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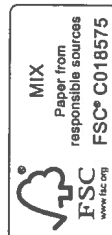
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## Chapter 7

# Enhanced Cooperation under the Lisbon Treaty

Nico Groenendijk

### Introduction

Provisions regarding closer cooperation between EU Member States appeared for the first time in the 1997 Treaty of Amsterdam. Three years later these provisions were augmented and restated by means of the Treaty of Nice, now using the term enhanced cooperation. The Lisbon Treaty has once again made some minor changes to the conditions under which Member States can engage in enhanced cooperation.

Put briefly, as Articles 20 and 326–34 of the Treaty on the functioning of the European Union (TFEU) state, enhanced cooperation is regarded as a measure of last resort and applicable only if the Council establishes that certain objectives cannot be obtained within a reasonable period of time by the Union as a whole. At least nine Member States have to participate in the enhanced cooperation, which can only deal with policies within the framework of the Union's non-exclusive competences. The enhanced cooperation is open to all Member States at any time. Acts adopted within the framework of enhanced cooperation do not become part of the general accession *acquis*.

Until recently, the possibility for closer or enhanced cooperation had not been used, even though more informal ways of flexible integration have been used in abundance (Groenendijk 2007). Recently however, enhanced cooperation has been put forward as a feasible option in two specific policy fields. In the field of *patents* eleven Member States will go ahead to implement a single patent, leaving Member States like Spain and Italy behind. In the field of *divorce law*, enhanced cooperation has been established by fourteen Member States, in June 2010.

This chapter analyses the pros and cons of the use of enhanced cooperation under the Lisbon Treaty, both in a general way and by looking specifically at these two cases.

The chapter is structured as follows. In section 2 we discuss the concept of flexible integration and the various forms it can take, with an emphasis on alternative integration and differentiated integration. Section 3 gives an overview of the procedural and substantive requirements to use the enhanced cooperation mechanism. Section 4 deals with the pros and cons of enhanced cooperation as compared to unitary integration and alternative integration. Section 5 focuses on the two current cases of actual enhanced cooperation (patents and divorce law). Section 6 concludes.

## Flexible integration

### Types of flexible integration<sup>1</sup>

Flexible integration (or sub-integration) refers to an instance of integration that takes place among some but not all members of an already existing (larger) integration scheme (*in casu* the European Union). It can take different shapes. The first typical feature is whether flexible integration takes place within the EU institutional and decision-making framework or not. The second typical feature refers to the policies involved. Flexible integration can deal with policies that are within the EU policy domain (as marked out by the relevant EU Treaties) or outside the EU policy domain.

If flexible integration uses another institutional framework than the EU framework it can either be labelled new integration or alternative integration.<sup>2</sup> *New integration* refers to flexible integration outside the EU institutional framework dealing with policy areas that are not part of the EU policy domain. Integration outside the EU institutional framework, concerned with policy areas that are within the EU domain, is called *alternative integration*. In both cases, because the EU institutional framework is not used, it is possible to cooperate with EU Member States as well as with outsiders (third countries).

If flexible integration occurs within the EU institutional framework, there are again two possibilities. One may be called the *odd integration*, flexible integration that employs EU institutions but deals with policies outside the EU domain. The term *differentiated integration* concerns flexible integration taking place both within the institutional framework and within the policy domain of the EU. Table 7.1 shows the four basic types of flexible integration.

**Table 7.1 Four basic types of flexible integration**

	Use of EU framework	Use of alternative framework
<i>Policies within EU domain</i>	Differentiated integration (including enhanced cooperation)	Alternative integration
<i>Policies outside EU domain</i>	Odd integration	New integration

In the literature on integration, a large variety of concepts and terms has been put forward to denote certain types of 'flexibility': *inter se* agreements, partial

<sup>1</sup> See Groenendijk (2007) for a more elaborate discussion.

