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We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU

by

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Abstract

The aim of this article is to analyse one of the main features of asymmetry in the EU legal order: enhanced cooperation. After the entry into force of the Lisbon Treaty, two enhanced cooperation schemes (on divorce and patent) have already seen the light of the day. The paper first focuses on the evolution of the rules on "closer cooperation"/"enhanced cooperation" from the Treaty of Amsterdam onwards, then it analyses the first two cases. Enhanced cooperation is a unique test to understand how the EU manages to balance unity and asymmetry, thus an analysis of the rules and the relevant practice is very useful to this extent. The last section of the paper compares asymmetric integration at the EU and the WTO level, in order to understand how different legal orders deal with sub-unions and what degree of asymmetry can a system tolerate.

Key-words

Enhanced Cooperation, Asymmetry, Lisbon Treaty, Preferential Trade Agreements

1. Introduction - Asymmetry: rule or exception?

Over the last decades, an impressive number of scholars have investigated the issue of the nature of the European Union legal order (Weiler, 1991; Amato *et al.* (eds.), 2007). Some scholars think that a "constitutionalisation" process is ongoing, although -in the aftermath of the rejection of the Consitutional Treaty in the French and Dutch referenda- the approval of the Lisbon Treaty, which is an evolution of the former project, has essentially deprived it of some of its constitutional symbols (Ziller, 2007). Some of them have even tried to compare the EU with federalising processes at the national level, highlighting the commonalities among the systems (Martinico, 2011).

The aim of this article is to analyse the first cases of enhanced cooperation in the EU. Asymmetric integration in the EU legal order has largely been investigated (Curtin, 1993) and the so-called *"multi-speed Europe"* is one of its main features. This issue is of particular interest nowadays, due to the various asymmetric solutions proposed to face the current Eurozone crisis. The first two enhanced cooperation schemes approved by the European Council (on divorce[I] and patent[II]) are undoubtedly unique experiments that help us understand whether asymmetry is sustainable at the EU level and whether it is a threat or an opportunity for the evolution of the EU legal order.

All evolutions of the EU legal order and all treaty reforms have always preserved, as a cornerstone of the entire integration process, the principle of diversity, as is also affirmed in official documents. In fact, the preamble of the Charter of Nice reads: *"The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level (...)"*.

The concept of diversity traditionally concerns the protection of national identities and cultures from the threats they may suffer from the progressive loss of sovereignty. However, a general attitude of the European Union, as a compound legal order[III], is to deal with differences and asymmetries and preserve them.

Asymmetry is a fundamental feature of most compound legal orders, since it applies to many of them either *de facto* (political or economic differences) or *de jure* (constitutional differences) (Palermo, 2007, p. 149). To this extent, the European Union

legal order and its evolution do not differ from most federalising processes (Carrozza, 2005, p. 259) when dealing with the difficult balance between unity and asymmetry. Indeed, the features of asymmetry in the EU legal order are many and multifaceted: enlargement (with accession to the EU by member states with heterogeneous constitutional identities and traditions); the dynamic of the accession treaties (transition periods, temporary derogations etc.); the opt-out provisions from some institutional arrangements that do not apply to all EU member states (i. e. EMU, Schengen Area) as well as the opt-in mechanisms[IV]; the possibility for some but not all member states to be authorised to agree on enhanced cooperation among them in pursuit of some policy goals. The task of this paper is to investigate how the first cases of enhanced cooperation work and what role they play in the asymmetric EU legal order.

Enhanced cooperation can be briefly defined as the procedure by which some member states may integrate -under certain conditions- their policies within the EU without all the other members necessarily being involved, at least at the first stage[V]. Its rationale is that members wishing to make steps towards integration should not be blocked by some countries' veto. However, enhanced cooperation was designed as a tool for future integration at the general EU level, thus its regulatory scheme provides guarantees for members which are not involved and gives the EU political institutions (mainly the Commission and the Parliament) a crucial role in the approval of those schemes.

The structure of this paper is as follows: Section 2 is devoted to an analysis of the historical evolution of the rules on enhanced cooperation; Section 3 examines the provisions introduced by the Lisbon Treaty; Section 4 deals with the first two cases of enhanced cooperation (on Divorce and Unitary Patent); Section 5 analyses the pros and cons of enhanced cooperation as regards the difficult balance between unity and asymmetry in the European Union. In order to do this, it offers a comparison between the different approaches the EU and the World Trade Organization to asymmetric integration. The WTO is a useful comparator to understand how peculiar the dynamic of asymmetry is at the EU level, compared to that of international organisations. At the end of the section, some conclusive remarks will be provided.

