100% overlap of membership between the two organisations. The same is true for European Atomic Energy Community (EAC) that is existing as a parallel structure of the EU until today.

of only three participants and unfettered by any substantive or procedural restraints (while, of course, outside the EU institutions and resources).

### 2.2.2. Schengen – Capturing Satellite Treaties

Later **communitarisations of multilateral treaties** agreed upon among some MS outside the Community ('**satellite treaties**')<sup>18</sup> were characterised by a general openness to newcomers. Counting today a subgroup of EU MS and non-MS among its signatories, most prominently the Schengen Agreement was '**captured**', i.e. incorporated ex-post into EU legal framework, with the Treaty of Amsterdam. Staying in our terminology, the problem of border controls was solved among the willing and able states outside the Treaties (that did at that time not provide any possibility for solution), allowing for an **agreement designed without institutional constraints** stemming from Community obligations of the participating states. The later incorporation of the established Schengen Convention into the Treaties **inherited this path-dependency**, letting – on the one hand – particularly **little room for supra-national institutions** like the EC or the EP to (re-)shape the underlying **intergovernmental rationale** of the Agreement. With the Lisbon Treaty most of the respective policy areas were then conferred to the Union's shared competences, which is – on the other hand – in line with the understanding of differentiated integration as a first step of the 'Monnet Method': Starting to **solve concrete problems together sparks a dynamic** which finally leads to a (full) communitarisation.

#### Article 16, TSCG

*"Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of **incorporating the substance of this Treaty into the legal framework of the European Union.**" (accentuation by the authors)*

This **double-faced logic** experienced a renaissance with the **executive-dominated crisis management** during the financial and sovereign debt crisis starting in 2009/10: Regarding, for example, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) of 2012,<sup>19</sup> also known as Fiscal Compact, an adaptation of the '**Schengen experience**' can be detected. Facing an immense pressure to act, the political leaders of the MS – via the European Council – opted for the **path of least resistance**: Unrestrained by the additional veto players, obstacles and scrutiny within the EU's institutional architecture, far-reaching decisions are taken outside the Treaties to be integrated into them '**through the backdoor**' at a later point (in case of the TSCG foreseen for 2019, see Art. 16 TSCG).

Interestingly, the TSCG underlines – although neither part of the Treaties (yet) nor seriously considered to be realised under the EnC framework itself – that the "Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro", **referring explicitly to EnC as a (supplementary) problem-solving mechanism** "on matters that are essential for the proper functioning of the euro area, without undermining the internal market" (Art. 10, TSCG).<sup>20</sup>

<sup>18</sup> See for example Daniel Thym, "Competing Models for Understanding Differentiated Integration", in: Bruno De Witte, Andrea Ott and Ellen Vos (eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Edward Elgar, Cheltenham, 2017, pp. 52ff.

<sup>19</sup> Entry into force in 2014.

<sup>20</sup> See also de Witte, *op. cit.*, 238.



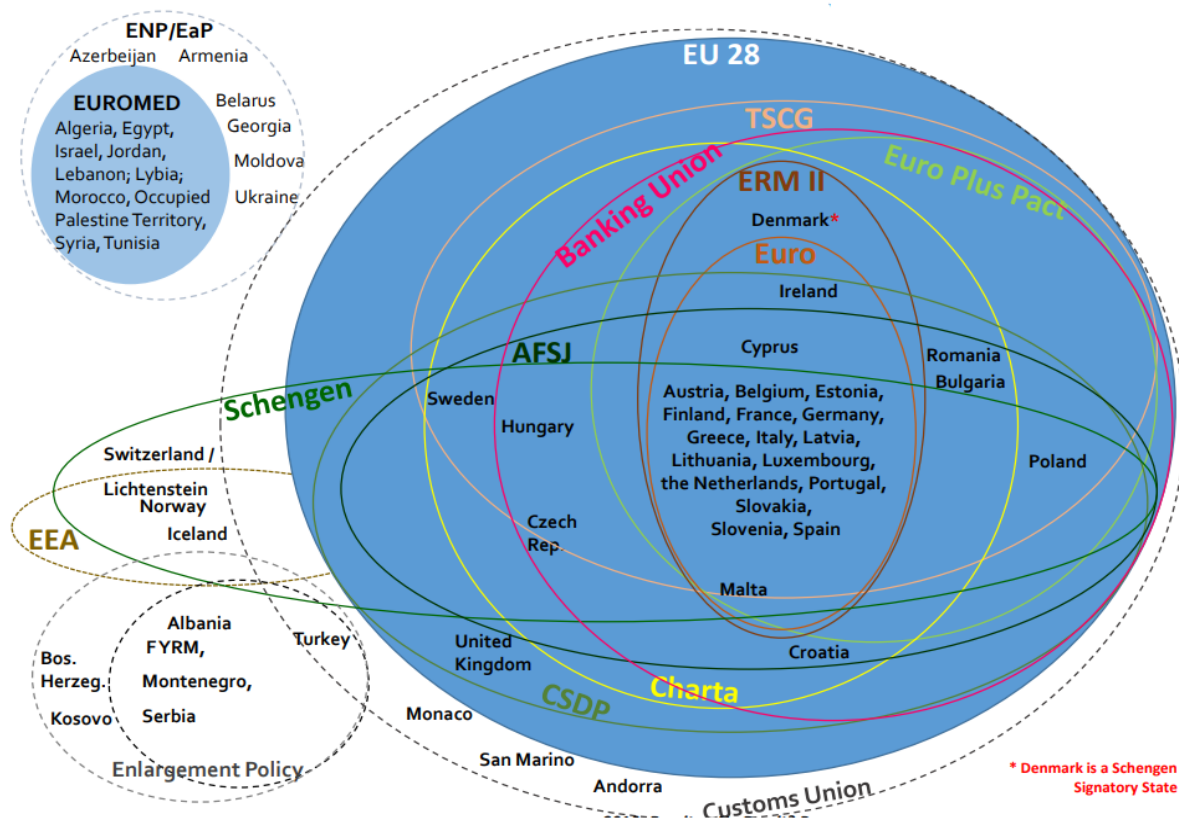
### 2.2.3. EMU and JHA – Opt-outs in Primary Law

With regard to the Economic and Monetary Union (EMU) and the policy areas today summarised under the Area of Freedom, Security and Justice (AFSJ)<sup>21</sup> the opt-outs granted to the UK, Ireland and Denmark enshrined their right not to participate directly in the EU primary law. During the Intergovernmental Conference leading to the Maastricht and the subsequent ratification process this “pick-and-choose” approach for some MS was **pragmatically traded against their required assent** to the Treaty as a whole. This **fragmentation of EU primary law** can be regarded as the **catalyst of secondary law fragmentation**<sup>22</sup> the respective policy areas, complicating – among others – the ascription of responsibility in the ‘**national-supranational blame game**’.

### 2.2.4. Horizon 2020 Projects on Differentiated Integration

Zooming out, table 3 illustrates how the numerous forms of differentiation, differentiated integration, partnerships with third countries, etc. have created a **maze of rights and obligations** in the long run, even if one excludes the few cases of EnC.<sup>23</sup> Regarding this broader perspective, particular attention should be paid to the Horizon 2020 research projects ‘**EU-IDEA – Integration and Differentiation for Efficiency and Accountability**’ and ‘**EU Differentiation, Dominance and Democracy (EU3D)**’, the latter one starting in February 2019 and investigating “the conditions under which differentiation is politically acceptable, institutionally sustainable and democratically legitimate.”<sup>24</sup>

**Figure 1: ‘Europe United in Diversity’**



Source: Funda Tekin, *Differentiated Integration at Work*, Baden-Baden, Nomos, 2012, p. 20.

<sup>21</sup> Alternatively still called Justice and Home Affairs (JHA).

<sup>22</sup> See for example, Thomas Duttler, et. al., “Opting out from European Union Legislation: the Differentiation of Secondary Law”, in: *Journal of European Public Policy*, vol. 24, no. 3, 2017, pp. 406-428.

<sup>23</sup> A comprehensive list of all forms of differentiation in the EU legal order before 2010 can be found in Tomasz Kubin, “Enhanced Cooperation, EMU Reforms and Their Implications for Differentiation in the European Union”, in: *Baltic Journal of European Studies*, vol. 7, no. 2, pp. 89f.

<sup>24</sup> For more information see the project’s official factsheet, available at <https://www.sv.uio.no/arena/english/research/news-and-events/news/2018/eu3d-factsheet.pdf> (consulted on 1 October 2018).

### 2.3. The Long Maturing of Enhanced Cooperation

Between 1999 and 2010 the EU revised its Treaties three times (not counting the failed Constitutional Treaty), welcomed 12 new MS in its rows and adopted hundreds of regulations and directives. Not a single of these legal acts grew out of an EnC project, the instrument that was praised as one of the major innovations of the Treaty of Amsterdam (later revised and relabelled under the Treaty of Nice), set up to solve the inevitable problems of finding compromise in the Union of 25/27.

With one consensual agreement reached in the '**shadow of EnC**'<sup>25</sup> as a '**bargaining tool**',<sup>26</sup> some very vague and later discarded considerations<sup>27</sup> of the procedure in other cases and rather cautious lowering of the hurdles with the respective Treaty revisions (see table 2 for a detailed overview), the framework of EnC failed to fulfill the original expectations as a 'magic formula'.

The **flexibilisation of EnC's inflexibility** over the Treaty reforms consisted – apart from the **crucial abolishment of the veto possibility with the Treaty of Nice** (see again table 2) – mainly of '**declaratory alleviation**', toning down the strict rhetoric of the Amsterdam provisions formulated in the expectation of a frequent usage of this instrument. While some scholars regard, for example, the transition from EnC may "not affect" the *acquis communautaire* to "respect" it (see Art. 43c TEU after the revisions of Nice Treaty) as a "soften[ing] the substantive conditions",<sup>28</sup> we argue that formal rules are only one part of the story: The **(strategic) reservations of MS** to make us of a new instrument putting – at least partly – into question the **political culture of a consensual spirit** of the Union should not be underestimated. Regarding the '**output failure of EnC**' in the first decade of the millennium from the **perspective of governmental attitudes** instead of formal hurdles, might explain, for example, the fact that even the abolishment of MS veto rights on the authorisation of EnC did not result in increasing the **attractiveness of EnC as a problem-solving vehicle**.

Against this backdrop, the 'EnC's maturing' can also be understood as a **maturing of MS governments' attitudes towards EnC** as a **not only a legal but also a legitimate tool** of problem-solving at the EU level (to be further discussed in subchapter 5.1).

<sup>25</sup> I.e. the credible threat to apply the EnC procedure led to the necessary consensus and thereby avoided the otherwise blockage of the policy in question. In this regard, the Community orthodoxy is preserved by the possibility of differentiated integration.