<sup>2</sup> The distinction between the four types of (sub-)integration is based on but different from Su (2007), who uses the terms opt-out integration (rather than alternative integration) and alienated integration (rather than odd integration).

agreements, parallel procedures, two-speed Europe, multi-speed Europe, multi-speed integration, European vanguard, *avant-garde* group, *directoire*, pioneers' clubs, pioneers and followers, core Europe, *Kern Europas*, *Harter Kern*, *noyau dur*, *centre de gravité*, centre of gravitation, variable geometry, *géométrie variable*, Europe à la carte, pick-and-choose, differentiated Europe, *Abgestufte Integration*, two-tier Europe, multi-tier Europe, *plusieurs niveaux*, concentric circles, *cercles concentriques*, magnetic fields, hub-and-spoke-Europe, eccentric ellipses, opt-in arrangements, opt-out arrangements, constructive abstention, declaratory abstention, positive abstention, active abstention, transition periods, special treatments, derogations, exemptions, flying geese, breakaway riders and pelotons.<sup>3</sup>

In the remainder of this section we will try to make some sense of these different concepts and terms by focusing on two types of flexible integration: alternative integration and differentiated integration.

### Alternative integration

Europe is replete with integration outside the EU framework. After all, EU membership does not imply that countries have given up all other treaty-making authority, which is exercised in relation with third countries or fellow Member States. Such agreements are called *inter se agreements*, *partial agreements*, or *parallel procedures*. Some examples of alternative integration are: the Benelux cooperation between Belgium, the Netherlands and Luxembourg; the monetary union between Belgium and Luxembourg (now incorporated into the EMU); the Nordic cooperation between Denmark, Norway, Finland and Sweden, the Faroe Islands, Greenland and Åland; the Schengen cooperation based on an Agreement signed in 1985 (part of the EU framework since the Treaty of Amsterdam); the Common Travel Area between the UK and Ireland; the Bologna Process dealing with higher education, which now involves 47 European countries; the European Patent Organization; the cooperation within the framework of NATO and the Western European Union (WEU); the cooperation within the OECD, and various other bilateral or multilateral treaties on a multitude of issues.

In some of these cases (for example the Benelux and the Nordic cooperation) the term alternative integration as a form of flexible integration may be misleading, because the 'alternative' cooperation was already there before the larger integration within the EU framework came about (Benelux: 1944; Nordic cooperation: 1952). The EEC Treaty specifically did not put an end to existing bilateral or multilateral treaties, a line which has been held with the various accession treaties.

Besides, some of these forms of cooperation do not so much or exclusively deal with specific policy areas (functional cooperation) but have developed into forms of structured coordination of views in order to maximize influence on

<sup>3</sup> See inter alia Wallace and Wallace (1995), Lansdaal (2002), and Federal Trust (2005) for overviews of concepts of flexibility.

collective decision-making within the EU. Again, the Benelux is an example of such a structured coordination, as is the Nordic cooperation.

Interestingly, it appears that alternative integration has more than one potential advantage. First, with parallel agreements it is possible to cover a larger part of Europe than just the EU-27 (or before 2004: the EU-15), with Norway, Iceland, Liechtenstein and Switzerland as the 'usual suspects' when it comes to cooperation with third countries.

Secondly, alternative integration may be beneficial because the EU framework imposes various constraints (in terms of decision-making, legislation, democratic accountability etc.). This should especially explain instances of alternative integration involving all EU Member States.

Thirdly, in cases where only some but not all EU Member States are involved, *inter se* agreements may be seen as a form of *de facto* enhanced cooperation between a relatively small subset of Member States, but without using the EU enhanced cooperation mechanism. Lack of consensus in a specific policy field, or perceived differences in implementation capacity and speed, is at the root of this kind of alternative integration. As the Schengen and Bologna cases show, such alternative integration by a vanguard group can easily become a catalyst for all EU Members, eventually spilling-over to the entire EU. Alternative integration can thus be used as leverage to speed up EU integration in a specific area.

The main disadvantage of alternative integration is of course that the EU institutional and legal framework is not used, resulting in a relatively high level of transaction costs, both in terms of preparation and negotiation of a multitude of bilateral agreements as in terms of enforcement and uniform application.

The success of alternative integration can be seen as posing varying degrees of antagonism to EU-wide integration. One, to a certain extent, manifold alternative integration could be interpreted as the result of failure of integration within the EU framework. If Member States cannot satisfactorily deal with policy problems inside the EU, they will start looking for alternative arrangements. Similarly, alternative integration is sometimes perceived as a threat to the larger EU integration, and various possibilities for differentiated integration (i.e. flexibility within the EU institutional framework) have developed – especially since the Treaty of Maastricht – as an alternative to 'alternative' integration.

#### Differentiated integration

The starting point to discuss differentiated integration is the EU default mode of integration, which involves uniformity in time and matter, and which can be called monolithic integration or *unitary integration*. With unitary integration common EU-wide goals are set and are to be reached at a certain unique point in time by all Member States.