2. From "closer cooperation" to "enhanced cooperation"

At the beginning of the integration process, in the 1950s, the idea was that all members were to be considered as equal and that they were to jointly take all the necessary steps towards deeper integration.

The progressive enlargement of the EU's boundaries, the accession of countries with different economic and institutional backgrounds from the original group and the increase of *de facto* asymmetries led the EU institutions to think about a new institutional balance between asymmetry and unity, without calling into question all the achievements reached so far by the integration process. Moreover, some challenges were not common to all EU member states (i. e. the Euro, the Schengen Area etc.), thus *ad hoc* institutional frameworks were arranged in order to allow a group of member states with the political will to foster integration to bypass the veto of unwilling countries. Bribosia (2007, p. 624) argues that the idea of a general mechanism for asymmetric integration on specific policy areas emerged after the approval of the Treaty of Maastricht[VI], because at that point it was clear that institutional adjustments were needed in order to avoid disaggregation and strike the balance between member states willing to take steps towards further integration and others that were more cautious.

The Treaty of Amsterdam (entered into force in 1999) first contained general rules on the possible authorisation of the "closer cooperation" of some member states. To this extent, the general provisions included in the TEU (Arts. 43 - 45 of the former TEU), plus specific rules on the first pillar (Community law) could be found in the ECT. The TEU itself also regulated cases of closer cooperation in the fields covered by the third pillar (mostly Criminal law). Such rules could be undoubtedly defined as strict (Ehlermann, 1998, p. 269): closer cooperation was considered a last resort option and had to involve the majority of the member states, could not be in contrast with the *acquis communautaire* or measures adopted, could not "affect the competences, rights, obligations, and interests of those member states which do not participate therein" (Art. 43(1) TEU, before the entry into force of the Treaty of Nice) and had to be open to all other member states. Moreover, further specific rules limited the concrete application of the closer cooperation mechanism. Indeed, as in the case of the first pillar, closer cooperation could not be established in

policy areas which fell within the EC exclusive competence. Furthermore, some other restrictions were applied (Art. 11 ECT, before amendment by the Treaty of Nice).

The Commission had to launch the procedure following a request by the majority of member states and the European Parliament had to be consulted. Authorisation had to be granted by the Council, acting by qualified majority voting (QMV), but any member of the Council could oppose it for important reasons of national policy. In that case, the Council, again by QMV, could "request that the matter be referred to the Council, meeting in the composition of the Heads of State or Government, for decision by unanimity" (Art. 11 (2) ECT, before amendment by the Treaty of Nice). Probably, such a complicated mechanism is the main reason why the closer cooperation provisions set out by the Treaty of Amsterdam never applied. However, this is how the evolution of the rules started and the current discipline is strongly influenced by the original one in its very nature. The idea that closer/enhanced cooperation schemes are only "last resorts" is the most emblematic factor to this extent.

The provisions introduced by the Treaty of Amsterdam were renegotiated as part of the Treaty of Nice. On that occasion, "closer cooperation" was renamed "enhanced cooperation". Significant changes in the procedures were made: a single member state was no longer able to block the procedures, rules on enhanced cooperation in the field of foreign policy were introduced, the European Parliament was given the power of assent (co-decision procedure), the minimum threshold to launch enhanced cooperation was lowered from the majority to the fixed number of eight member states. There was an appreciable modification also in the substantive conditions to be met for enhanced cooperation proposals to be approved. The *acquis communautaire* and other EU measures had to be respected (Art. 43(c) TEU) rather than not be affected, and this clearly was not just a slight terminological modification (Rossi, 2003, p. 47; Craig, 2010, p. 439).

Even after the entry into force of the Treaty of Nice no enhanced cooperation project was approved[VII]. There was only one proposal on the choice of the law applicable to divorces of international couples, but it sat on the JHA Commissioner's desk for some time and then, as it will be shown *infra*, the process followed the new rules introduced by the Lisbon Treaty. Nonetheless, the EC treaty provisions on the authorisation of member states to join enhanced cooperation were effectively used (see the authorisation of the UK

and Ireland to join immigration, asylum or civil law measures already adopted) (Peers, 2010, p. 343).