<sup>26</sup> Namely Italy's opposition to the European Arrest Warrant in 2002, see Daniela A. Kroll and Dirk Leuffen, "Enhanced Cooperation in Practice. An Analysis of Differentiated Integration in EU Secondary Law", in: *Journal of European Public Policy*, vol. 23, no. 3, 2015, p. 366.

<sup>27</sup> See for example COM (2004) 328: Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union.

<sup>28</sup> Steve Peers, "Enhanced Cooperation: The Cinderella of Differentiated Integration", in: B. De Witte, A. Ott, E. Vos (eds.), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law*, Edward Elgar, Cheltenham, 2017, p. 79. In this highly recommended book chapter, Peers also indicates the usage of EnC's opt-in mechanism that was used at several occasions with regard to the UK and Ireland in JHA policy area, see *ibid.*, p. 80f.

Table 3: Closer/Enhanced Cooperation from Amsterdam to Lisbon

Cautious flexibilisation of the rules	<p><b>Before Amsterdam</b></p> <ul style="list-style-type: none"> <li>- Single European Act: Deviations from single market policies granted to MS “on grounds of major needs” (Art. 100c(4) TEC, today Art. 114 TFEU);</li> <li>- Maastricht Treaty: Opt-outs for unwilling MS in the areas of social affairs and the EMU;</li> <li>- During the Intergovernmental Conference (IGC) 1996-97: Intensive and lengthy discussions about flexibility in the Treaties in general and the possibilities of legally embedding ways of differentiated integration.<sup>29</sup></li> </ul>
	<p><b>Treaty of Amsterdam 1997/99</b> (reference for all subsequent Articles in this box)</p> <ul style="list-style-type: none"> <li>- Introduction of the framework of ‘Closer Cooperation’;</li> <li>- In Title VII (Art. 43-45 TEU before Nice) the <b>general rules</b> of Closer Cooperation are laid down: <ul style="list-style-type: none"> <li>o “aimed at furthering the objectives of the Union” (Art. 43a);</li> <li>o “respect[ing] [...] the single institutional framework of the Union” (Art. 43b);</li> <li>o “only used as a last resort” (Art. 43c);</li> <li>o “concerns at least a majority of Member States” (Art. 43d);</li> <li>o “does not affect the ‘acquis communautaire’” (Art. 43e);</li> <li>o “is open to all Member States” (Art. 43g).</li> </ul> </li> <li>- Provisions for Closer Cooperation laid down in <u>Art. 11 TEC</u> for the first pillar (‘community pillar’): <ul style="list-style-type: none"> <li>o <b>authorisation:</b> EC proposal, authorisation by QMV in the Council / implementing decisions by subgroup participating in Closer Cooperation; <ul style="list-style-type: none"> <li>▪ but <b>‘veto clause’:</b> “If a member of the Council declares that, <b>for important and stated reasons of national policy</b>, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the Council, meeting in the composition of the Heads of State of Government, <b>for decision by unanimity.</b>” (Art. 11(2) TEC, accentuation by the authors).</li> </ul> </li> </ul> </li> <li>- In Title VI (Art. 40-42) the rules for the third pillar (JHA) were laid out: <ul style="list-style-type: none"> <li>o <b>authorisation:</b> initiative by MS concerned, only opinion from EC and information of EP, but <b>also veto clause</b> (Art. 40(2) TEU, analogous to Art. 11(2) TEC, see above).</li> </ul> </li> <li>- Closer Cooperation not foreseen in the second pillar (CFSP);<sup>30</sup></li> </ul> <p><i>No application/usage of Closer Cooperation under the Amsterdam provisions.</i></p>
	<p><b>Treaty of Nice 2001/03</b> (reference for all subsequent Articles in this box)</p> <ul style="list-style-type: none"> <li>- reform of the framework, being <b>renamed as EnC</b>;<sup>31</sup></li> <li>- <b>abolishment of the veto clauses</b> (see above), min. number of participants fixed at 8;</li> <li>- <b>EP gets veto right</b> by having to give its consent in the process of authorising EnC in the first pillar (Art. 11(2) TEC);</li> <li>- Downgrading from <b>“not affect” the acquis communautaire to “respect” it</b> (Art. 43c TEU);</li> <li>- Introduction of EnC in the second CFSP pillar (particular rules, see Art. 27 TEU);</li> </ul> <p><i>No application/usage of Closer Cooperation under the Nice provisions.</i></p>
<p><b>Lisbon provisions</b> (in substance the framework agreed upon in the Constitutional Treaty, see chap. 3).</p>	

Source: Own elaboration.

<sup>29</sup> See Alexander Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond*, Palgrave Macmillan, Basingstoke, 2002, pp. 58 ff.

<sup>30</sup> Instead possibility of “constructive abstention” (see Art. 23(1) of the Treaty of Amsterdam).

<sup>31</sup> See for example José M. de Areilza, “The Reform of Enhanced Cooperation Rules: Towards Less Flexibility?”, in B. De Witte, D. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in the EU*, Intersentia, Cambridge, 2001, pp. 27ff.

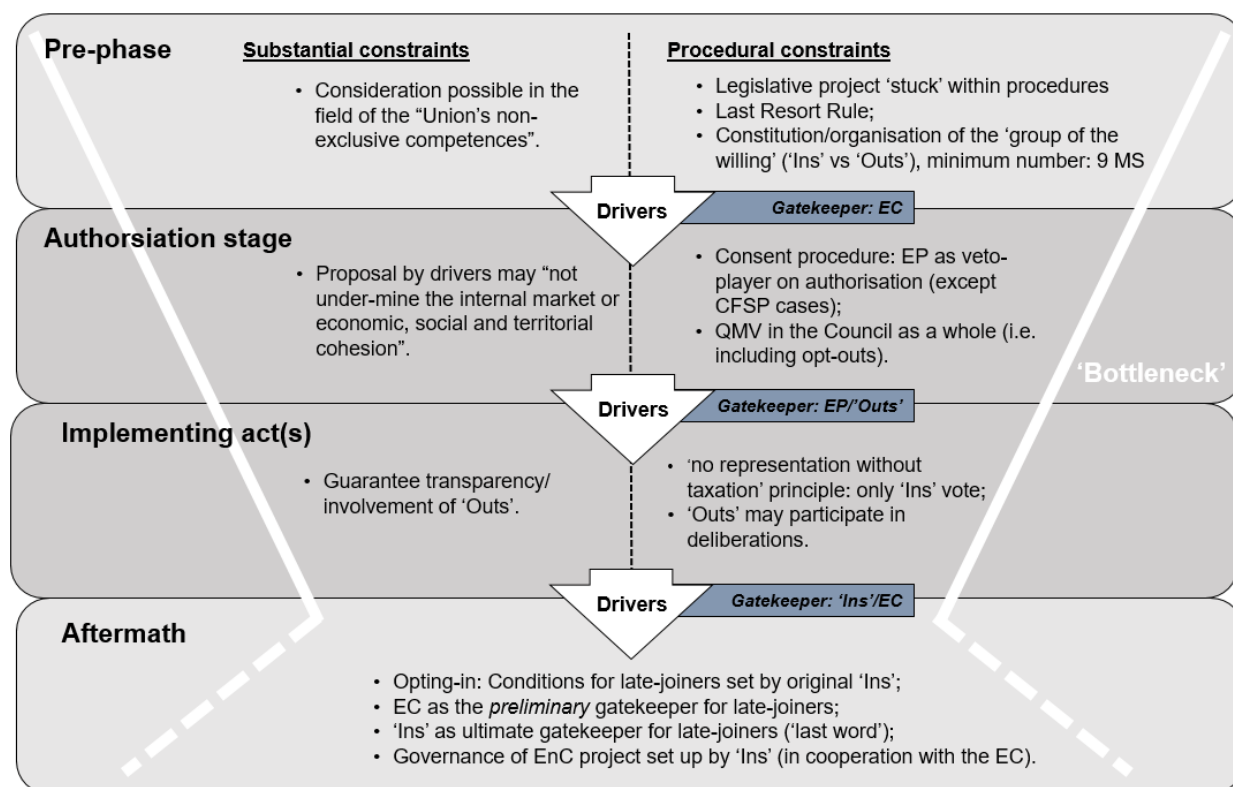
### 3. THE LEGAL WORD: ENHANCED COOPERATION IN THE LISBON TREATY – PROVISIONS, PROCEDURES AND ALTERNATIVES

#### 3.1. Enhanced Cooperation in TEU and TFEU (except CFSP)

Prominently anchoring the general framework of EnC in Art. 20 TEU in addition to the ‘more hidden’ provisions of Art. 326-334 TFEU,<sup>32</sup> the MS as the signatories of the Treaties of Lisbon underlined their intention to establish EnC as the **default procedure** for future differentiated integration. Already foreseen in the Constitutional Treaty (Art. I-44), this symbolical, judicially irrelevant<sup>33</sup> upgrading indicates that – albeit being a ‘**non-starter**’ in the decade post-Amsterdam – EnC was at that time still considered as the most promising solution to the inevitable tensions in a growing Union without a clearly defined *finalité*. These undaunted expectations are in so far surprising that the changes of framework’s rules were by no means ground-breaking, as we will elaborate in this subchapter.

We will present the rules governing EnC post-Lisbon by separating the procedure in four phases, namely ‘**pre-phase**’, ‘**authorisation stage**’, ‘**implementing act(s)**’ and ‘**aftermath**’. Each of these stages will be examined through the lenses ‘**bottlenecks**’, ‘**gatekeepers**’ and ‘**institutional drivers**’, taking into account both to the legal framework and its interpretation by judges and scholars. In this subchapter our analysis of the EnC’s legal framework refers to all policy fields **except CFSP for which different rules apply**. By opposing the specific EnC rules in the area of CFSP to the PESCO framework in subchapter 3.2., we will offset this omission in a comparative manner at a later point.

**Figure 2: Enhanced Cooperation Procedure – Obstacles and Thresholds**



Source: Own elaboration.

<sup>32</sup> And further special provisions like Art. 86(1) allowing for a simplified procedure for the establishment of a European Public Prosecutor’s Office (EPPO), which will be discussed in subchapter 4.6.

<sup>33</sup> TEU and TFEU are of equal legal rank, without giving any interpretational preference to the (generally) less elaborated provisions of the TEU.

### 3.1.1. Pre-Phase

On the most basic level, the **inflexibilisation of EnC's flexibility** is rooted in the fact that the procedure **cannot arise 'out of the procedural void'**, here understood as out of the discretion of a single driver who recognises a problem and suggests a solution (like, for example, the EC in the Ordinary Legislative Procedure). In fact, the consideration of EnC always constitutes a **preliminary end** of a legislative procedure, in the form of a **failure of agreement** on a specific policy within the Community orthodoxy (both supranational and intergovernmental). Also (or even) the political leaders in European Council, who initiated and agreed upon most forms of differentiation in the past, **cannot launch the procedure 'from scratch'**. This is reflected in the notion of **"last resort"** in Art. 20(2) TEU, which must be considered as the fundamental prerequisite of any further action. The crucial question is obvious: When can failure of agreement be ascertained? Or, to put it differently, how long and with which efforts should MS try to find a common ground preventing the application of **EnC as an ultima ratio**?