Departure from this default mode is possible along a number of dimensions:

1. Differentiation can refer to time only, as opposed to differentiation in time and matter. Put differently: to what extent should sub-integration eventually be an exclusive thing? If there is differentiation in time only, common EU-wide goals are retained but may be reached at different points in time by different Member States. Sub-integration in this sense is open to all, and indeed is successful only if eventually all members of the larger integration participate (after which the sub-integration is simply absorbed into that larger integration). If there is differentiation in time and matter, aiming at and attaining certain policy goals will be exclusive to the 'insiders';
2. Sub-integration may deal either with a single issue (or a few single, non-related issues) or with a multitude of (potentially interrelated) policy issues;
3. Sub-integration can differ as far as the size of the group of insiders is concerned (relative to the size of the group of outsiders);
4. The composition of the group of insiders can be steady across the range of policy areas in which sub-integration occurs, but can also vary (mixed coalitions);
5. Moreover, such coalitions can be more or less stable over time;
6. There can be a difference in influence in issues of the larger integration between those Member States inside and those Member States outside the sub-integration.

The closest thing to the default mode, i.e. unitary integration, is differentiation in time only, on a limited number of issues, and involving a limited number of outsiders. *Transitional arrangements*, *temporary derogations* and/or *exemptions* (to the *acquis communautaire*) are a clear example of this kind of flexibility. Such differentiation has always been part of the Treaties (and of numerous Protocols) and of specific Community Directives. *Constructive abstention* (*declaratory abstention*, *positive abstention*, *active abstention*) is yet another possibility, earlier restricted by the Treaty to specific measures taken as part of the Common Foreign and Security Policy, but now (under the Lisbon Treaty) expanded to (European) Council decision-making under the unanimity rule (Articles 235 and 238 TFEU). With constructive abstention a Member State can simply declare that it does not support the decision taken and will not apply it itself, but accepts that the decision commits the Union. Constructive abstention to a large extent resembles the more general idea of a (temporary and single-issue) *opt-out* clause, as for instance used by the United Kingdom and Denmark to be left out of the third stage of Economic and Monetary Union (EMU).<sup>4</sup>

If a larger number of Member States opt out, but these outsiders are still expected to catch up with the others at a later stage, such sub-integration can be

4 In the EU opt-out clauses are generally reserved for incumbent members. Candidate states are not being offered the opportunity to negotiate similar flexible arrangements; the European Council has made it clear on a number of occasions that acceding members will not be allowed opt-outs or others forms of flexible integration.

labelled *multi-speed Europe* (*nvo-speed Europe, multi-speed integration*). Here the idea is that European integration is driven forward by a sub-group of Member States, but no Member State is excluded in the long run nor can Member States exclude themselves indefinitely. Differentiation is allowed to exist temporarily only. A special case of multi-speed is what German commentators call *abgestufte Integration*. Member States agree on particular policy objectives, but specific timetables or stages of adoption by individual Member States are set. Differentiation is then a matter of (timing of) policy implementation rather than policy goals.

The multi-speed concept is rather similar to the idea of a *European vanguard group* (*avant-garde group, directrice, pioneers' clubs, pioneers and followers, pathfinders, breakaway riders*). Again, the final goal is to reach shared objectives, with the vanguard group breaking ground and shaping these objectives along the way.

Other forms of differentiated integration presuppose that differentiation is not necessarily temporary. The idea of a *core Europe* (*Kern Europas, Harter Kern, noyau dur*) assumes a highly restricted membership of that core, which is (potentially) permanently limited. The core countries get engaged in far deeper integration than Member States outside the core. The latter no longer constrain the former. The deeper integration does involve multiple related issues, and core countries do have a considerably larger overall influence than countries outside the core. The idea of a *two-tier Europe* is essentially the same, but uses another kind of visualization.<sup>5</sup> The related ideas of *concentric circles* (*cercles concentriques*) and of *multi-tier Europe* (*Europe de plusieurs niveaux*) differ in that they presuppose the existence of more than just two groups (of insiders and outsiders).