3. Enhanced cooperation rules in the Treaty of Lisbon

The new discipline on enhanced cooperation consists of a single Article of the TEU (Art. 20) and a special Title in the Treaty on the Functioning of the European Union (Arts. 326 - 335 TFEU). The regulatory scheme for the establishment of enhanced cooperation is significantly different from the one that was recalled earlier in this paper. The very nature of the discipline is preserved, since acts adopted under the framework of an enhanced cooperation scheme are binding only for the participants. Most importantly, the TFEU -generally speaking- sets out uniform rules for the establishment of enhanced cooperation in all sectors that do not fall within the EU's exclusive competence[VIII]. This is because all member states agreed on a complete transfer of sovereignty in those matters. Therefore, allowing a group of member states to move further ahead than the EU could be detrimental for the unity of the system.

The discipline sets out rules regarding the conditions to be met when some of the member states wish to integrate in particular policy areas. Some of them relate to the goals that enhanced cooperation schemes should necessarily pursue. Art. 20, Para. 1, TEU, reads: "(...) Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process (...)". This is of fundamental importance because it reveals the essence of the regulatory framework for enhanced cooperation: it was clearly created as a means to foster European integration first among those member states whishing to deepen political integration, leaving the door open to other members to join them at a later stage. Other rules were drawn up in order to provide some caveats to the member states embarking on a new enhanced cooperation scheme: enhanced cooperation *"shall comply with the Treaties and Union law"* (Art. 326, para. 1 TFEU), *"shall not undermine the internal market or economic, social and territorial cohesion"* nor *"shall* [it] *(...) constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them"* (Art. 326, Para. 2). Enhanced cooperation should not be used as a means to harm members which have decided not to join it[IX].

The pivotal provision in the architecture of enhanced cooperation is Art. 328 TFEU, whereby legislators have provided strong guarantees in order to ensure the unity and the stability of the EU legal system as a whole. First of all, it is clearly acknowledged that it should be open to all member states able to prove that they have met the requirements set up in the authorising decision. Moreover, enhanced cooperation should leave the door open to third parties also at a later stage, provided that they have met all the conditions imposed by the Treaties and by the participating members in enhanced cooperation[X]. However, without any experience in this area, we do not know exactly how it will work.

Arts. 329 TFEU and ff. clarify the procedure to be followed in order to establish enhanced cooperation among at least nine member states[XI]. Those national governments whishing to engage in enhanced cooperation in any field except those falling under the exclusive competence of the Union and the CFSP, need the Commission to back their proposal. Indeed, they have to submit a request to the Commission, clarifying the goals they aim to achieve, and the Commission can decide whether to submit a proposal to the Council or reject the request issued by the member states, motivating its decision.

It is particularly worth examining the wording of Art. 329, Para. 1 TFEU. The first subparagraph reads: *"The Commission may submit a proposal to the Council to that effect"*. The Commission "may" decide to back the request of nine or more member states to foster their integration through enhanced cooperation, but the Treaty does not oblige the Commission, not even under certain circumstances, to submit a proposal to the Council (Craig, 2010, p. 441). This provision is of crucial importance, since it was drawn up to safeguard the unity of the system and avoid the risk of a completely fragmented European Union. Art. 329, Para. 1, TFEU goes on to affirm that after the Commission has submitted a proposal to the Council, the latter has the power to authorise proceeding with it by qualified majority voting (QMV), after obtaining the consent of the European Parliament. It is crucial to highlight that under the new rules set out in the Lisbon Treaty, the European Parliament has the power to give its consent on all enhanced cooperation proposals, except those in the field of foreign policy. Again, this can be seen as evidence of the concerns for the unity of the EU political institution system. The extension of the co-decision procedure to all enhanced cooperation schemes strengthens the powers of the EU Parliament and potentially gives it the role of co-protagonist in the evolution of the EU system, if the

renewed regulatory scheme is considered by the member states to be the powerful instrument that it undoubtedly is.

Transparency plays an important role in the architecture of the norms that are described here. Art. 330 TFEU authorises all members of the Council to participate in the deliberations on enhanced cooperation, irrespective of whether or not they are part of it. However, they cannot vote and they do not have to be counted in for decisions.

Along with the principle of transparency, the principle of openness is another fundamental pillar of the whole regulatory framework for enhanced cooperation. Art. 331 TFEU sets the conditions for third parties to subsequently join pre-existing enhanced cooperation schemes. The norm under analysis here is of fundamental importance, since the decision regarding the admission of other members is up to the Commission and not to the original members of the enhanced cooperation scheme. If the Commission believes that the applicant member does not fulfil the conditions *"(...) it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request"* (Art. 331, Para. 1 TFEU). In the event of unsuccessful re-examination, the member state can even "appeal" to the Council, which will then be in charge of the final decision. I will return to this issue later on in this paper, but it is worth stressing how important this safeguard clause is for the unity of the entire EU legal system. The insight not to leave the decision on later accessions to the original group of member states, which decided to establish enhanced cooperation, is the key to governing asymmetry properly at the EU level and to avoiding a situation whereby a group of states decides to move too fast in a multi-speed Europe.