Art. 20(2) TEU

*"The decision authorising enhanced cooperation shall be adopted by the Council as a **last resort**, when it has established that the objectives of such cooperation **cannot be attained within a reasonable period by the Union as a whole**, and provided that at least nine Member States participate in it [...]."* (accentuation by the authors)

The explanation to the **'last resort rule'**, introduced by the Nice Treaty and retained afterwards, leaves broad room for interpretation ("**reasonable period**") and was therefore already challenged before the CJEU. In its judgement on the joined cases C-274/11 and C-295/11 (16 April 2013) the Court pointed to 'the inability' of the Council to find agreement, indicated by the impossibility "to adopt such legislation in the foreseeable future" (§50).<sup>34</sup> While this **'inability'** is to be determined by the Council itself, the Court only examines if the Council has "carefully and impartially" (§54) examined the situation. A formal role for the European Parliament is not foreseen at this stage save its **(potential) involvement in the failed legislative procedure before the final rejection** in the Council. However, it must be noted that under the current rules EnC is most likely to emerge in the contexts of unanimity decisions in the Council, generally implicating a side-lined EP in the first place. Hitherto, **all EnC cases developed out of failed special legislative procedures**.

The **'first mover'** and main institutional driver at this stage is therefore the **subgroup of MS willing** to engage in EnC acting through the Council.<sup>35</sup> A **minimum number of 9 participating MS** is foreseen under the Lisbon provisions (Art. 20(2) TEU) and constitutes – compared to the Nice provision (min. 8 MS) – in this point – even a **procedural tightening** by the post-2009 framework. Submitting a formal request to EC, the Ins elaborate on substance and scope of their undertaking and **thereby organise themselves as a group**.

A rather broad substantive 'constraint' to be considered by this pioneering group during this self-constitution in the pre-phase is the limitation to act in "the framework of the Union's non-exclusive competences" (Art. 20(1)). This leads to a **filtering of EnC towards fields of shared competences, like the single market and JHA**, since – on the other side – 'soft policies' within the MS' exclusive competences<sup>36</sup> (e.g. via the Open Method of Coordination) neither 'end up' in failures beseeching a last resort (see above) nor do they comply with **EnC's central incentive** in the first place:

<sup>34</sup> For a detailed analysis of these cases see Federico Fabbrini, "Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU judiciary", in: *Legal Issues of Economic Integration*, vol. 40, no. 3, 2013, pp. 197-224.

<sup>35</sup> Sometimes bolstered by the engagement of the European Council (e.g. in the case of the EPPO).

<sup>36</sup> However, in cases of a policy fields with a relationship to the Union's supporting competences, e.g. ERASMUS programme or the EU's role in non-EU frameworks like the Bologna process, scenarios entailing last resort and incentive components can be envisaged.

The Opt-ins “may make use of [the Union’s] [...] institutions” (Art. 20(1)) to implement and govern their endeavour after approval.

### 3.1.2. Authorisation Stage

The first major **gatekeeper and driver position is held by the EC** at the junction of pre-phase and authorisation stage: Having received the official request of the Ins, the EC is equipped with the monopoly to initiate the authorisation of EnC and is **free to reject** the subgroups proposal, outlining the reasons for its decision to do so. These might be, for example, a lack of **openness to join the pioneers** (Art. 328(1) TFEU), disagreement about the **exhaustion of all other options** (i.e. ways achieve a joint position of the Council as a whole) or **substance related reservations**.

#### Art. 329(1) TFEU

*“Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, [...] shall address a request to the Commission, **specifying the scope and objectives** of the enhanced cooperation proposed. The **Commission may submit a proposal to the Council** to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so. [...]”* (accentuation by the authors)

The specification of “scope and objectives” to be presented by pioneering subgroup, read together with **the second paragraph of Art. 326** can be considered the **tightest substantive bottleneck** in the whole process and was **only cosmetically streamlined** by crossing out the reference to Art. 26 TFEU (former Art. 14 TEC) in the Treaty of Lisbon.<sup>37</sup>

#### Art. 326 TFEU

*“Any enhanced cooperation shall comply with the Treaties and Union law.*

*Such cooperation shall **not undermine the internal market or economic, social and territorial cohesion**. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.”* (accentuation by the authors)

Although ‘not undermining the internal market’ is semantical less restrictive than, for example, ‘not affecting the *acquis communautaire*’ (a provision governing EnC before the Treaty of Nice),<sup>38</sup> this paragraph imposes a **complex and protracted justification duty** of answering the question of **how a policy does not undermine the four freedoms, etc.** Dauntingly difficult in general, it is almost impossible if the subgroup tries to ‘save’ a rejected, single market related policy in the first place. The above-described ‘**filter towards shared competences**’ is thus – on the authorisation stage – **additionally streamlined away from the single market, and towards, for example, JHA**. As we will see in chapter 4, this prediction is largely confirmed by the 4 ½ cases of EnC so far.

Following the **supranational logic of the consent procedure** – often considered an integral part of the Community orthodoxy itself – the EP is granted the role of a **veto player** between the EC’s elaborated proposal to authorise EnC and the Council’s voting on the issue. The EP decides by a simple majority of the votes cast, i.e. there is no additional quorum of the majority of all MEPs. In addition to the **expansion of this veto right to all areas save CFSP** with the Lisbon Treaty, the introduction of Art. 333 TFEU in the Lisbon Treaty, read in combination with Declaration 40 annexed to the Treaties (both

<sup>37</sup> See Daniel Thym, 2018, *op. cit.*, p. 857, particularly footnote 81.

<sup>38</sup> Replaced and ‘defused’ with “respect the *acquis communautaire*” in the Treaty of Nice (Art. 43(c) TEU).

below), this **strategically crucial, intermediate veto position** of the EP has been – *prima facie* – leveraged substantively.<sup>39</sup>

Article 333(2) TFEU

*Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, **acting unanimously** in accordance with the arrangements laid down in Article 330, **may adopt a decision stipulating that it will act under the ordinary legislative procedure.** The Council shall act **after consulting the European Parliament.**" (accentuation by the authors)*

Declaration 40 on Article 329 of the TFEU

*"The Conference declares that Member States may indicate, when they make a request to establish enhanced cooperation, if they intend already at that stage to make use of Article 333 providing for the extension of qualified majority voting or to have recourse to the ordinary legislative procedure."*

Adopting the so-called Bresso/Brok report, the EP underlined that it "[i]s determined to implement fully the Treaty provisions on enhanced cooperation by committing not to give its consent to any new enhanced cooperation proposals unless the participating Member States commit to activate the special 'passerelle clause' enshrined in Article 333 TFEU to switch from unanimity to QMV, and from a special to the ordinary legislative procedure."<sup>40</sup> However, this favourable setting for the EP is complicated, protracted and restrained by national legislation and jurisdiction of MS, most prominently by the 'Lisbon judgement' of the German Bunderverfassungsgericht binding the assent to the **activation of the 'passerelle clause'** of the German representative to the respective decisions of the Bundestag (lower chamber) and – in some cases – even of the Bundesrat (upper/federal chamber).<sup>41</sup>

Concerning the authorising decision in the Council, the Treaties stipulate normal Qualified Majority Voting (QMV)<sup>42</sup> on the EC proposal (Art. 329 TFEU), i.e. opt-ins and opt-outs both have voting rights at this stage. Hence, the minimum number of 9 participating/yes-voting MS suffices under no circumstances, making the authorisation of EnC projects with a smaller number of participating MS dependent on the abstentions or support of non-participating MS. Two corollaries can be drawn from this **'tightening of the bottleneck'** in the authorisation phase. Firstly, **additional thresholds for subgroup fragmentation** flow from both the necessary consent of the EP and the sufficient support of a qualitative majority in the Council. Secondly, the QMV constellation within the Council (including all MS) during the authorisation phase constitutes an **institutional bias**: Failed unanimity decisions (as in most special legislative procedures) can create minorities that can be outvoted within the EnC framework; failed QMV decisions (for example in the OLP) presuppose blocking minorities that *cannot* be outvoted when it comes to the authorisation of pioneering subgroup problem-solving (given that the 'Outs' retain their general reservations towards the respective policy). Therefore, the **EP as a definitive, and the out-group as a potential gatekeeper** filter the transition from the authorisation to the implementing stage.

<sup>39</sup> Once again, save the Enhanced Cooperation projects in the field of CFSP for which different rules apply, e.g. neither gatekeeper role for the EC nor veto player right for the EP at this stage, see also chap. 3.1.

<sup>40</sup> European Parliament, "Report on Improving the Functioning of the European Union Building on the Potential of the Lisbon Treaty", 2014/2249(INI), adopted 16 February 2017, §40.

<sup>41</sup> Bundesverfassungsgericht, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, §321; see also "Integrationsverantwortungsgesetz vom 22. September 2009", BGBl I, p. 3022, §9.

<sup>42</sup> See Art. 16(4) TEU.

### 3.1.3. Implementing Act(s)

Once the authorisation has been given, the Treaties follow a **'no representation without taxation' principle** when it comes to voting rights in the Council, while one tries at the same time to **keep the opt-outs as involved as possible**: All MS have the right to participate in the deliberations of the subgroup (see Art. 330 TFEU). The latter aspect should not be seen as a declaratory note of transparency only but – in the **sense of openness as inclusivity** – as key tenet of **avoiding the impression of first- and second-class MS** and of the justification of **EnC as a pioneering experiment**.

#### Article 330 TFEU

*"All members of the Council **may participate in its deliberations**, but only members of the Council representing the **Member States participating in enhanced cooperation shall take part in the vote**.*

*Unanimity shall be constituted by the votes of the representatives of the participating Member States only.*

*A qualified majority shall be defined in accordance with Article 238(3)." (accentuation by the authors)*

Fenced in by the substantive restraints (see table 5), already laid down in the EC proposal to authorise EnC, the **opt-ins adopt the implementing acts** (e.g. regulations, directives, decisions) in the constellation of a **subgroup Council**, with – for example – adjusted QMV rules. The role of EC and EP depend on the nature of the legislation as foreseen in the respective 'normal' Treaty provisions and thereby **generally mirror the pre-authorisation, failed legislative procedure** (nota bene the above-described institutional bias towards special legislative procedures). To be discussed in depth in chapter 5.3., it is noteworthy that the rights of individual MEPs – independent of their nationality or MS elected from – are not subject to the 'no representation without taxation' principle, i.e. the EP adopts, amends or rejects legislative acts within the EnC framework at all stages in its full composition (regarding both the committee work and the voting rights in the plenary).