*Variable geometry* (*géométrie variable*) is yet another concept of sub-integration. It also assumes a permanent state of sub-integration to be established, due to the fact that integrative capacities and desires will vary across the Union. Variable geometry envisages a series of different policy areas (in addition to the internal market), all of which would have varying membership (or policy consortia).<sup>6</sup> Contrary to the idea of a hard core, which puts a permanent set of Member States in the middle of integration, variable geometry starts from the internal market as core policy, around which various other policies have developed and will develop. This policy area configuration and the membership of the different policy consortia are, however, rather stable. The latter is not necessarily the case with *Europe à la carte* (or *pick-and-choose*, or *opt in/opt out*). Moreover, the policy core here is not a full-fledged internal market but a common trading zone.

The differences between the various forms of differentiated integration are gradual only, and it is hard to unambiguously label actual examples of differentiated integration. EMU, for example, can be regarded as an example of two-speed

5 The same goes for concepts like magnetic fields, centre of gravitation, and hub-and-spoke Europe.

6 The concept of eccentric ellipses (Gomes de Andrade 2005) is one way of visualizing this variable geometry.

Europe but it also resembles a vanguard group, it involves opt-outs, and it can also be concerned with the current and future EU core. However, the different types of flexibility are linked to certain views on how European integration should proceed, and in some cases can be linked to specific Member States. The idea of a *Europe à la carte* can be regarded as a mechanism to break federalist dynamism (Philippart and Sie Dhian Ho 2003: 5) and was put forward in 1994 by then UK Prime Minister John Major.<sup>7</sup> Ideas like the *nouvel dur*, *géométrie variable*, and *cercles concentriques* have been advocated by French politicians (Delors, Mitterrand, Balladur), assuming a Franco-German coalition at the heart and at the helm of Europe.<sup>8</sup> Interestingly, differentiated integration can be advocated from a position that favours deeper integration as well as from a position that aims at curbing federalist tendencies.

How do all these variants of flexibility relate to the formal mechanism of enhanced cooperation? As Su (2005) observes, the need to seriously discuss differentiated integration became imminent due to the eastern enlargement of the EU. In his analysis (partly building on Philippart and Sie Dhian Ho 2003), enlargement has been postponed time and time again, in order for the EU to reach consensus on mechanisms it could use to deal with diversity, which explains the emergence of opt-outs, the increased importance of subsidiarity, the embracing in 2000 of the open method of policy coordination, and – last but not least – of enhanced cooperation. When it became clear, quite early in the process, that the central and eastern European countries would not content themselves with association agreements but wanted full EU Membership, and EU leaders – pressured by Germany – had to give enlargement the green light (in Copenhagen, June 1993), a new and formal mechanism had to be found to make differentiation between EU Members possible: ‘closer cooperation’ or ‘enhanced cooperation’, to which we now turn.

### Provisions for enhanced cooperation

Enhanced cooperation can be seen as a specific mode of flexible integration, with a particular legal basis which regulates (and constrains) it. Provisions regarding ‘closer cooperation’ appear for the first time in the 1997 Treaty of Amsterdam and were changed (now using the term ‘enhanced cooperation’) by means of the Treaty of Nice (which became effective on 1 February 2003). In the still-born Constitutional Treaty the Nice mechanism was subjected to further changes; the provisions on enhanced cooperation in the Constitutional Treaty were later fully incorporated into the Lisbon Treaty.

The closer cooperation mechanism of the *Treaty of Amsterdam* was a very cautious and rather general mechanism, allowing a group of willing states to

7 In his William and Mary Lecture given in Leyden in June 1994.

8 See Lansdaal (2002) for a more detailed discussion of joint Franco-German ideas in this field.

undertake closer cooperation among themselves while using the institutional mechanisms of the EU, but only if others would allow them to do so (De Witte 2004: 145). This mechanism was established in the first and third pillars, and contained an emergency brake procedure: the Council of Ministers had to decide on closer cooperation by qualified majority, but any Member State, for important and stated reasons of national policy, could refer the proposal to the European Council for a unanimous decision (thereby constituting a *de facto* veto right). Furthermore, closer cooperation had to be endorsed by a majority of Member States (smaller groups were not allowed).

The *Nice Treaty* did away with the emergency brake procedure (in the first and third pillar) and extended enhanced cooperation to the second pillar (CFSP) albeit with an emergency brake (i.e. *de facto* veto) procedure. In the first and second pillar, proposals for enhanced cooperation (put to the Council by the European Commission following a request from the Member States involved) were subject to a qualified majority vote. The number of Member States required for launching the procedure was changed from the majority to a fixed number of eight Member States.

