



RSC 2022/15
Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union
(InDivEU)

WORKING PAPER

**Legal Feasibility Study of
the Differentiation Options**

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European University Institute

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Published in March 2022 by the European University Institute.

Badia Fiesolana, via dei Roccettini 9

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu

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With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states. InDivEU begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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This project received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement number 822304. The content of this document represents only the views of the InDivEU consortium and is its sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains

**Integrating
Diversity in the
European Union**

Abstract

In recent years, leading political actors and institutions have suggested further differentiation as a plausible scenario for the EU's future, in fields such as economic governance, social Europe, migration, tax harmonisation, and defence. One central question is to what extent such scenarios require revision of the current EU Treaties and which ones can, on the contrary, be implemented under the current Treaty text. As the chances for Treaty revision are very remote, the latter option is the more promising. Under the current rules, the various forms of differentiated integration offer different costs and benefits due, in part, to the legal conditions and constraints applying to them. For example, enhanced cooperation (wherein a group of member states can 'use' the EU institutions) does not allow for self-selection of participating countries and can only be undertaken for specific projects and as a 'last resort'. By contrast, separate agreements concluded under international law between 'willing and able' member states do allow for self-selection of the participants, but are less effective tools as they cannot use the legal instruments of EU law. This paper presents and weighs the advantages and costs of each of the forms of differentiated integration, in relation to the various policy areas in which they might be experimented in the coming years. It does so from a legal perspective.

Keywords

Differentiated integration, European Union, legal feasibility, opt-out, enhanced co-operation.

1. The Legal Regime of Differentiated Integration in the European Union: A General View

In a lecture that he gave in Florence in 1979, Ralf Dahrendorf (previously a member of the European Commission) stated: '*Europe à la carte*, that is, common policies where there are common interests without any constraint on those who cannot, at a given point of time, join them, must become the rule rather than the exception, if European union is not to get stuck.'¹ A faraway echo of this view can be found in a special report by *The Economist* on the future of the European Union, published in March 2017 on the 60th anniversary of the Treaties of Rome. The report was significantly entitled 'The case for flexibility', and it argued that 'the EU must embrace greater differentiation or face potential disintegration', and that 'a more differentiated Europe, based around the idea of variable geometry, a range of speeds or concentric circles, would be a good way to ease the tensions and problems that afflict the present, overly rigid EU'.²

In the intervening thirty-eight years between Dahrendorf's speech and the *Economist's* report, differentiated integration has become a structural element of the EU legal order, but not in the way advocated by Dahrendorf. The member state governments and the EU institutions shunned the *à la carte* approach, and instead a regime of legally constrained differentiation was put in place, which according to some (including *The Economist*) does not offer the degree of flexibility that the European integration now needs.

In fact, *Europe à la carte* was not a utopian construct at the time of Dahrendorf's speech, but the living legal reality of the 'other Europe' that had existed alongside the European Community since the 1950s, namely the Council of Europe. The Strasbourg-based organisation offered (and still offers) precisely what Ralf Dahrendorf recommended for the European Community, namely the possibility for states to cooperate only where they find a common interest, without being compelled to do so in other instances. That regime of perfectly variable geometry consists in the adoption of law-making treaties (called conventions) within the organisational framework of the Council of Europe, followed by their separate signature and ratification by those Council of Europe states that choose to do so.³ Moreover, states retain the option of making reservations to specific provisions of the conventions that they ratify. More than 200 conventions and additional protocols have been adopted since the origins of the Council of Europe, and they show a widely varying pattern of participating states. There is only one Council of Europe convention whose ratification is now compulsory for every member state of the organisation: the European Convention for the protection of Human Rights (ECHR) of 1950.