### 3.1.4. Aftermath

Having adopted the legislative acts implementing EnC (which should not be taken for granted, see the case of the Financial Transaction Tax, to be discussed in chap. 4.6.), the central questions of the aftermath are grouped around the **questions of governance** and **opting-in of outsiders**.<sup>43</sup>

#### Article 331(1) TFEU

*"Any Member State which wishes to participate [...] shall notify its intention to the Council and the Commission.*

*The Commission shall, within four months of the date of receipt of that notification, confirm the participation of the Member State concerned. It shall note where necessary that **the conditions of participation have been fulfilled** [...].*

*However, if the Commission considers that the **conditions of participation** have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. [...]. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may **refer the matter to the Council, which shall decide on the request**. The Council shall act in accordance with Article 330. [...]" (accentuation by the authors)*

<sup>43</sup> The Treaties do not foresee any possibility to opt-out from specific legislation adopted within the respective EnC procedure or to leave the subgroup of participating MS completely.



The discussion of the **'willing and able'** becoming part of EnC projects is mainly reflected in the provisions regarding **'laggards'** wishing to join adopted policies at a later stage. In cooperation with EC, the original Ins are in the situation not only to define the **conditions of opting-in** but constitute the ultimate **gatekeeper for any enlargement of the subgroup**. The general possibility to join the avant-garde at any point of the four stages can be regarded, on the one hand, as the justification to use the Union's existing governance structures and, on the other hand, warrants the classification of the 'subgroup solution' as an 'integration experiment' within the Treaties.

*Article 20(1) TEU*

*"Member States which wish to establish enhanced cooperation between [...] **may make use of its institutions** and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits."* (accentuation by the authors)

### 3.2. Alternatives *Within* the Treaties

#### 3.2.1. EnC in CFSP vs. Permanent Structured Cooperation (PESCO)

When comparing EnC with PESCO, it is – following the rationale of most similar cases – reasonable to choose the particular provisions of **EnC within CFSP** as one's reference point, although EnC in CFSP has – in contrast to PESCO – not been used yet. In general, the just-described, **ordinary EnC framework is 'mirrored' in the field of CFSP** with the **'typical procedural deviations'** for this intergovernmentally governed policy field,<sup>44</sup> most notably:

- The subgroup of minimum 9 MS directly approaches the Council to authorise their EnC initiative, thereby **circumventing the EC as the initial gatekeeper and the EP as a veto player** in the authorisation process (Art. 329 TFEU);
- The **authorisation of EnC in CFSP requires unanimity** of the Council as a whole (not QMV as for all other cases of EnC);
- The **EC is also side-lined in the process of opting-in**, being only informed and asked for its opinion, while the role of the **gatekeeper and driver lies solely with the Council deciding by unanimity** (Art. 331 TFEU);
- Opt-outs may participate – as in ordinary EnC – at all the deliberations and consultations in the format of the 'subgroup Council';
- The role of the **High Representative of the Union for Foreign Affairs and Security Policy (HR)** highly depends on the substance of the agreed upon EnC; on the authorisation stage the HR "give[s] an opinion" on the coherence of the project with the CFSP in general (Art. 331(2)) and functions as an **intra- and interinstitutional moderator of the process**.

PESCO, introduced with the Lisbon Treaty<sup>45</sup> and activated as *the framework of subgroup problem-solving in the area of CSDP* in November/December 2017, goes – at least when it comes to the decision-making in the Council – **beyond this strict intergovernmental logic** (Art. 46(1-4) TEU):

- It is **established with QMV in the Council's full composition** (instead of unanimity for EnC in CFSP);
- **QMV applies for MS requesting to join PESCO** at a later point (instead of unanimity for EnC in CFSP);
- It entails a **general precondition of capability** (Art. 42(6) TEU, Prot. 10(2));
- The **possibility of suspension of MS** is given by QMV (neither a voluntarily exit nor suspension option within EnC in CFSP);<sup>46</sup>

<sup>44</sup> See inter alia Art. 22 and 31 TEU.

<sup>45</sup> Laid down in Art. 42(6) and 46 TEU, alongside with Protocol 10.

<sup>46</sup> The provisions on suspension stress again the concept of willing *and* able.

- **Opt-outs may participate in all deliberations of the PESCO format** without any voting rights once PESCO has been established;
- The HR plays the role of the **moderator and facilitator during the setup phase of PESCO** and holds a **pivotal position in the governance of the PESCO projects**: As the head of both EEAS and EDA which constitute the '**virtual**' PESCO secretariat, the HR is not only the **bridge between EC and Council but also between the governing bodies**.

However, unanimity voting of the participating MS still applies for – inter alia – strategic questions, establishment and governance of concrete PESCO projects and project assessments.

**Table 4: Comparison PESCO and EnC in CFSP**

	<b>PESCO</b>	<b>EnC in CFSP</b>
<b>Min. number</b>	not foreseen at any stage (includes project-level)	9 MS (as in ordinary EnC)
<b>General conditions</b>	willingness and “capabilities fulfil higher criteria” (Art. 42(6) TEU, Prot. 10(2))	“consistent with the Union’s common foreign and security policy” (Art. 329(2))
<b>Opting-in ('late-joining')</b>	elaborated conditions + QMV within PESCO subgroup	elaborated conditions + unanimity within subgroup
<b>Exit</b>	withdrawal or suspension by QMV (Art. 46(4-5) TEU)	neither withdrawal nor suspension foreseen at any stage
<b>Governance</b>	project-based, organised by PESCO Secretariat (EEAS+EDA)	“make use of [the Union’s] institutions” (Art. 20(1))

Source: Own elaboration.

### 3.2.2. EnC in R&D vs. Joint Undertakings (JU)

Referring back to our understanding of differentiated integration as ‘variable geometry’ (see chap. 2.1), the framework of Joint Undertakings (JU) based on Art. 187 TFEU **cannot be considered as a sector-specific alternative of differentiated integration**, compared to, for example, an EnC in the field of Research and Development (R&D).<sup>47</sup> While – as elaborated in accompanying EPRS report<sup>48</sup> on the case of the High Performance Computers JU (EuroHPC) – the internal governance of a *some* JU is indeed based on **subgroup decision-making mechanism** in a wider sense (combined with substantial voting rights of the EC), the **strategic and administrative decisions** taken by a JU’s ‘Governing Board’ within a **public-private partnership setting** can hardly be regarded as legal norms *applying to the participating MS* (like in EnC or PESCO).<sup>49</sup>

Taking a step back, the ‘**agency-like rationale**’ behind the setup of JUs becomes clear in Art. 187 TFEU:

Art. 187 TFEU

*“The Union may set up joint undertakings or any other structure necessary **for the efficient execution** of Union research, technological development and demonstration programmes.”* (accentuation by the authors)

<sup>47</sup> For EnC in R&D the standard EnC rules – as elaborated in chap. 3.1 – apply.

<sup>48</sup> Study ‘The implementation of the Treaty provisions concerning enhanced cooperation’, Parliamentary Research Service, European Parliament, 2018, to be published soon.

<sup>49</sup> The additional budgetary pledges of participating MS to co-finance the JU are, of course, binding; however, they are best understood as national contributions to a specific EU research project.

In contrast to legislative acts adopted under a hypothetical EnC project in the field of R&D, JU provisions – generated in a rather complicated combination of a special and ordinary legislative procedure (see Art. 188 TFEU) including all MS – are in the first place **directed to efficiency problems on the Union level**, not to transnational problems to be solved among MS. The case described above, i.e. the particular combination of supplementary research programmes including less than all MS (see Art. 183/184 TFEU) with the establishment of a JU to support this very programme (Art. 187 TFEU), can be considered as a **facilitation of MS research cooperation in a specific field** based on an exchange of additional financial pledges for privileged ownership of the thus generated knowledge. Therefore, we argue that JU are better understood from the perspective of **incentivised national co-investments** than of (differentiated) integration in the field of R&D.

### 3.3. Alternatives *Outside* the Treaties

As already discussed in subchapter 2.2.2., the establishment of **satellite treaties revolving around the EU's institutional architecture** has not stopped with the introduction of Treaty frameworks allowing for differentiated integration within the Community/Union. The political leaders of MS in the European Council looked for solving major crises. In doing so particularly in the field EMU policies, put under enormous pressure to **deliver swift solutions to problems threatening the very existence of the construct**, the Treaty provisions only played a role in so far that they had to be **'tweaked' to allow for intergovernmental subgroup arrangements** (e.g. the case of the European Stability Mechanism), which – on their part – included **provisions underlining the intention to integrate their substance into the Treaties** at a later point.

The incentive structure for both options, EnC on the one hand and satellite treaties on the other hand, is obvious. While EnC explicitly offers the advantage to make use of the Union's institutions and thereby **drastically reduce the follow-up transaction and administration costs** among the solution-seeking MS (acting within an established institutional architecture), satellite treaties are attractive problem-solving vehicles through their **lack of constraints**, usually monitored by the EC and scrutinised by the CJEU. On the procedural sides, this includes – inter alia – a **bypassing of the EP** and the **possibility of unfettered exclusion of non-participating MS** even from consultations (see **PESCO's and EnC's 'inclusion of opt-outs'**), on the substantive side the avoidance of the protracted 'last resort' justification and the **de facto limitation to a particular subset of policies** within the Union's shared competences.

An interesting – and from a perspective of EnC highly problematic development – is the **entanglement of satellite treaties with EU institutions** even before their full incorporation into the Treaties. Combining **the best of both worlds**, i.e. using Union institutions **without specifications how to respect the Community orthodoxy**, the fiscal contract refers to and empowers the **EC as a central monitoring and enforcing body** of the construct in several articles (e.g. Art. 3 or 5-8 TSCG). The above-described dynamic of the institutions capturing the satellite treaties by their incorporation into the Treaties at one point, itself subject to many problems (see Schengen agreement), is here turned upside down: **Satellite treaties capture EU institutions**. Leading over to our 'real world' analysis in the following chapter, the case of the European Patent with Unitary Effect (short 'Unitary Patent') is peculiarly interesting in this regard: While the Unitary Patent was introduced within the EnC framework, **the accompanying Unified Patent Court is based on an intergovernmental agreement**, outside the Treaties and not as a specialised court within the CJEU structures.<sup>50</sup>

While these examples **do not flow from an overarching strategy of MS to 'cherry pick'**, the pragmatic answers of MS to complex legal, political and institutional questions still lead to solutions outside the Treaties, **disregarding EnC not only as an option** (mainly due to its substantive constraints) **but also as a 'blueprint'** how to approach authorisation and implementation of these agreements. To put in a nutshell: The problem-solving instinct of the concerned and interested MS – especially within the European Council – has been stronger than the Community orthodoxy and the political and legal power of the opt-outs.