Art. 333 TFEU allows members of enhanced cooperation schemes to unanimously agree to modify the decision-making processes, except for measures having military or defence implications. Indeed, the Council[XII] may decide that in cases where the Treaties would normally require unanimity, decisions could be adopted by QMV instead. Moreover, the Council can also decide as well to move from special to ordinary legislative procedure if it deems appropriate.

The last provision of the Title of the TFEU devoted to enhanced cooperation provides another "assurance" for the unity of the system. The Treaty refers to the Commission and the Council as the institutions with the responsibility to ensure that

activities undertaken in the context of enhanced cooperation are not in contrast with the policies and the objectives of the EU.

Now it is worth to briefly summarising the main innovations introduced by the Lisbon Treaty: the threshold of member states required to table the proposal of enhanced cooperation was increased to nine; there are no longer different rules for third pillar issues since they now share the same discipline as the first pillar, the European Parliament has the power of assent over all authorisations for enhanced cooperation (except when relating to foreign policy); in the event the Commission does not approve a member state's application for a pre-existing enhanced cooperation, the applicant member state can "appeal" to the Council to obtain the authorization to join the latter. Furthermore - and this is maybe the most interesting part - states participating in enhanced cooperation can change the decision-making rules of the measures in the areas that regard them (Art. 333 TFEU).

Craig (2010) writes: *"The message from the Lisbon Treaty is very much that enhanced cooperation should be used where action by the EU as a whole has not proven possible, coupled with the hope that it will then be a catalyst and that other Member States will subscribe to such initiatives"*. This undoubtedly reflects the framers' spirit, and their hope to use enhanced cooperation as a twofold mechanism. On the one hand -at least potentially- the mitigation of the rules on enhanced cooperation can help overcome the political *impasse* the integration process is facing. On the other hand, its last-resort nature and the safeguard clauses described above apparently represent a fair way to strike a balance between unity and asymmetry in the EU. In the next section, the first two cases of enhanced cooperation (on the choice of the law applicable to divorces of international couples and on unitary patent) will be analysed.

4. The first cases of enhanced cooperation: Divorce and Unitary Patent

It is now worth to analysing the first two cases of enhanced cooperation. Indeed, a closer look at the procedures for the approval of the first two schemes and the identity of the member states involved can help interpret the very role of enhanced cooperation in the EU institutional architecture.

4.1 Divorce

The issue of the choice of the law applicable in divorce cases is becoming more and more important since the number of international couples is increasing[XIII] and, before the approval of the enhanced cooperation scheme described herein, there were no rules at the EU level. Yet steps towards the clarification of the issue of *jurisdiction* in cases of the divorce of international couples were taken[XIV], although the possibility to choose the applicable law was not taken into account[XV]. This increased the likelihood of a dramatic "rush to the courts" whereby divorcing spouses tried to file their complaints before tribunals of country A rather than country B because of more favourable legislation.

In 2006 the Commission proposed a regulation on the issue of the conflict of laws and jurisdiction rules in divorce cases. The UK and Ireland opted out and Denmark did not opt in (Denmark had a complete opt-out from Title IV issues - "immigration, asylum and civil judicial cooperation"). The Council officially acknowledged that it was impossible to reach an agreement on the subject within a reasonable period of time[XVI]. Nevertheless, a group of member states decided to boost legal integration on such issues, at least among a limited number of states. For this purpose, they decided to follow the rules for the establishment of "enhanced cooperation". For almost two years the Commission did not issue a formal response. Then the Treaty of Lisbon entered into force in December 2009 and the new European Commission was appointed.

The new Commissioner for Justice, Viviane Reding, decided to back the proposal of a group of member states to launch enhanced cooperation on the choice of law in divorce cases and the Commission formally submitted the proposal to the Council in March 2010. The European Parliament gave its consent in June and the Council issued its final decision on authorisation in July 2010. Eventually, in late December 2010[XVII], the Council approved the final Regulation, which will enter into force by July 2012.

In brief, the main outcome is that international couples will be able to choose which law to apply to their divorce at the moment of their marriage, thus preventing a rush to the courts and costly litigations, both economically and emotionally. In the case that the couple does not choose which law to apply, the above-mentioned Regulation will provide automatic mechanisms to establish the competent forum and the applicable law[XVIII], in order to guarantee the certainty of law.