The European Community had adopted, from the time of its inception, a very different model. Its founding treaties (principally the EEC Treaty) themselves contained – unlike the founding Statute of the Council of Europe – a large number of substantive obligations applicable to all the member states of the organisation. In the course of time those obligations in 'primary law' were to be supplemented by many additional rules of 'secondary law' (contained in regulations, directives and decisions) all of which were binding for, and applicable to, all the Community's member states. This collection of legal norms constituted a 'Community legal order' marked by a sense of unity and uniform application across the territory of the member states. The Court of Justice insisted on the fact that EU legal

1 Ralf Dahrendorf, *A Third Europe?*, Third Jean Monnet lecture, Florence, European University Institute, 1979. I owe the reference to Frank Schimmelfennig, 'Is differentiation the future of European integration?', in Björn Fägersten and Göran von Sydow (eds), *Perspectives on the Future of the EU*, Swedish Institute for European Policy Studies (SIEPS), 2019, 99, at 100.

2 *The Economist*, Special report on the future of the European Union, *The case for flexibility* (2017), p.15, <http://www.economist.com/news/special-report/21719188-it-marks-its-60th-birthday-european-union-poor-shape-it-needs-more>.

3 For a complete list of the conventions and protocols see <https://www.coe.int/en/web/conventions/full-list>

rules were ‘fully applicable at the same time and with identical effects over the whole territory of the Community’.⁴

From the start, though, there were exceptions to this overall approach. The EEC Treaty contained special protocols and derogations for single countries,⁵ and Community legislation occasionally contained special rules or derogations for particular countries, but that was not common practice. True differentiated integration, meaning that not all member states participate in the adoption of EU norms and that the non-participating states are not bound by those rules, was inaugurated rather late in the life of the Community, namely with the Treaty of Maastricht. Even then, the recourse to differentiated integration was not a shared vision, but rather the unexpected outcome of the negotiations of that treaty. The negotiations resulted in ‘forced differentiation’, as opt-outs for the UK (from monetary union and social policy) and Denmark (from monetary union) had been a condition for getting unanimous agreement on the treaty as a whole. This pattern was replicated in later treaty revisions. The UK, in particular, was able to insist on new opt-out mechanisms as a condition for agreeing the overall treaty revision packages at the Amsterdam, Nice and Lisbon conferences. It is clear that ‘given the existing constraint of consensual intergovernmental agreement on and ratification of European treaties, the deepening of European integration would have stopped at a much earlier stage’,⁶ if it had not been for those opt-out solutions.

Soon after the adoption of the Maastricht Treaty, the prospect of enlargement with a large number of new states promoted a broader debate on differentiated or ‘multi-speed’ integration. During the 1996 intergovernmental conference, there emerged a consensus among the member state governments that some mechanism of institutional flexibility (or of, as it was eventually called, ‘closer cooperation’) should be put in place, but that it should be encapsulated within the existing EU framework and be made subject to rather strict conditions. In fact, the conditions for closer cooperation imposed by the Amsterdam Treaty were so rigid that, only one year after that Treaty’s entry into force, and before the new regime had even been applied in practice, the governments reviewed and, ultimately, redrafted the relevant rules during the IGC that took place in 2000, leading up to the Nice Treaty. The new Treaty text allowed for what was now named ‘enhanced cooperation’ to be launched by a qualified majority vote in the Council, except in common foreign and security policy. The substantive conditions for closer cooperation were also somewhat relaxed compared to the Amsterdam regime.

The political energy needed to exploit that enhanced cooperation mechanism disappeared, almost immediately after the signature of the Treaty of Nice, because of the new constitutional reform process launched by the Convention on the Future of the Union. Within that context of across-the-board constitutional reform, flexibility did not emerge as a central issue. The few changes proposed in the Draft Constitutional Treaty, and much later laid down in the Lisbon Treaty, once again aimed at facilitating enhanced cooperation compared to the post-Nice situation. Enhanced cooperation initiatives can now start on request of at least nine Member States, and a qualified majority vote of the Council must authorize them. They can cover all areas of non-exclusive EU competence.⁷ The Lisbon Treaty reforms also put a new emphasis on closer cooperation in the field of CFSP and particularly defence. Whereas the latter policy field was previously off-limits for closer cooperation initiatives, the Lisbon Treaty now turned it into a privileged area for experimentation with a range of flexibility regimes, denoting a greater acceptance of the European Union as a policy-making venue for military matters. Another specific regime of enhanced cooperation created by the Lisbon Treaty,

4 ECJ, Case 48/71 *Commission v Italy*, EU:C:1972:65, para 8.

5 See Dominik Hanf, ‘Flexibility clauses in the founding Treaties, from Rome to Nice’, in Bruno De Witte, Dominik Hanf and Ellen Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001) 3.