<sup>50</sup> Related to the participation of non-EU states, see Opinion 01/09 of the CJEU, 8 March 2011.

## 4. THE REAL WORLD: 4 ½ CASES OF ENHANCED COOPERATION

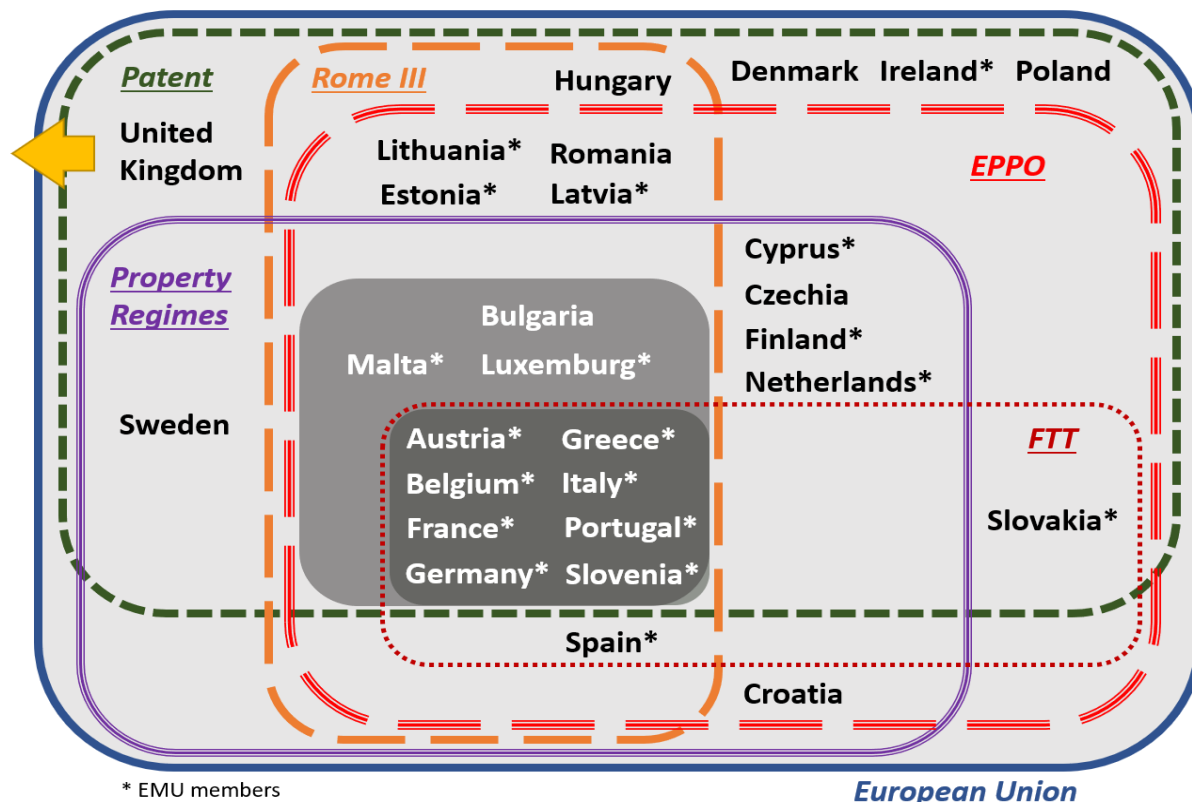
### 4.1. Overview and Analytical Approach

Following reflections on the 'legal word' governing problem-solving processes under EnC, we will now turn to the analysis of the 4 ½ cases of EnC in the 'real world'. Before examining the Law Applicable to Divorce and Legal Separation ('Rome III Regulation'), European Patent with Unitary Effect ('Unitary Patent'), Property Regimes Rules for International Couples, the European Public Prosecutor's Office (EPPO) and the not implemented Financial Transaction Tax (FTT), some first observations should be outlined regarding these cases as an *ensemble*.

As figure 3 and table 5 illustrate, the – on the first sight – diffuse participation of MS in EnC initiatives reveal at least some noteworthy patterns:

- **Eurozone cleavage** – The core of MS participating in all cases of EnC (including FTT) consists of Eurozone members only; excluding FTT only one non-Euro MS belongs to the core (namely Bulgaria);
- **Geographical cleavage** – Northern as well as Central- and Eastern European MS are less likely to participate in EnC than Western and Southern European MS (particularly the six founding members);
- **Opt-out periphery** – MS with primary law opt-outs (i.e. UK, Ireland and Denmark) constitute – together with Poland – the periphery of EnC participation;
- **Franco-German tandem** – The two biggest EU MS are not only part of the EnC but also participants in the respective EnC initiatives from the very beginning; they can therefore be considered (among others) as a **cross-cutting driver of EnC** (see table 5: original members and late-joiners).

Figure 3: 'Spaghetti Bowl' of Enhanced Cooperation



Source: Own elaboration.

**Table 5: List view (Enhanced Cooperation)**

	Rome III	Uni. Patent	Property Reg.	EPPO	(FTT)
Austria					
Belgium					
Bulgaria					
Croatia					
Cyprus					
Czechia					
Denmark					
Estonia					
Finland					
France					
Germany					
Greece					
Hungary					
Ireland					
Italy					
Latvia					
Lithuania					
Luxemburg					
Malta					
Netherlands					
Poland					
Portugal					
Romania					
Slovakia					
Slovenia					
Spain					
Sweden					
(United Kingdom)					

**Explanation:**

non-participating	original member	late-joiner
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Source: Own elaboration.

Taking a focus on the issues solved by the scarce selection of EnC, three main observations can be made:

- All **4 ½ cases developed out of unsuccessful special legislative procedures** after the failure to achieve unanimity in the Council (see subchapter 3.1.2.);
- **3 of the 4 ½ cases fall into the area of AFSJ/JHA** (see again subchapter 3.1.2., this can be explained by the **filtering function of the substantive constraints** of EnC);
- These **3 cases face a rather smooth implementation** without any major legal challenges (as in the case of the Unitary Patent falling in the field of legal approximation in the single market);
- **2 of the 4 ½ cases**, namely Rome III and Property Regime Rules (both AFSJ/JHA), are **conflict-of-law solution schemes only** (i.e. no legal substance is created on the EU level, order of the applicable national law is standardised for questions of transnational dimension);
- Since the FTT (sensitive policy area of taxation) has not been implemented and EnC in CFSP has not occurred yet, **no item of significant political importance**, i.e. dealing with core competences of national sovereignty, **has so far been realised under the EnC framework**.<sup>51</sup>

## 4.2. Analytical Approach

In line with the starting point of our analysis, scrutinising **EnC through the lenses of problem and solution**, embedded in a dilemma setting **encircled by Community orthodoxy** and confronted with the **challenges of potential negative spillovers** ('negative externalities') for both the **opt-ins and -outs**, we will apply a corresponding analytical scheme to the 4 ½ cases of EnC. The **PASE-scheme**, consisting of the dimensions **Problem** (i.a. background), **Analysis** (i.a. stakeholder, extra-territorial effects and cleavages), **Solution process** (i.a. duration and governance) and **Evaluation** will not only provide a concise overview for each of these cases but will also bridge our examination of bottlenecks, gatekeepers and (institutional) drivers in the abstract legal framework to our final results and recommendation presented in chapter 5.

At this point, we would like to point once again to the accompanying EPRS report<sup>52</sup> which provides comprehensive and meticulously researched descriptions of all discussed cases, providing a **plethora of additional information beyond our analytical focus**.

## 4.3. Law Applicable to Divorce and Legal Separation ('Rome III Regulation')

The Rome III Regulation,<sup>53</sup> is the **first case of a successfully implemented EnC initiative**, agreed upon almost exactly one year after the entry into force of the Lisbon Treaty and being applied in **17 participating MS** (see table 8) since June 2012.<sup>54</sup>

### *Problem*

With increasing numbers of **marriages with a transnational dimension** (e.g. spouses from different EU MS and/or permanently based in another MS) not only the mutual recognition of these relationships poses coordination pressures, but also the **dissolution of these relationships**. While the **Brussels IIa Regulation of 2003**<sup>55</sup> covers the mutual recognition of divorces in other MS and defines common criteria to determine the competent jurisdiction, conflicting national rules on the determination of the law applicable in the first place remained, creating **legal uncertainty and unpredictability: Which**

<sup>51</sup> EPPO can be considered the most far-reaching EnC in this regard. However, its range of action is very limited to large-scale crimes against the EU budget with a transnational dimension.

<sup>52</sup> Study 'The implementation of the Treaty provisions concerning enhanced cooperation', Parliamentary Research Service, European Parliament, 2018, to be published soon.

<sup>53</sup> Official name 'Law Applicable to Divorce and Legal Separation', see Council Regulation No 1259/2010 of 20 December 2010

<sup>54</sup> A detailed analysis of this first case of enhanced cooperation is provided by Jan-Jaap Kuipers, "The Law Applicable to Divorce as Test Ground for Enhanced Cooperation", in: *European Law Journal*, Vol. 18, No. 2, pp. 201-229.

<sup>55</sup> See Council Regulation No 2201/2003 of 27 November 2003.

## national legal framework prevails?

### Analysis

In this **typical conflict-of-law setting** the main stakeholders are – apart from the affected couples – the national courts/judges and executive bodies. **Neither the creation of substantive law on EU level is needed, nor extra-territorial effects<sup>56</sup>** can be expected by the **establishment of conditions and order of the national law applicable**. In questions of matrimonial matters, the main cleavage runs along the divide between **more liberal and more conservative MS**, i.e. their respective societies and legal systems.

### Solution Process

After no unanimity could be reached on the original EC proposal to **establish an EU-wide conflict-of-law solution scheme**, by **spelling out the order and conditions of national divorce law** applicable, an avantgarde of originally 13 MS (4 MS joined later) requested and was authorised to pursue the adoption of the regulation within the EnC framework **without facing any major concerns**. The slightly amended regulation was then adopted only a few months later.

### Evaluation

Unchallenged by the opt-outs, the EC or the EP, the first case of EnC **went smoothly and is generally regarded to have solved the problem for the participating MS**.

**Table 6: PASE-Scheme ‘Rome III’**

<b>Problem</b> <ul style="list-style-type: none"> <li>• policy area: AFSJ/JHA (Art. 81 TFEU)</li> <li>• different national conflict-of-law rules</li> <li>• legal uncertainty/unpredictability</li> </ul>	<b>Analysis</b> <ul style="list-style-type: none"> <li>• now ‘substance’ added to EU law</li> <li>• no extra-territorial effects (neutral)</li> <li>• more liberal vs. conservative MS</li> </ul>
<b>Solution Process</b> <ul style="list-style-type: none"> <li>• ‘ordering’ of national laws applicable</li> <li>• duration: 4 years and 5 months</li> <li>• additional governance: no necessity</li> </ul>	<b>Evaluation</b> <ul style="list-style-type: none"> <li>• neither authorisation nor implementation seriously challenged</li> <li>• ‘late-joiners’ attracted by solution</li> </ul>

Source: Own elaboration.