It could be of some interest to look at the group of fourteen member states involved in enhanced cooperation in the field of law applicable to divorces of international couples. At the beginning, a proposal was put forward by eight member states (Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia). They were later joined by two others (Bulgaria and France) and then Greece withdrew its request. After the Commission's proposal, Germany, Belgium, Latvia, Malta and Portugal joined the pre-existing group, adding up to fourteen members. Peers[XIX] argues that this proves that enhanced cooperation was not created to help old members to move ahead faster than newer ones in the integration process. As it has been shown *supra*, the Treaties themselves already contain some provisions that can be seen as guaranteeing the unity of the system. However, since enhanced cooperation is potentially a very powerful tool to boost legal integration and avoid vetoes, a certain degree of asymmetry must still be taken into account. This means that we cannot foresee whether - and to what extent - enhanced cooperation will also be applied in cases that have greater economic or political impact, wherein the interests of the member states are really conflicting.

Enhanced cooperation on unitary patent, which will now be briefly described, again is not the perfect stress-test since it is in the interest of many different EU members, with the sole exception of Italy and Spain, for reasons that will be explained *infra*.

4.2 Unitary Patent

In December 2010, twelve member states tabled a proposal for enhanced cooperation on a common European patent, after many failed attempts over the years to introduce EU legislation to regulate this area[XX]. This is a very sensitive issue for private investors and companies, since they currently have to seek patent protection in each European country (EU and non-EU countries) separately. A so-called "European patent" does already exist, within the framework of the European Patent Office (EPO)[XXI], but it is nothing more than the sum of the individual countries' patents. Thus, private investors and companies seeking patent protection for their products have to validate it (and eventually litigate) in every single European country. This process is obviously expensive, mainly because of translation costs. As Bonadio points out: *"It has been estimated that protecting an invention using the current EPO procedure in all twenty-seven EU Member States would cost applicants*

roughly €32,000, of which €23,000 would be incurred for translation fees alone. On the other hand, a US patent costs €1,850 on average" (Bonadio, 2011, p. 416). Thus, it goes without saying that such a situation is detrimental for the competitiveness of European companies and represents a potential disincentive for investments in innovation.

At the beginning of 2011, the number of member states backing the proposal before the European Commission increased to the impressive number of 25, not including Italy and Spain, whose governments opposed the proposal for linguistic reasons. The project for a unitary patent follows the "three - language" scheme of the European Patent Office: English, French and German. Spanish officials and politicians, in particular, tried to lobby in favour of a different solution: they would rather the unitary patent be only in English[XXII]. However, the Commission decided to submit a proposal to the Council to establish enhanced cooperation in the field of patents. After the consent of the European Parliament, on March 10th, 2011, the Council issued the authorising decision for the enhanced cooperation scheme.

This is a very rare situation in enhanced cooperation, since only two member states have been left out, and only because of linguistic issues, not because of disagreement about the policy. Enhanced cooperation, therefore, can slightly change the geography of intra-EU relationships since, in this case, it was approved despite the opposition of two major member states, one of which -Italy- was also a founding member of European integration and, traditionally, one of the most euro-enthusiastic ones. However, Italy and Spain lodged a complaint before the Court of Justice, which is still pending and the outcome is unforeseeable. According to the complainants, the authorising decision undermines the internal market in that it makes the procedures more expensive for companies and investors of countries where English, French and German are not the official languages. Moreover, as their argument goes, the decision would be discriminatory since it does not respect linguistic diversity, thus violating Art. 21 of the Charter of Fundamental Rights of the European Union.

In the event that the Court rejects the complaint filed by Italy and Spain, Italian and Spanish companies will have to bear higher costs *vis-à-vis* their EU competitors, since they have to register their products for patent protection both at the national and the EU level. However, the situation will be much clearer after the decision of the Court of Justice.

5. The pros and cons of Enhanced cooperation and the difficult balance between asymmetry and unity (and some conclusive remarks)

Contrary to what happened from the entry into force of the Treaty of Amsterdam until the Treaty of Lisbon, EU member states have started to take enhanced cooperation seriously and take steps towards multi-speed integration. The March 11th approval by the Council of the request for enhanced cooperation in the field of patents (a very sensitive issue for developed economies) demonstrates that, given the difficulty of deeper integration at the EU level, member states are becoming aware of this new (and easier) opportunity to foster integration at least with some other countries. Moreover, this also proves that member states are well aware of the economic consequences of taking steps towards greater integration in some policy areas. Also, the approval of two enhanced cooperation schemes so far, in a period of disillusion with European integration, demonstrates the huge potential of this powerful tool. Therefore, the question is no longer whether or not the rules on enhanced cooperation are useful. Rather, it remains to be properly assessed how far forward they will push European asymmetry, whether more asymmetry is desirable and what level of asymmetry is sustainable. To sum up, it is worth highlighting the pros and cons of enhanced cooperation when striking a balance between asymmetry and unity.