The *Constitutional Treaty* and the subsequent *Lisbon Treaty* stripped the enhanced cooperation mechanism of some of the conditions mentioned in the Amsterdam and Nice Treaties (which were largely considered to be superfluous anyway; see Philippart 2003a, 2003b), but most provisions were retained, albeit rephrased. Following Philippart (2003b) we can distinguish between substantial, procedural and decision-making/operational provisions.

First, under the Lisbon Treaty, the *substantial provisions* for enhanced cooperation<sup>9</sup> are the following:

- a. provisions that specify what enhanced cooperation should aim at. Enhanced cooperation is meant to aim at furthering the objectives of the Union, at protecting and serving EU interests, and at reinforcing the process of European integration. Still, enhanced cooperation is a last resort (i.e. it has to be established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole);
- b. provisions referring to what enhanced cooperation should not entail. Enhanced cooperation must not undermine the internal market, should not undermine economic, social and territorial cohesion, and should not distort competition. It has to comply with the Union's Treaties and law. However, acts adopted and decisions taken within enhanced cooperation unions shall not become part of the Union *acquis* (which new EU Member States must adopt upon accession);
- c. provisions referring to areas in which enhanced cooperation is simply forbidden. Enhanced cooperation should be established within the framework of the Union's non-exclusive competences, i.e. it cannot

<sup>9</sup> We focus here on the general enhanced cooperation mechanism and refrain from discussing the special provisions for enhanced cooperation in the area of CFSP.

be established in areas where the Union has no powers or has exclusive powers (common policies);

- d. several provisions that deal with the protection of Member States not participating in the enhanced cooperation. Enhanced cooperation must respect the competences, rights, and obligations of the outsiders. Acts adopted and decisions taken within enhanced cooperation unions are not binding on the outsiders, but EU Members wishing to join the enhanced cooperation at a later stage have to adopt the enhanced cooperation *acquis*.

Secondly, there are some *procedural provisions* for enhanced cooperation:

1. a participation threshold applies of nine Member States;<sup>10</sup>
2. the enhanced cooperation scheme should be open at all times to all EU Member States, provided new participants adhere to the enhanced cooperation *acquis*;
3. the Council grants authorization to proceed with enhanced cooperation by a European decision, upon a proposal from the Commission, and after obtaining the consent of the European Parliament. The Council decides by qualified majority.

Finally, the following provisions deal with decision-making within the enhanced cooperation union and its operation:

4. the enhanced cooperation may make use of the Union's institutions;
5. it is possible for the Member States engaged in enhanced cooperation to decide (unanimously) to take decisions by qualified majority even if in the specific area unanimity is the rule;
6. all EU Member States are able to take part in deliberations, but only enhanced cooperation union members shall take part in the vote;
7. expenditure resulting from enhanced cooperation (other than administrative costs) shall be borne by the insiders only;

Both under the Nice Treaty and the Lisbon Treaty an important role is played by the European Commission.<sup>11</sup> First, the Commission is to pass a request for enhanced cooperation to the Council by means of a Commission proposal. Secondly, the Commission vets any later applications of Member States wanting to join the sub-group.

<sup>10</sup> In this regard the Lisbon Treaty differs from the Constitutional Treaty, which used a general threshold of one-third of the number of Member States.

<sup>11</sup> See Federal Trust (2005) for a discussion of the possible functioning of some other institutions under flexibility.

### Pros and cons of enhanced cooperation

In the academic literature various pros and cons of differentiated integration, and more specifically of enhanced cooperation, have been put forward, though unfortunately not in very systematic way.

We should compare enhanced cooperation with two other possibilities:

- a. unitary integration;
- b. alternative integration (outside the EU framework).

Table 7.2 lists some aspects that are relevant in comparing unitary integration, enhanced cooperation and alternative integration.