## 4.4. European Patent with Unitary Effect (‘Unitary Patent’)

Regulation 1257/2012 of the EP and the Council,<sup>57</sup> Council Regulation 1260/2012,<sup>58</sup> and Council Agreement 2013/C 175/01<sup>59</sup> form together the so far **most complex and most challenged case of EnC**, also known as the ‘patent package’ or short ‘Unitary Patent’. Regarded as core feature of a single market, the introduction of a unitary patent on the European level – **going beyond the ‘European patent’** of the (non-EU) European Patent Organisation (EPO)<sup>60</sup> which must be validated in every MS separately – has been demanded and discussed for decades. **26 MS (including UK)** will participate in the Unitary Patent once it is fully implemented (i.e. when the **Unified Patent Court (UPC)**, based on an **intergovernmental satellite treaty**<sup>61</sup> and still in the ratification process, starts working).

<sup>56</sup> See also Kroll/Leuffen, *op. cit.*, p. 358 ff.

<sup>57</sup> Establishment of a European Patent with Unitary Effect (OLP), Regulation 1257/2012 of the European Parliament and of the Council of 17 December 2012.

<sup>58</sup> Corresponding translation/language regime (unanimity), Council Regulation 1260/2012 of 17 December 2017.

<sup>59</sup> Of 19 February 2013. For more detailed explanations of the legislations see accompanying EPRS report.

<sup>60</sup> Established in 1973 and comprising 40 EU and non-EU MS.

<sup>61</sup> See again Opinion 01/09 of the CJEU, 8 March 2011.

*Problem*

The **costs of translating or validating a national or European patent** in other EU MS represent a market disadvantage of EU-based innovative companies and entrepreneurs compared to their competitors in – for example – ‘monolingual’ China or the US. Therefore, a unitary patent had to fulfill two conditions: Firstly, it had to be **effective in all EU MS by default**, and secondly, it had to provide an **efficient language regime**, particularly with regard to patent jurisdiction and **path-dependent on the existing EPO regime**.

*Analysis*

**Table 7: PASE-Scheme ‘Unitary Patent’**

<p><b>Problem</b></p> <ul style="list-style-type: none"> <li>• policy field: single market</li> <li>• costs of protecting innovations</li> <li>• language diversity/discrimination</li> </ul>	<p><b>Analysis</b></p> <ul style="list-style-type: none"> <li>• cleavages around language regime</li> <li>• extra-territorial negative effects</li> <li>• institution-building, ‘added substance’</li> </ul>
<p><b>Solution Process</b></p> <ul style="list-style-type: none"> <li>• protracted (CJEU + ratification of UPC)</li> <li>• duration: in total 12 years (without UPC)</li> <li>• governance: mainly (non-EU) UPC &amp; EPO</li> </ul>	<p><b>Evaluation</b></p> <ul style="list-style-type: none"> <li>• first real test for EnC (CJEU judgements)</li> <li>• highly complex, EnC is only one part</li> <li>• protracted process creates uncertainty</li> </ul>

Source: Own elaboration.

In this case of **harmonisation of rules within the single market**, it is not so much the first but the second condition necessary for a functioning unitary patent that is creating the main cleavage: Which should be the official languages unitary patents can be filed in? Since the **language regime is an integral part** of a functioning institutionalisation of a unitary patent, a veto of **‘language-wise discriminated’ MS** blocks the whole package (although setup of the patent itself can proceed in the OLP). By the authorisation of EnC by QMV and the subsequent **adoption of the language regime by unanimity of the subgroup only**, the **original veto players can be side-lined** and the institution-building of the patent package on EU level can be completed (save the jurisdiction, see below). As an **“excludable network good”**,<sup>62</sup> a unitary patent is likely to affect outsiders negatively by **fostering exchange of innovation and possibly related investments within the in-group**. This puts **pressure on original opt-outs** to join the unitary patent in the long-run.

*Solution Process*

With Italy and Spain in the role of the ‘language-wise discriminated’ MS opposing the translation agreement,<sup>63</sup> and thus blocking the Unitary Patent as a whole, **this analysis completely reflects the de facto path this legislative package has taken**. While the protracted ratification procedure of the UPC goes beyond the scope of our EnC analysis, it is noteworthy that with Italy one of the MS blocking the procedure in the first place – and together with Spain bringing the authorisation of EnC before the CJEU<sup>64</sup> – joined the subgroup **even before ‘negative spillovers’ could affect its economy**. Croatia and Spain, possibly together with **Poland which is part of EnC in-group but not a signatory of the separate UPC treaty**, form the group of outsiders.

*Evaluation*

The Unitary Patent poses the first real test for EnC since **negative externalities of subgroup problem-solving** are combined with the **legal complexity** of integrating the Unitary Patent not only into the

<sup>62</sup> Kroll/Leuffen, *op. cit.*, p. 361.

<sup>63</sup> The language regime takes over the official EPO languages: English, French and German.

<sup>64</sup> Together with Spain, see the cases C-274/11 and C-295/11 (already discussed in subchapter 3.1).



EU Treaties but also into a non-EU institution, namely EPO. Although EnC is more or less at the heart of the whole Unitary Patent project, an **additional satellite treaty is necessary to safeguard jurisdiction** within the construct. Instead of solving the original problem, the **protracted uncertainty** about the future development could – at least for now – be considered as a step back.

#### 4.5. Property Regimes Rules for International Couples

**Akin to the already discussed case of the Rome III Regulation**, the two Council Regulations within the EnC initiative Property Regimes Rules for International Couples, one for matrimonial property regimes and for property of registered partnerships,<sup>65</sup> fall into the **policy area of AFSJ/JHA and are governed under the Art. 81 TFEU** (cooperation in civil matters, special legislative procedure). **18 MS** are currently participating in this EnC.

##### *Problem*

Spouses or registered partners with **common property in a transnational setting** faced incoherent and – often contradicting – national rules of which MS laws apply in cases of divorce, inheritance or separation in general (for example, couples with two different EU passports living permanently in a third MS). **Uncertainty and unpredictability** in these constellations, paired with disagreement between the parties, favour a **‘first-come-first-serve’ logic** which lead – in a **setting of (binding) recognition of judgements in other MS** – to a **‘rush to the courts’** in order to **‘pick one’s preferred national laws’**.

##### *Analysis*

Establishing a **coherent order of national laws applicable** in these cases **neither adds any legal substance** to the EU level **nor generates negative externalities** for potential outsiders. The main motivation for MS to **forgo (but not oppose) such a subgroup problem-solving** is the **protection of national judicial autonomy/discretion** in these cases, which constitutes the main cleavage here.

##### *Solution Process*

Dating back to 2011, the original Commission proposal could not find consensus in the Council which noted **more than 4 years later** that in the foreseeable future no unanimity can be reached on this legislative act. Following the notification of 17 MS (later joined by Cyprus) to ‘save the solution’ within the EnC framework and the **overwhelming assent of the EP** (550 of 654 MEPs voted in favour) to authorise EnC, the two regulations were adopted in June 2016. As for Rome III, **specific governance did not have to be set up** (apart from delegation of further implementing acts and **monitoring/evaluation tasks to the EC**).

##### *Evaluation*

Since the Regulations themselves apply from end of January 2019 only, an assessment of **how the solution fits the problem in reality** cannot be made yet. Apart from the conclusions of the Rome III, which can be largely transferred to this case (compare tables 6 and 8), another observation is worth discussing: **A ‘domino effect’ between to very similar EnC projects cannot be attested**, i.e. the participation in Rome III is a **rather weak predictor** of MS participation in the Property Regime Rules for International Couples (see also figure 2). Apart from the core group participating in all EnC projects, there is **little overlap between the two groups** which creates itself **uncertainty by complexity for the stakeholders** (to be further discussed in subchapter 5.1). This poses a **question mark behind any assumptions of an inter-EnC dynamic of opting-in**, in contrast to already observable **intra-EnC dynamics of late-joiners** who are pushed by (potential) negative externalities and pulled by an (expected) effective/efficient problem-solving of the pioneers.

<sup>65</sup> Council Regulation 2016/1103 and 2016/1104, both of 24 June 2016.

**Table 8: PASE-Scheme 'Property Regime Rules'**

<b>Problem</b> <ul style="list-style-type: none"> <li>• policy area: AFSJ/JHA (Art. 81 TFEU)</li> <li>• different national conflict-of-law rules</li> <li>• legal uncertainty/unpredictability</li> </ul>	<b>Analysis</b> <ul style="list-style-type: none"> <li>• no 'substance' added to EU law</li> <li>• no extra-territorial effects (neutral)</li> <li>• national legal discretion at stake</li> </ul>
<b>Solution Process</b> <ul style="list-style-type: none"> <li>• 'ordering' of national law applicable</li> <li>• duration: 5 years</li> <li>• additional governance: no necessity</li> </ul>	<b>Evaluation</b> <ul style="list-style-type: none"> <li>• not yet entered into force (no assessment)</li> <li>• in substance akin to Rome III Regulation</li> <li>• little overlap of the two EnC subgroups</li> </ul>

Source: Own elaboration.

#### 4.6. European Public Prosecutor's Office ('EPPO')

The most recent – and widely discussed – regulation within the EnC framework is the establishment of a European Public Prosecutor's Office (EPPO).<sup>66</sup> With **22 participating countries**, EPPO takes the second place behind the Unitary Patent EnC (26 participants). Apart from the high expectations connected to this **project with high symbolic value**, it is central that the EPPO developed out of a **'short track' EnC**, based on Art. 86(1) TFEU which allows to **'skip the authorisation stage'** ordinary EnC initiatives have to pass.<sup>67</sup>

##### *Problem*

Regarding offences against the Union's financial interest, the EU has been completely **dependent on the prosecution mechanisms in its MS**. From a MS perspective, its own contributions to and entitlements from the EU budget may be **negatively affected by insufficient action** against these crimes in other MS. Particularly in cases with a transnational dimension, for example 'VAT optimisation' or other cross-border fraud to the disadvantage of financial sources or funds, this **division of tasks was considered inefficient and ineffective** for many years. Therefore, the problem to solve can be considered to have a **horizontal (cross-border crimes) and vertical dimension (EU financial resources)**.