6 Frank Schimmelfennig, ‘Is differentiation the future of European integration?’, in Björn Fägersten and Göran von Sydow (eds), *Perspectives on the Future of the EU*, Swedish Institute for European Policy Studies (SIEPS), 2019, 99, at 107.

7 Art. 20 TEU. The conditions and procedures are spelled out in considerable detail in Articles 326 to 334 TFEU.

which was less prominently discussed in its preparatory phase but proved important in practice, concerns the field of economic governance, where it was grafted upon the existing variable geometry between Eurozone and non-eurozone countries. A legal basis allowing for the adoption of euro-area specific legislation on economic governance was inserted in Article 136(1) TFEU.

The Amsterdam Treaty, apart from creating the closer cooperation mechanism, had also 'repatriated' the Schengen regime within the legal order of the European Union. As a price for this repatriation, a new opt-out Treaty regime had been created for the United Kingdom and Ireland, and another one for Denmark. A system of differentiation between EU Member States that had existed *outside* the EU legal framework was thus brought *inside* that framework, but without modifying the degree and content of the differentiation. This new opt-out area established by the Amsterdam Treaty joined the Maastricht-based opt-out regime for EMU. The Lisbon Treaty added yet another opt-out regime in the field of police cooperation and criminal justice where, in return for the introduction of the 'Community method' in that policy area, the United Kingdom obtained an opt-out from future developments and even a right to unilaterally pull out from existing third pillar instruments by which the UK was bound.

The combination of a number of opt-out regimes organised in detail in Protocols attached to the Treaties, and regimes of enhanced cooperation that are carefully defined in the Treaty text, defines the current EU legal regime of differentiated integration. To this must be added the transitional arrangements for newly acceding member states, which create temporary modes of differentiated integration. This complex regime is far removed from the *à la carte* model practiced in the Council of Europe and instead can be better described as a regulated and legally constrained regime of flexible integration.

However, *à la carte* elements are present alongside that regulated regime. They result from the fact that the member states of the EU are still states, that is, subjects of international law that have retained the capacity to conclude international treaties with other states, including with their fellow member states of the EU (in fact, all EU states are active participants in the patchwork system of Council of Europe conventions which we described above).

The fact that the Amsterdam Treaty had terminated the separate legal life of the Schengen Agreement and Convention, by transforming their content into EU law, and that it had also established a system of enhanced cooperation within the EU institutional framework, seemed to put an end to the conclusion of Schengen-type agreements situated *outside* EU law. Yet, the recent practice of the EU member states shows that they have kept the capacity to conclude international treaties among themselves, even when the subject matter of their agreement is close to the European Union policy domain. The conclusion of the 'Fiscal Compact' between 25 member states, and of the Treaty establishing the European Stability Mechanism between the (then) 17 euro area states, are recent and somewhat controversial examples of the use of international law as a mechanism of differentiated integration. It is a mechanism that, unlike the opt-out regimes and the enhanced cooperation mechanisms, is not regulated by the EU Treaties and can be considered as an extra option for *à la carte* cooperation (although, as we shall see later, subject to certain legal constraints under EU law).

The various forms of differentiation that have spread so profusely during the past 20 years have not formally challenged the existence of one EU legal order; and there are rather firm criteria to determine whether a legal norm belongs to the EU legal order or not. Thus, measures of enhanced cooperation are part of EU law, although they are binding only upon, and within, the member states that participated in their adoption. Similarly, legal measures from which some countries opt out are also part of the EU legal order, despite their limited geographical scope. What people still wrongly call 'Schengen law' has become regular EU law after the incorporation of the Schengen regime in Amsterdam. On the contrary, international agreements concluded by a limited set of member states (such as the ESM treaty and the Fiscal Compact) are not part of the EU legal order, and the Court of Justice cannot review the decisions adopted by organs set up under such an agreement.