On this subject, European public opinion and academic circles have been involved in an intense debate on the possibility of accepting a multi-speed Europe even in policy areas that are different from those covered by the Euro and the Schengen Area. Some people have considered enhanced cooperation to be the second best option in cases where decisions at the central level are not likely to be taken, as long as some guarantees are provided for non-participating member states (Baldwin *et al.*, 2001). Others, while not taking a position specifically against mechanisms of asymmetric integration, have expressed concerns over the cons of a multi-speed Europe (Philippart *et al.*, 1999).

It would be useful to compare this debate to the long-standing discussion within World Trade scholarship regarding "regionalism vs. multilateralism" in order to understand what level of asymmetry a system can tolerate and how important safeguard mechanisms for third parties to sub-unions are within legal orders. The WTO allows its members to

sign Preferential Trade Agreements (PTAs) with one or more other members, provided that some requirements are met. Therefore, it is an international *forum* which permits asymmetric integration among its members, thus representing a useful comparator for the issues discussed so far in this paper. It is rather interesting to see how the WTO strikes a balance between unity and asymmetry compared to what happens at the EU level according to the general rules for the establishment of enhanced cooperation schemes.

Given the impressive proliferation of PTAs at the WTO level, scholars have investigated the issue of whether this phenomenon represents a threat or an opportunity for unity and what the welfare implications are for third parties (WTO members not participating in PTAs). On the one hand, some scholars consider the PTAs termites undermining the WTO architecture and compromising free trade (Bhagwati, 2002); on the other hand, others consider PTAs the building blocs towards future integration at the multilateral level (Baldwin, 2006), envisaging a sort of "domino effect".

Going into further detail, we can assume that the rules on enhanced cooperation as they were modified by the Lisbon Treaty, given the "no veto - no exclusion" structure of the regulatory scheme (Bordignon *et al.*, 2006: 2082) (third parties cannot impede the establishment of enhanced cooperation and have the right to join in at a later stage), may potentially represent an effective way to foster European integration. This is undoubtedly true if we look at the guarantees for third parties provided by the rules on enhanced cooperation and compare them to what happens in the WTO. There are four considerations that must be made:

1) Common agents (control): In the case of enhanced cooperation, the Commission and the European Parliament play a fundamental role. This means that the remaining member states, by means of their representatives in the Commission and the European Parliament, can influence relevant decisions regarding whether or not to authorise the establishment of enhanced cooperation or at least can participate in all the stages of the procedures, thus avoiding the lack of information. Furthermore, the Commission (along with the Council as a whole) is in charge of overseeing the implementation of enhanced cooperation schemes, thus ensuring that they respect the unity of the EU system. This does not happen at the WTO level, since members wishing to sign a PTA only need to notify it to the Secretariat, without the approval of a common agent;

2) Transparency: Asymmetry of information can be a serious threat in cases of sub-unions, because it could create some problems for third parties as they are trying to meet the necessary requirements for joining enhanced cooperation. Contrary to what has been laid down under Art. XXIV GATT and Art. V GATS, EU member states can participate in the Council meetings in the case of enhanced cooperation even if they are not parties to it (obviously, they do not have the right to vote). Lack of information regarding what is being decided at the regional level is one of the main concerns regarding the proliferation of PTAs among WTO members. Indeed, this is why some scholars have argued in favour of solutions that give interested WTO members *"the right to participate in the activities of PTAs to which they are not parties"* (Davey, 2011, p. 248);

3) Sector specificity: In order to comply with the rules of WTO Treaties (Art. XXIV GATT for trade in goods and Art. V GATS for trade in services), PTAs among members must commit to liberalising "substantially all trade" (for trade in goods) or must have "substantial sectoral coverage" (as regards trade in services). This is exactly the opposite of what the EU rules require for the establishment of enhanced cooperation, since it can be established only in specific and detailed policy areas. This is a guarantee not only for those member states without the political will to join enhanced cooperation from the beginning, but also for those which do not meet the objective requirements for joining the enhanced cooperation scheme. Indeed, allowing for very specific enhanced cooperation is the only way for member states that still are not ready to commit to further supranational integration not to lose too much ground *vis-à-vis* other European partners;

4) Openness: WTO rules do not regulate the possibility for third parties to join already existing PTAs. However, since there is no common agent comparable to the EU Commission at the WTO level, the decision on later accessions is completely at the discretion of the original PTA members. This is what best legitimises the concerns related to fragmentation and asymmetry in the WTO context. To this extent, enhanced cooperation rules in the EU Treaties provide again for third party friendly rules. Member states that wish to join a pre-existing enhanced cooperation scheme at a later stage have to submit their request to the Commission. Moreover, in the event that the Commission rejects their request, they can even "appeal" to the Council for the final decision.