**Table 7.2 Comparison of uniform integration, enhanced cooperation and alternative integration**

	Uniform integration	Enhanced cooperation	Alternative integration
1. <i>Danger of distortion of competition, internal market infringements</i>	No	Low	Low
2. <i>Danger of decrease of cohesion</i>	No	Middle	Possibly high
3. <i>Transaction costs in general</i>	Relatively low	Relatively low (if EU framework is used), relatively high (if EU framework is not used)	Relatively high
4. <i>Procedural constraints</i>	High	Middle (but mitigated if unanimity is replaced by majority decision-making)	Low
5. <i>Democratic (input) legitimacy</i>	High	High	Low
6. <i>Use in fields of non-EU-competences</i>	Not possible	Not possible	Possible
7. <i>Position of outsiders</i>	No outsiders	Relatively weak due to first-mover advantage Beneficiaries of path-finding	Relatively weak due to first-mover advantage Beneficiaries of path-finding
8. <i>Involvement of third countries</i>	Not possible	Not possible	Possible

One of the main possible disadvantages of flexibility in general, compared to unitary integration, is that it leads to less internal cohesion (in economic, social or territorial terms). In addition to this, often the dangers of distortion of competition and of distortion of the functioning of the internal market are mentioned. Whether flexibility indeed endangers cohesion and the internal market is a matter of judgment. It could be argued that the substantive conditions for enhanced cooperation (see b. and c. in the previous section) are rather restrictive and that they explicitly address these dangers. Actually, a closer look at these conditions shows that these conditions are rather general and merely repeat general obligations also to be found elsewhere in the Treaties (Philippart and Sie Dhian Ho 2003: 15). In that sense, compared to the possibility of unitary integration, enhanced cooperation does not entail a disadvantage. Moreover, compared to alternative integration, the conditions referring to the internal market, to competition, to cohesion and to the exclusive powers of the Union, do not really constitute a disadvantage to enhanced cooperation as Member States are not allowed to infringe EU Treaties in these respects as part of alternative integration schemes either. There is, however, the possibility that enhanced cooperation may lead to a permanent divide between insiders and outsiders, between a rich core and a poor periphery, which Martin and Ottaviano (1995) – in the context of possible enhanced cooperation in the field of company taxation – have labelled the ‘agglomeration effect of multi-speed integration’, which is increased if enhanced cooperation groups in different fields are stable (rather than mixed coalitions). As the decision to form such groups in the case of alternative integration is easier than in the case of enhanced cooperation, this danger is even greater in the case of alternative integration.

As far as the general transaction costs are concerned, these are high in the case of alternative integration, but can be low in the case of enhanced cooperation if the EU administrative framework is used (and in that case these administrative costs are borne by the EU-27). Such use is, however, not compulsory.

Another issue is the extent to which procedural (decision-making) constraints play a part. Obviously, these are in principle high in the case of unitary integration, thereby creating the possibility of decision-making and integration deadlock. With enhanced cooperation these procedural constraints are less strict and can even be reduced if the enhanced cooperation group members decide (unanimously) to switch from unanimity (if that is the relevant decision-making rule) to majority decision making.

Related to this is the issue of democratic (input) legitimacy. The provisions on enhanced cooperation safeguard proper involvement of the European Parliament and – in terms of deliberative democracy – of outsiders. This is clearly different from the case of alternative integration, which is often fully intergovernmental, with limited involvement of (national) parliaments and no involvement of outsiders. In terms of legitimacy, a possible drawback of enhanced cooperation could be the impression it creates among citizens of a Union that is weak and permissive, making it possible for its member states to pick-and-choose.



Unitary integration and enhanced cooperation cannot deal with policy fields that are not in the realm of the EU. The prohibition of enhanced cooperation in fields where the Union has no powers clearly is a disadvantage of enhanced cooperation compared to alternative integration.

The position of outsiders is a complicated one. Enhanced cooperation (and the same goes for alternative integration schemes) creates a partial *acquis* resulting in a first-mover advantage (Bordignon and Brusco 2003; Bordignon 2005) as those member states that move first set the stage for later entrants. On the one hand, such an advantage could be an incentive for hesitant Member States to participate in the enhanced cooperation from day one, or even to promote direct moves forward for the EU as a whole without actual enhanced cooperation taking place. In the latter case the existence of the mere possibility of an enhanced cooperation mechanism can already break deadlock. As Philippart and Sie Dhian Ho (2003) argue, in a number of cases the 'threat' of starting enhanced cooperation has probably contributed to breaking deadlock situations.<sup>12</sup> On the other hand, the first-mover advantage could create rigidity at later stages. Although enhanced cooperation is open to all Member States at all stages, accession to the enhanced cooperation is restricted to those Member States willing to accept the *partial acquis* created by the first movers. Contrarily, one could argue that outsiders profit from the path-finding efforts of the first movers. The enhanced cooperation group paves the way for the countries temporarily left behind. Another possibility is that enhanced cooperation in one field, by one group of countries, will extend to other areas and will thus benefit other countries. This possibility has been put forward by, among others, Baldwin (1993), who uses the term 'domino-effect', by Pisany-Ferry (1995) who talks of a 'centripetal force' and by Gomes de Andrade (2005) who uses the term 'pull effect'.