Thus, if the formal criteria for deciding what belongs to the EU legal order still function well, the content of that EU legal order is no longer uniform. Its degree of fragmentation, in terms of participation of states in decision-making, and of applicability of legal norms across the EU territory, is rather unique and sets the European Union firmly apart from the federal constitutional systems to which it resembles in other respects. The Court's old ideal of EU legal rules being 'fully applicable at the same time and with identical effects over the whole territory of the Community'⁸ has become unattainable.

2. The Legal Tools and Achievements of Differentiated Integration

In this section of the report, we will describe the legal characteristics of the three main tools of differentiated integration described above, namely the opt-out regimes, enhanced cooperation, and separate international agreements. Each of those legal forms can be, and has been, used in a variety of policy domains. The main policy applications of each of the three forms will be recalled.

a) *The Opt-Out Regimes in EMU and JHA*

The Treaty of Maastricht innovated by allowing some member states not to participate at all, or in limited ways, in the development of the Economic and Monetary Union. An opt-out was agreed to for the UK but also for Denmark; this opt-out was presented as temporary, although no timeline was laid down for those countries to join the EMU. The Treaty also spelled out what could be called a 'quasi-accession procedure', whereby EU member states could enter the euro area only if they complied with certain convergence criteria and following a procedure set out in the Treaty. This quasi-accession procedure is still in place today, as not all member states of the EU other than the UK and Denmark have yet adopted the single currency. This fundamental division between euro-area and non-euro-area Member States is reflected in both the institutional and substantive norms of EMU constitutional law, as some of them apply to all EU states and others only to the euro area states.⁹ This opt-out reality led, for example, to the emergence of a formation of the Council that is specific to the euro area countries, namely the Eurogroup, whose existence is mentioned in primary law,¹⁰ and whose political importance largely exceeds its diminutive legal status.

The differentiation within EMU law is not just one between euro and non-euro area countries, but a further differentiation exists within each of those two groups. There is, first, a certain amount of differentiation between the 'outs'¹¹. There is the 'old' distinction, going back to the Maastricht Treaty, between countries with a formal opt-out laid down in detail in primary law (the UK and Denmark) and the other non-euro area countries, who are considered to have a temporary derogation from euro area membership. Further differentiations have occurred more recently, when some non-euro area states decided to access to the Fiscal Compact and others not, and when the Single Supervisory Mechanism regulation allows single non-euro states to join the new banking supervision system. A differentiation within the group of 'ins' was introduced as a result of the euro crisis, with the emergence of the category of 'programme countries' who, on the one hand, benefit from assistance from the ESM and the EFSM, and, on the other hand, are subject to a stricter surveillance of their fiscal and

⁸ See footnote 5 above.

⁹ See, for an overview of the Treaty rules on the division between the two categories of states, Jean-Victor Louis, 'Differentiation and the EMU' in Bruno De Witte, Dominik Hanf and Ellen Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001) 43.

¹⁰ Article 137 TFEU and Protocol on the Euro Group.

¹¹ See Thomas Beukers and Marijn Van der Sluis, 'Differentiated integration from the perspective of the non-euro area member states' in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law* (CUP, 2017) 143.

macroeconomic policies under Regulation 472/2013.¹² The latter distinction is not a direct result of the Treaty opt-out construction, but from a later legislative initiative.