Enhanced cooperation rules are based on three main principles: transparency, openness and control. The combination of these principles along with the absence of a

power of veto for member states without the will (or the possibility) to join the enhanced cooperation make the system apparently well balanced and respectful of all member states' needs. Contrary to what happens in the WTO, the EU seems to have provided the necessary guarantees to third parties, thus preserving unity. Although it is too early to make forecasts or to learn lessons from the enhanced cooperation experience, we can still highlight the pros and cons of the regulatory scheme.

The pros of the possibility of agreeing on enhanced cooperation schemes are that policy innovation can be faster and these schemes can lead to new experiences in terms of policies and agency design as well. Conversely, the cons are that the repeated use of enhanced cooperation or the malfunctioning of openness and transparency mechanisms could progressively undermine the unity of the integration process. Such a situation would be highly detrimental for third parties, since transaction costs may rise. Moreover, one classic concern regarding enhanced cooperation, i. e. the increase in centrifugal tendencies, still lies in the background.

After the various enlargements, the European Union experienced a long period of institutional *impasse* and failed reform attempts because of constant tensions between integration and sovereignty. The Lisbon Treaty made it easier to integrate policies, at least for the member states that are ready to do it, without obliging them to wait for all the other EU members to agree. All the safeguards provided for by the Treaties and the nature of the "last resort option" make enhanced cooperation a powerful tool towards integration at the broader EU level.

This said, there is another concern which must be addressed and should not be underestimated. While the issue of later accession to pre-existing enhanced cooperation schemes has been widely investigated thus far, little has been said about the possibility of the members of an enhanced cooperation scheme to withdraw from it and the possible implications of such a decision. An editorial published on the *Common Market Law Review* (2011, p. 322) has tried to assess the issue, outlining some possible future scenarios. However, the Treaties remain mute on this matter and so far there have been no such cases within the context of the two enhanced cooperation schemes approved. The impression is that member states wishing to withdraw from enhanced cooperation will have to push for a modification of the authorising decision; otherwise, this would hardly be compatible with

the guarantees for the unity of the system provided by the Treaties. However, we cannot go into further detail on this subject because of a lack of experience in this area.

It is now time for some conclusive remarks.

Enhanced cooperation is a relatively new experience in the EU and its evolution is still hardly predictable. The impression, however, is that enhanced cooperation schemes are not an unbearable stress test for the institutional architecture of the European Union. Asymmetry is in the DNA of the European Union, and it has been a constant in all the main evolutions of the integration process. The guarantees it provides for third parties and the combination of openness, transparency and control principles make enhanced cooperation an interesting and powerful tool to help the EU overcome its difficulties in taking the necessary steps towards further integration.

Furthermore, this paper has tried to compare the EU's way of managing asymmetry to that of an international organisation like the WTO, which also allows its members to establish some sub-unions. This analysis has showed how differently the issues of transparency, openness and control are assessed at the EU and the WTO level, with the former striking a balance between unity and asymmetry in a much fairer way than the latter.

Until this paper's submission (January 2012), only two cases of enhanced cooperation have been approved (with Italy and Spain challenging the scheme for a unitary patent before the CJ). However, institutional actors and public opinion are starting to become familiar with the rules on enhanced cooperation and their potential.

Craig (2010, p. 449) wrote: *"The idea that acts adopted in pursuance of enhanced cooperation only bind the parties thereto, and do not form part of the more general acquis, has always been central to the conceptualization of this area and remains so. (...) The idea that acts adopted pursuant to enhanced cooperation and the judicial interpretation thereof by the EU courts can be hermetically sealed from the remainder of EU law may well prove considerably more difficult in practice than in theory"*. This is a serious concern and it should be verified in practice. However, one of the ideas behind the regulatory scheme on enhanced cooperation is that it can be established only in very specific policy areas. Therefore, it will probably not be so hard for courts to separate the wheat from the chaff when issuing judgements on particular policy areas. Furthermore, enhanced cooperation was devised as a tool for the progressive integration of the EU as a whole. The *two-speed* situation it leads to should only be considered temporary, and this is

probably why the issue of the different laws that must be applied by the EU courts was not addressed extensively by the framers.