##### *Analysis*

Solving such **two-level problems** naturally poses the **question of subsidiarity**: Is it more effective/efficient to approach the problem on the **national/intergovernmental level** (*cooperation*) or is **additional supranational institutionalisation** necessary (*transfer*)? Opting for the latter solution in a subgroup problem-solving setting gives furthermore rise to questions connected to **'non-excludable network goods'**.<sup>68</sup> Since everyone is profiting from the enhanced protection of common financial resources (independent of the own contribution), these **positive externalities** incentivise **free-riding**, i.e. supporting the initiative without one's own participation.

<sup>66</sup> Council Regulation 2017/1939 of 12 October 2017.

<sup>67</sup> The third paragraph of Art. 86(1) reads: "Within the same timeframe, in case of disagreement, and if **at least nine Member States** wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the **authorisation to proceed with enhanced cooperation** [...] shall be deemed to be granted and the provisions on enhanced cooperation shall apply." (accentuation by the authors)

<sup>68</sup> See Kroll/Leuffen, *op. cit.*, p. 364.

*Solution Process*

8 years after Art. 86 TFEU entered – with the Treaty of Lisbon – into force and 4 years after the original 2013 EC proposal to set up the EPPO within a **special legislative procedure** (which was accompanied with 11 yellow cards of national parliaments via the Early Warning Mechanism), a subgroup of 16 MS decided to take the **‘risk of pioneering in this scenario’** and informed the EC about their ambition to realise the EPPO within the EnC framework not earlier than April 2017, and adopted the Regulation together with 6 late-joiners in October 2017 (as indicated above, authorisation was required neither from the Council as a whole nor from the EP, which can therefore be considered as institutionally sidelined during the whole process). As “one single Office with a decentralised structure”,<sup>69</sup> the **governance of the ‘EPPO solution’** tries to accommodate both the horizontal and vertical dimension of the problem within a **complex internal structure**,<sup>70</sup> which is going to take up its work not earlier than November 2020.<sup>71</sup>

*Evaluation*

Again, the effectiveness/efficiency of this solution can only be assessed after its mechanism are applied for at least a couple of years. Evaluating this case from our perspective of the fundamental dilemma between subgroup problem-solving and Community orthodoxy, it is noteworthy that in the given scenario the **invocation of the ‘same rights and obligations for all MS’** is first of all **attributable to the in-group**: Of the four implemented cases of EnC, EPPO is the only one with a ‘positive spillover for the opt-outs’ which can be also framed as a **‘negative spillover for the opt-ins’**. The **critical number of participating MS to provide this ‘network good’** is therefore **higher than in other cases with neutral externalities**.

**Table 9: PASE-Scheme ‘EPPO’**

<p><b>Problem</b></p> <ul style="list-style-type: none"> <li>• policy area: ASFJ/JHA</li> <li>• cross-border fraud (EU resources)</li> <li>• dependency on prosecution in MS</li> </ul>	<p><b>Analysis</b></p> <ul style="list-style-type: none"> <li>• two-level problem (subsidiarity)</li> <li>• positive externalities (free-riding)</li> <li>• institution-building, ‘added substance’</li> </ul>
<p><b>Solution Process</b></p> <ul style="list-style-type: none"> <li>• short-track EnC (Art. 86 TFEU)</li> <li>• duration: 4 years (8 years after Lisbon)</li> <li>• complex governance to be set up</li> </ul>	<p><b>Evaluation</b></p> <ul style="list-style-type: none"> <li>• not yet entered into force (no assessment)</li> <li>• high number of participating MS needed to create added value also for opt-ins</li> </ul>

Source: Own elaboration.

<sup>69</sup> Art. 8(1) of Council Regulation 2017/1939.

<sup>70</sup> For a detailed explanation of the EPPO’s internal structures see EPRS report.

<sup>71</sup> See Art. 120(2) of Council Regulation 2017/1939.

#### 4.7. Financial Transaction Tax ('FTT')

As the ½ case we have included the Financial Transaction Tax (FTT) in our analysis although the adoption of the act implementing this EnC initiative (authorised already in 2013) is not foreseeable. After the withdrawal of Estonia, the potential in-groups consist of 10 MS at the moment (no MS has joined later).

##### Problem

As a reaction to the financial crisis of 2008/09 the introduction of a FTT was not only discussed in the EU as a **tool to tame the detrimental dynamics in the financial sector** and as an **additional source of revenue**. Apart from this, the very idea of introducing a FTT was at that time popular across MS at that time.<sup>72</sup>

##### Analysis

Due to the flexibility of financial transactions and whole markets, the introduction of a non-global FTT will produce **positive externalities which incentivise free-riding**, making a common solution on EU level unlikely. The central question is why a small EU subgroup should embark on this endeavour then. As Kroll and Leuffen convincingly argue, **symbolic action and the public opinion** of the time might have convinced national governments nevertheless to opt-for subgroup problem-solving in this context.<sup>73</sup>

##### Solution Process

Apart from the **dismissed annulment procedure** brought before the CJEU by the UK,<sup>74</sup> interestingly claiming that the potential implementing acts could create negative externalities due to the entanglement of the EU financial market, there are **no noteworthy developments** since the authorisation of EnC in 2013.

##### Evaluation

Against this backdrop, the failure of an EnC initiative operating in such an externality structure and – at the same time – touching the MS core sovereignty of taxation cannot be considered as an unexpected development.

**Table 10: PASE-Scheme 'Rome III'**

<p><b>Problem</b></p> <ul style="list-style-type: none"> <li>• policy area: tax harmonisation</li> <li>• governance of financial markets</li> <li>• tax revenues of MS</li> </ul>	<p><b>Analysis</b></p> <ul style="list-style-type: none"> <li>• positive externalities (free-riding)</li> <li>• pressure from public opinion</li> </ul>
<p><b>Solution Process</b></p> <ul style="list-style-type: none"> <li>• failed for the time being, no prospect of progress in subgroup negotiations</li> </ul>	<p><b>Evaluation</b></p> <ul style="list-style-type: none"> <li>• touching core sovereignty of MS</li> <li>• activating EnC as an symbolic act</li> </ul>

Source: Own elaboration.

<sup>72</sup> See Eurobarometer 78 of December 2012.

<sup>73</sup> See Kroll/Leuffen, *op.cit.*, p. 363.

<sup>74</sup> See Case C-209/13.

## 5. SYNTHESIS AND EVALUATION: AN 'INSTITUTIONAL TOOLBOX'

### 5.1. The Evolution of Enhanced Cooperation: Synthesis, Impacts and Evolution

Taking the **scarce empirical material** provided by the 4 ½ cases into account, a systematic synthesis concerning the **success of these EnC projects** with regard to **the specific problem they aim to solve** or their **individual impacts on the policy field** they are embedded in, let alone **on EU integration in general**, is from a scientific point of view hardly justifiable. The *prima facie* **sobering inventory of EnC** consists of:

- **One 'conflict-of-law solution scheme' already at work** (Rome III Regulation);
- The **Unitary Patent** hinging on the **protracted ratification of an accompanying intergovernmental satellite treaty**;
- **Another 'conflict-of-law solution scheme'** to be applied from early 2019 onwards (Property Regime Rules);
- The **EPPO**, established in a **one-time-only short-track EnC procedure**, in the **early phase of its institutionalisation** and not operational before late 2020;
- [The FTT is authorised only and an agreement on the implementing acts cannot be expected in the foreseeable future.]

However, against the backdrop of this empirical evidence, the **most crucial impact of the implementation of EnC framework as whole** in the post-Lisbon decade is that **it has been implemented**. This non-trivial result has to be seen in the light of our discussion of the **persistent attitudes of MS** (see subchapter 2.3):

'EnC's maturing' can – with great caution – also be understood as a **maturing of MS governments' attitudes towards EnC** as a **not only a legal but also a legitimate tool** of problem-solving at the EU level.

Reluctant to make use of EnC under the Amsterdam/Nice provisions, since Lisbon MS have started to consider **EnC as a problem-solving vehicle**, not in the sense of mainstreaming but in the sense of **daring to 'test the waters'**. Beginning with – from a sovereignty and integrationist point of view – rather **benign pioneering projects** with neutral/no externalities (like Rome III or Property Regime Rules), over a **more delicate** (negative extra-territorial effects) but with 26 participating MS almost 'complete' subgroup (Unitary Patent) to a project with a clear danger of free-riding outsiders (EPPO), the **attitudes of MS are evolving**. Or to put differently, the **problem-solving propensity of MS** seems to **become more 'adventurous'** with regard to a 'generalised' and 'standardised' framework of differentiated integration, without embarking on any long-term prediction in this regard.

*'Evolutionary normalisation instead of revolutionary magic formula'*

While none of the above-mentioned cases has in itself measurable consequences for EU as a whole, the very fact that they exist as **positive or negative role models** contributes to the **normalisation of the 'EnC discourse'** and thereby to **lowered strategic and psychological hurdles** when considering a subgroup solution in the first place. **Shift in attitudes** and the **'normalisation of the procedure'** can in this sense be regarded as **situated in an interdependent dynamic**, that was sparked by the first authorisation of EnC and is going to be maintained – not only but primarily – by the identified core group (see subchapter 4.1). With projects like the establishment of **Common Consolidated Corporate Tax Base (CCCTB)** under EnC, there seem to be at least some projects on the horizon to continue this path.

The following SWOC-analysis and institutional toolbox will be developed in the light of 'attitudes' and 'normalisation', while referring to **'hard facts' of the legal framework governing EnC and its limited output** during the last years.

## 5.2. Abstracting from the Cases: A SWOC-Analysis

The following SWOC-Analysis is meant to give a final overview over our results before we elaborate them further in our Institutional Toolbox (see next subchapter).

**Table 11: SWOC-Analysis**

### Strengths

- EnC embeds the authorisation of subgroup problem-solving **within the Treaty rules and institutional architecture**;
- Its main incentive is thus to **make use of EU institutions**;
- **Intra-EnC dynamics** are already observable (late-joiners), see subchapter 4.5.;
- Facing little negative externalities, it is in cases of **conflict-of-law solution schemes** already an attractive problem-solving vehicle.

### Opportunities

EnC offers the potential to **become a 'blueprint' for differentiated integration** if:

- **concrete institutional reforms** are realised (see next subchapter);
- **attitudes may change**/normalise over time (first indications);
- and **alternatives** outside the Treaties are **deprived of any access to EU institutions/administration**.

### Weaknesses

- By procedural and substantive constraints EnC is **biased towards (failed) special legislative procedures**, particularly in the area of AFSJ/JHA;
- The **procedure from initial proposal to implementing acts is protracted**, (duration between 4 and 12 years);
- **No inter-EnC dynamics** observable, see subchapter 4.5.;
- Its **relationship to the *acquis communautaire*** in the long-term remains unclear.