Finally, alternative integration, compared to unitary integration and enhanced cooperation, offers the possibility of including third countries in the cooperation.

## Patents and divorce law

### *Enhanced cooperation and the single community patent*

Although there is the European Patent Organization (EPO), there is no single EU patent, which is in sharp contrast with, for example, the United States of America and is regarded as putting EU inventors and innovators at a significant competitive disadvantage.

<sup>12</sup> They mention the unlocking (in 2000) of the deadlock on the regulation concerning the European Company Statute and the 2001 agreement on a European Arrest Warrant. In addition the Bolkestein Directive on services (2006) could be mentioned. This mechanism is similar to the one described in more general terms regarding the fear-to-be-left-out in international cooperation as an incentive for such cooperation, by Gruber (2000).

The EPO is an example of a parallel procedure (alternative integration). The EPO was preceded by the International Patent Institute (*Institut International des Brevets*, IIB), established in The Hague in 1947 by France and the three Benelux countries. Already in 1949 an international organization like the later EPO was advocated by the Council of Europe, modelled on the IIB. It would take until 1973 for the EPO to be established, by the Munich Convention (or European Patent Convention). Currently, the EPO has 38 Member States, including all 27 EU Member States.

The EPO provides a single patent grant procedure, not a single European patent. An *EPO-patent* can be obtained by filing a single application in one of the official languages of the European Patent Office (English, French or German) in a unitary procedure before the EPO and is valid in as many of the contracting states as the applicant cares to designate. An *EPO-patent* affords the same rights in the designated contracting states as a national patent granted in any of these states, but it is not a single, centrally enforceable, EU-wide patent. This can be expensive for the patentee in that enforcement must be carried out through national courts in individual countries, and for a third party in that revocation cannot be accomplished centrally once a certain opposition period has expired. That is why, since the 1970s, there has been concurrent discussion towards the creation of a Community Patent (ComPat) in the European Union. The ComPat is intended to solve both of these problems, and also to provide a patent right that is consistent across Europe, thus fulfilling one of the key principles of the SEM (as different patent rights in different countries present a distortion of the internal market principle). Although initially political agreement was reached, the Luxembourg convention on the Community patent of 1975 never entered into force.

In August 2000 the Commission proposed a regulation for a Community patent. In May 2004, however, discussions within the EU led to a stalemate (the language issue being the most notable obstacle) and the prospect of a single EU-wide patent receded. Even though the EPO-patent is far from perfect, there simply was no alternative available within the EU framework. Other legal agreements have been proposed – as with EPO: outside the EU legal framework – to reduce the costs of translation (of patents when granted) and litigation, namely the London Agreement (of 2000, signed by ten countries, of which seven are EU Members, but still waiting to be ratified) and the European Patent Litigation Agreement (EPLA, still under discussion).

After ten years of negotiations on the 2000 Commission proposal, in December 2010 it was concluded in the Competitiveness Council that unanimous agreement could not be reached on a joint approach of all Member States, as Spain and Italy strongly opposed the idea of using English, German and French as sole languages in patent granting. On 14 December 2010, the Commission, on request of twelve member States,<sup>13</sup> submitted a proposal for a Council Decision authorizing

<sup>13</sup> Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and the UK.

enhanced cooperation in this field. On 15 February 2011 the European Parliament gave its consent to the use of an enhanced cooperation mechanism. The Council is expected to formally adopt the decision authorizing enhanced cooperation in March 2011. Subsequently, the Commission will put forward two proposals, one establishing the single patent and another on the language regime.