A legal analysis of the provisions shows that, in theory, enhanced cooperation was devised as a balanced tool to foster European integration. However, only time will tell how the legitimate concerns expressed by some scholars regarding the alleged threats to the unity of the system will be addressed.

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I Council Decision of 12 July 2010 (2010/405/EU), OJEU, L 189/12.

II Council Decision of 10 March 2011 (2011/167/ EU), OJEU, L 76/53.

III Fabbrini (2007) wrote *"The EU is a combination of intergovernmental (confederal) institutional elements and supranational (federal) structures (...). It is a mixed institutional system, with a variable geometry or balance, overlapping jurisdictions, and with an uncertain territorial identity."*

IV For a comprehensive overview of opt-out and opt-in mechanisms, see Warleigh, 2002 and Miles, 2005.

V Bribosia, in Amato *et al.*, 2007: *"Il s'agit d'un mécanisme qui ne peut être enclenché qu'un «dernier ressort», lors qu'il est établi qu'une action de l'Union ne peut aboutir avec la participation de tous les États membres."*

VI *Ibid.* p. 624, fn. 4: *"Ainsi, le premier ministre français E. Balladur avait suggéré d'organiser l'Europe en différents cercles concentriques d'intégration, les parlamentaires de la CDU/CSU guidés par K. Lammers et W. Schaüble évoquèrent l'idée d'un noyau dur, tandis que l'ancien premier ministre britannique J. Major prônait une Europe à la carte".*

VII *"Their use was seriously considered in 2007 when a qualified majority of member states supported the adoption of a proposal on Framework Decision on criminal suspects' procedural rights, but a small group of member states exercised a veto on the proposal. However, there was insufficient support among the member states supporting the proposal to go ahead with the measure on the basis of enhanced cooperation".* Peers, 2010, p. 342.

VIII There are some important differences in the field of the EU Common Foreign and Security and Defence Policy (CFSDP), but since no enhanced cooperation in this field has been established so far, I decided not to dwell on the topic in this paper. For a detailed overview of this issue, see Cremona, 2009.

IX *"Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States".* Art. 327 TFEU.

X The openness mechanism must respect the decision taken by the members of enhanced cooperation to impose some "objective" requirements for later accessions to the pre-existing group, like the Euro-group and the Schengen area. It cannot be excluded at this stage that some Member States will decide to integrate particularly delicate policy areas and this will obviously require stricter conditions for third parties wishing to join in later.

XI This is of fundamental importance. The minimum threshold for the establishment of an enhanced

cooperation scheme is not expressed in terms of a proportion (i. e. one third, one half etc.). Art. 20 TEU clearly reads "at least nine member states", so this number is not going to change even if other countries join the EU in the coming years. Tiberi emphasises this innovation, adopting the stance that unbinding the minimum threshold from the whole number of EU member states will eventually help create enhanced cooperation schemes in increasingly more policy areas. See Tiberi, 2010, p. 317.

[XII] Art. 333 TFEU makes an explicit *renvoi* to Art. 330, so the Council must be considered as being in the composition described in the latter provision.

[XIII] Dethloff 2003, p. 37: *"The number of binational marriages is growing constantly. Today, more than 15% of those entering into marriage are of different nationalities, often of European states"*. The author provides a footnote as well, quoting numbers from various national statistics institutions.

[XIV] For a comprehensive overview of the main achievements of the "Brussels II" convention, please see Peers, cit., pp. 344 and f.

[XV] This shortcoming is even more evident if we consider that in other sensitive policy areas the EU has already provided for rules in order to choose the applicable law (i. e. contractual liability).

[XVI] See the JHA Council Press Release, 5-6 June 2008, 9956/08 (Presse 146), available at http://91.194.202.11/ueDocs/cms_Data/docs/pressData/en/jha/100983.pdf.

[XVII] Council Regulation (EU) N° 1259/2010 of 20 December 2010.

[XVIII] Preferably, the law of the state where the couple was habitually resident at the time the court was seized (See Art. 8).

[XIX] *"It is notable that the participating member states comprise eight of the first fifteen member states and six of the twelve newer member states – i.e., about half of each category – (...) [thus it] does not represent a move by the older member states to go ahead without the newer ones"* Peers, 2010, p. 347.

[XX] For a comprehensive overview of the negotiations on enhanced cooperation regarding European patent, see Bonadio, 2011.

[XXI] The EPO is the Munich-based institution set up by the European Patent Convention, an international agreement signed by EU and non-EU countries (currently, its members are thirty-eight).

[XXII] For a detailed account of the positions, please see Lamping, 2011, at 922.

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