### Constraints

- EnC will and should always be regarded as a **'second-best solution'**, a default alternative not a default approach;
- MS will always search for the most pragmatic solution in a given **incentive-cost-structure** → while this structure can be **'tweaked'** towards EnC, satellite treaties can neither be precluded nor prohibited (in some cases they will always offer more incentives).

Source: Own elaboration.

## 5.3. Recommendations: An 'Institutional Toolbox'

Based on the insights of the previous chapters and from a legitimacy and efficiency point of view, we would like to condense our most important insights in form of an Institutional Toolbox (see below), comprising the current tools and mechanism of EnC and recommendations to optimise and streamline them **without and/or with Treaty reforms**. It should be underlined that we regard these **ideas as a contribution to a discussion** that the AFCO committee has 'restarted' with its interest in the topic. We are fully aware that these recommendations will – even if fully realised – **not turn EnC into a magic formula**, as we have discussed in the introduction. The internal EP procedures concerning EnC will be discussed in the subsequent, final subchapter of our in-depth analysis.

Table 12: Institutional Toolbox

Existing EnC toolbox	
<ul style="list-style-type: none"> <li>• Last resort option for a <b>deadlock situation in the Council</b>;</li> <li>• Incentive to make <b>use of Community institutions for pioneers/avant-garde</b>;</li> <li>• Biased towards problem-solving within the contexts of <b>special legislative procedures</b> in the area of <b>AFSJ/JHA</b>;</li> <li>• <b>Different authorisation of and opting-in provisions</b> for EnC in general and EnC in CFSP (see subchapter 3.2.1);</li> <li>• <b>Differentiation between subgroup problem-solving in CFSP</b> (EnC framework) <b>and CSDP</b> (PESCO framework);</li> <li>• <b>'No representation without participation' rationale</b> applies to the Council only;</li> <li>• <b>EnC legislation does not become part of the <i>acquis communautaire</i></b> (relevant for EU accession negotiations).</li> </ul>	
Recommended reform/extension of the EnC toolbox	
<i>Without Treaty reforms</i>	<i>With Treaty reforms</i>
<ul style="list-style-type: none"> <li>• <b>Abolishing the use of EU institutions/administration</b> for any form of differentiated integration <b>other than EnC</b> (and PESCO), achieved by systematic refusal of EU institutions to comply (first of all the EC); the European Council should <b>as a norm refrain from searching for satellite treaties</b>;</li> <li>• Establishing a special <b>EnC unit/secretariat in the EC</b> to coordinate and facilitate the institutional setup of EnC projects irrespective of the specific policy field;</li> <li>• Establishing an <b>EnC committee format in the EP</b> to accept, amend or reject the substantive legal acts of an already authorised EnC initiative;</li> <li>• Making <b>constructive use of Art. 333 TFEU</b> as an offer to streamline decision-making in EnC and not as a blackmailing tool threatening to block its authorisation in the first place;</li> <li>• Concentrating on <b>adjacent policy fields of the existing EnC projects</b> to foster inter-EnC dynamics;</li> <li>• The EP uses its Treaty-based right to suggest acts of legislation to the EC with the <b>clear expression of supporting an EnC in this regard</b>.</li> </ul>	<ul style="list-style-type: none"> <li>• Equipping the <b>EP with the right to initiate an EnC project</b> if conciliation with the Council has failed after the second reading in the OLP;</li> <li>• Easing up the substantive and procedural constraints of EnC initiated by the <b>Eurogroup in the fields of tax harmonisation and social policy</b> (see 'single market bottleneck', chap. 3.1.2. or Art. 326 TFEU);</li> <li>• <b>Reducing complexity and variations</b> of differentiated integration in the EU by: <ul style="list-style-type: none"> <li>○ Applying QMV for opting-in and authorisation of EnC in CFSP in the Council;</li> <li>○ Integrating the <b>PESCO into the EnC umbrella</b>;</li> </ul> </li> <li>• Allowing for <b>fast-track authorisation EnC in fields of high political salience</b> (e.g. in the field of migration, see also EPPO case);</li> <li>• Increasing the synergies of EnC projects in adjacent policy fields by allowing <b>for additional financial and administrative incentives</b> in these cases, proposed by the EC and amended/confirmed by the EP;</li> <li>• <b>Automatic integration of EnC legislation into the <i>acquis communautaire</i></b> after a transition period of 5 years.</li> </ul>

Source: Own elaboration.

#### 5.4. EnC Procedures in the EP

When it comes to the discussion of procedural reforms of EnC one question is – particularly from the perspective of the EP – of high salience: **Which MEPs should be eligible to vote in the two stages of the procedure (authorisation and implementing acts)?** Or, to put it differently, in which composition should the EP act as an institutional 'veto player' in these cases? **Two basic lines of argumentation** are possible here, **based on different normative assumptions** and each entailing particular consequences for the field of differentiated integration as a whole.

In the first scenario, the *status quo*, the EP takes its decisions on the authorisation (simple majority of MEPs voting, consent procedure) and the implementing acts (different majorities might apply, e.g. OLP) in its **full composition** and based on the **ordinary committee structures and procedures**. On the one hand, this follows the general idea of **embedding the EnC procedure in the supranational decision-making structure** and is – at least *prima facie* – in line with the **(self-)understanding of the EP**<sup>75</sup> as the representative of the European citizens, as laid down most prominently in Art. 9, 10 and 13 TEU. On the other hand, the representatives of non-affected citizens, i.e. residents of non-participating MS,<sup>76</sup> might block or at least influence the outcome on all stages of the EnC initiative.

In the second scenario, the already discussed '**no representation without taxation**' rationale, underlying the **exclusion of non-participating MS** from the voting procedure in the Council, applies the composition of the EP as well. From a legitimacy perspective, it might stand to reason that only MEPs elected in participating MS should be allowed to accept or reject authorising and to amend or vote on implementing acts related to EnC. To be more precise, and to fully **mirror the Council provisions on the side of the EP**, one could argue that this **differentiation between MEPs** should apply to voting on implementing acts only (and not to the consent of the EP in the authorisation stage), since a **qualitative majority of the Council as a whole is needed to authorise EnC** in the first place.

Akin to the discussion of the EP's role in decision-making related to the EMU, the consequences of the one or the other scenario – as demonstrated **both backed by reasonable normative assumptions** – are going beyond the rather limited field of EnC initiatives (as the institutionalised 'blue print' of differentiated integration). While **granting voting rights to 'outsider MEPs' by default** might lead to a **(further) alienation** between European decision-makers and (affected) citizens and, thus, delegitimise the EP's position towards the public sphere(s), a **case-by-case distinction between two groups of MEPs significantly increases the procedural complexity**, lowers identification with the EP as a whole and undermines the **transnational nature of the institution**. Apart from internal pragmatic questions (e.g. organisation and representation in committees), the second scenario might also undermine the EP's **standing towards other supranational institutions** unless similar differentiations are realised in their respective compositions (e.g. College of Commissioners, Chambers of Judges in the CJEU). Contrarily, the long-term continuation of the status quo described in first scenario could reduce the attractiveness of EnC compared to '**tailor-made**' institutions outside the Treaties and thus incentivise 'satellite agreements' leaving no formal role for the EP. This might be the case when the role of the EP is – for whatever reason – seen as an obstacle for interested member states and therefore motivates arrangements out of the primary law (see for example the EP's role in the Fiscal compact and ESM).

The **severity of these challenges obviously decreases with the high numbers of participating MS**, particularly if the tendency continues that big MS like Germany, France, Italy and Spain are consistently part of the 'in-group': MEPs from non-participating MS outvoting MEPs from participating MS is under these circumstances highly unlikely. However, it cannot be assumed that this will be the case in all future cases of EnC.

Therefore, we suggest a third scenario, trying to find a **middle way** between the two presented ones and thus avoiding – or at least mitigating – some of these drawbacks.

#### *Establishment of an EnC committee format in the EP*

To combine both, the cohesion of the EP as a supranational actor and the reasonable claim of 'no representation without taxation' on the second stage of implementing acts, we suggest the setup of an

<sup>75</sup> See also European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)): The EP "[t]akes the view that any formal differentiation of parliamentary participation rights with regard to the origin of Members of the European Parliament represents discrimination on grounds of nationality, the prohibition of which is a founding principle of the European Union, and violates the principle of equality of Union citizens as enshrined in Article 9 TEU".

<sup>76</sup> Not limited to nationals of non-participating MS since citizens of other EU MS are eligible to vote in EP elections are allowed to vote in their country of residence.



**additional EP committee format granting voting rights to MEPs from the MS participating in the EnC only**, while equipping the other MEPs in the committee with the rights of participating in the consultations at every stage.

Established on an **ad-hoc basis** once an EnC related legislative act is discussed, the allocation mechanisms of the existing committee(s) responsible – depending on the categorisation of the policy in question – as well as the **administrative framework and mandate of each committee remain untouched**. The EnC committee format is therefore only reflected in the **adaption of the decision-making procedure** (i.e. voting rights) within the ‘ordinary’ committee in charge of the respective policy field. To **avoid scenarios of non-representation of MEPs from smaller MS** within a committee’s EnC format, parliamentary groups should be granted the exceptional possibility to **nominate additional MEPs with voting rights** to the respective committee, whose number reflects the size of both the parliamentary group and the non-presented country and whose rights are limited to deliberating and voting on these EnC related acts only.

The underlying rationale of this structure would be the following: The EnC committee takes a decision on the implementing act(s) followed by a **formal ‘ratification’ of the plenary as a whole**. Once in the plenary, changes to the committee’s proposal or its rejection would **require a ‘strong majority’ of all MEPs (i.e. 356 MEPs)**,<sup>77</sup> substantially limiting the influence of MEPs from non-participating MS while at the same time **not turning the plenary vote into a mere show**. Based on the corresponding logics in the Council and the empirical evidence that the authorisation of EnC by the EP was – until now – always given by overwhelming majorities, we suggest that **this new procedure applies to the stage of implementing acts only**. The voting rights in the committee on the EnC authorisation stage in the first place cannot be limited to representatives of the opt-ins only in order to **avoid a procedural disempowerment of voices opposing the initiative**, for example for reasons of policy cohesion, in the first place.

Given differences in the interest of MS to use the Union for solving their problems, differentiation was, is and will be an issue of high salience. The relevance of the EnC in searching for an optimal form of flexibility will remain as a major point of orientation though **not as the magic formula**. The EP should envisage useful procedures to deal with this and other cases of differentiation.

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<sup>77</sup> Indicated number refers to the size of the EP for the 2019-2024 term.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs, examines – against a historical backdrop – the legal provisions governing Enhanced Cooperation as well as the so far very limited number of implemented Enhanced Cooperation initiatives. Based on these insights, concrete ideas are formulated on how to optimise this 'standardised and generalised framework' of differentiated integration, touching upon questions of efficacy, efficiency and legitimacy.

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