There are, however, indications that Spain and Italy will not let the case rest and may take the Commission and/or Council to the European Court of Justice. Their main argument is that the last-resort requirement is not fulfilled as it is not yet clear that the patent issue cannot be resolved by a joint approach.<sup>14</sup>

#### *Enhanced cooperation and divorce law*

Currently, in cross-border divorce matters (which potentially affect 16 million married couples in the EU, i.e. 13 per cent of total EU marriages), 20 Member States determine which country's law applies, based on factors such as nationality and long-term residence of the spouses. Seven Member States (Denmark, Latvia, Cyprus, Finland, Sweden and the United Kingdom) always apply domestic law, regardless of the nationality or residential history of the spouses. This lack of harmonization of choice-of-law in divorce matters has resulted in a rush-to-court phenomenon, with husbands or wives in international marriages taking action in these courts where they feel they will get the best divorce settlement.<sup>15</sup>

Following its 2005 Green Paper on Applicable Law and Jurisdiction in Divorce Matters (SEC(2005)331), the Commission in 2006 has proposed a Regulation (called Rome III) which aims at harmonizing choice-of-law rules in divorce matters. Due to the opposition of a number of Member States, including Sweden, the United Kingdom, Ireland and the Netherlands, Rome III was never endorsed. These countries want to be able to keep applying their own – relatively liberal – divorce laws.

Over the summer of 2008 nine<sup>16</sup> EU Member States proposed to then Commissioner Barrot to go ahead with harmonizing choice-of-law rules in divorce matters through the mechanism of enhanced cooperation. They argued that the draft legislation of Rome III had been stalled in the Council and that there was no other way to take it forward. In 2009 and 2010 other<sup>17</sup> Member States joined this request. Eventually, by 2010, 14 member States were backing the request for enhanced cooperation.

<sup>14</sup> EUobserver, 15 February 2011.

<sup>15</sup> Also known as forum shopping or litigation shopping.

<sup>16</sup> Austria, Bulgaria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain. In 2010 Greece withdrew its 2008 request.

<sup>17</sup> Belgium, France, Germany, Latvia, Malta and Portugal. The Netherlands, the United Kingdom, Sweden, Finland, Denmark, Estonia, Lithuania, Cyprus, Ireland, Poland, Czech Republic, Slovakia and Greece are the outsiders.

Following the request, the Commission, on 24 March 2010, announced a new proposal, similar to Rome III, but to be adopted by a limited number of Member States only. Commissioner Reding indicated that although the optimal solution would be one that would include all 27 Member States, the new proposal should be seen as a desirable midway solution. On 16 June 2010 the European Parliament gave its consent to the enhanced cooperation measures. After political agreement was reached on 3–4 June 2010 (with a comfortable qualified majority), on 12 July 2010 the Council formally authorized the 14 Member States concerned to establish enhanced cooperation between themselves. On 3 December 2010 the justice ministers of these 14 Member States reached a political agreement on the actual legislation, which was approved by the European Parliament on 15 December 2010. The enhanced cooperation legislation will enter into force 18 months after its adoption.

#### **Conclusions**

Both cases clearly show the use of enhanced cooperation due to its main advantage: bypassing the constraints of unitary integration in terms of unanimous decision-making which has led to decades of integration deadlock. Moreover, in both cases the EU administrative framework is used and democratic (input) legitimacy has been safeguarded by the involvement of the European Parliament.

However, these first actual cases of enhanced cooperation also show the possible weaknesses of the mechanism. First, one could argue that the case of enhanced cooperation in patents shows that the introduction of enhanced cooperation has brought about the danger that unanimous decision-making has *de facto* been done away with in the few fields that it is still relevant in. After all, the unanimity requirement can be bypassed by establishing, with a qualified majority, an enhanced cooperation. In that regard the possible involvement by Spain and Italy of the European Court of Justice to 'vet' the enhanced cooperation decision regarding the patent system could be a first test to see if the mechanism really holds.

Secondly, although it is too early to assess the risk of stable coalitions and agglomeration effects of enhanced cooperation, as we only have two cases of enhanced cooperation yet, it is interesting to see that in both cases France and Germany (being the most distinct advocates of a core Europe) are part of the enhanced cooperation groups.

Thirdly, the case of patents shows that the (majority of the) Council, the Commission and the European Parliament are not overcautious when it comes to application of the requirements on non-distortion of the internal market and competition. Enhanced cooperation in this field could lead to a split patent system, which is clearly at odds with the idea of common rules for a common market. On the other hand, it could be argued that having a split system is always better than having 27 different systems.

Finally, the case of enhanced cooperation in divorce law shows that the concept of a vanguard group is a relative one. The countries that are engaged in enhanced cooperation in this field may be 'path-breaking' as far as the cooperation as such is concerned but not necessarily when it comes to the content of their divorce laws. Enhanced cooperation, through the first mover mechanism, can also be used to create a *fait accompli* in a specific policy field.

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