The other domain of core state powers marked by the existence of an opt-out regime is Justice and Home Affairs, where the United Kingdom, Ireland and Denmark, each in their own way, participated in some but not all EU policies and are, as a result, not bound by some key EU legislation, such as the directives defining the rights of asylum seekers.¹³ After the UK's withdrawal, Denmark and Ireland have retained their opt-outs in this field.

b) Enhanced cooperation: The general regime and the special regimes for defence and for economic governance

In the years since the entry into force of the Lisbon Treaty, the enhanced cooperation mechanism was finally put in operation.¹⁴ A first and rather uncontroversial application happened for the regulation of transnational divorces.¹⁵ A second, much more controversial application related to the creation of a new EU patent system; two countries (Italy and Spain) had refused to participate in an EU-wide solution, because they were unhappy with the language regime for patent applications that the other states supported. They challenged the recourse to enhanced cooperation before the Court of Justice, arguing among other things that enhanced cooperation had been used to bypass the veto power that the Treaty text gave to them in this area.¹⁶ In its judgment, the Court confirmed that the function of enhanced cooperation is indeed to advance European cooperation even where (or rather, *especially* where) the unanimity requirement makes 'normal' decision-making too difficult.

Since then, a third piece of enhanced cooperation law was adopted, namely the twin Regulations on judicial cooperation in matters of matrimonial property and registered partnership property. A fourth Council authorization for enhanced cooperation was given for the creation of a financial transaction tax, but the directive itself was finally not adopted. This failure was not due to legal impediments but to the lack of political commitment by the governments that had initially launched the project.¹⁷ Finally, the European Public Prosecutors Office was set up as an enhanced cooperation project between 22 member states, under slightly different procedural rules applying only to this policy domain (according to Article 86 (1) TFEU).

So, the practice since the Lisbon Treaty, shows that enhanced cooperation is a feasible option. The Treaty text contains numerous substantive and procedural conditions for launching an enhanced

12 Regulation 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ 2013, L 140/1.

13 On the opt-outs in the JHA domain, see Nadine El-Enany, 'The perils of differentiated integration in the field of asylum', in Bruno De Witte, Andrea Ott and Ellen Vos (eds.), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar, 2017) 362; and Ester Herlin-Karnell, 'Between flexibility and disintegration in EU criminal law', *Ibidem*, 384.

14 See the overview by Daniela A. Kroll and Dirk Leuffen, 'Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law', 22 *Journal of European Public Policy* (2015) 353; and the study by Wolfgang Wessels and Carsten Gerards for the European Parliament, *The implementation of enhanced cooperation in the European Union*, Study requested by the AFCO committee of the EP, PE 604.987, October 2018.

15 Council Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 343/10. The authorization had been given by Council Decision 2010/405 of 12 July 2010, OJ 2010, L 189/12. See Steve Peers, 'Divorce European style: The first authorization of enhanced cooperation', 6 *European Constitutional Law Review* (2010) 339.

16 Joined Cases C-274/11 and C-295/11 Spain and Italy v Council, EU:C:2013:240. The Council had authorized enhanced cooperation in this area by a Decision adopted (despite negative votes of Italy and Spain) on 10 March 2011, OJ 2011, L 76/53.

17 On the origins of this attempt at enhanced cooperation, see Pieter Van Cleynenbreugel and Wouter Devroe, 'The financial transaction tax project', in Bruno De Witte, Andrea Ott and Ellen Vos (eds.), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (Edward Elgar, 2017) 282.

cooperation initiative,¹⁸ which makes sense because the participating states receive the benefit of using the EU institutional system to adopt policies only among themselves instead of for the whole EU: the Commission (acting in its full composition) supports their initiative, the European Parliament (also acting in its full composition) approves the enhanced cooperation project, and the project, if successful, takes the legal form of an EU regulation, directive or decision, thus benefitting from the supranational qualities of EU law. Fulfilling the not so onerous conditions listed in the Treaty is a very reasonable price to pay for obtaining those benefits. Enhanced cooperation is thus an attractive mechanism, and one may wonder why it has not been used more frequently in the past twelve years (i.e. since the entry into force of the Lisbon Treaty). The continuing reluctance of member states to engage in variable geometry is, arguably, testimony to the enduring strength of the consensus culture inside the Council.

In addition to the general enhanced cooperation mechanism, the Lisbon Treaty had created a specific regime of enhanced cooperation in the field of economic governance, which was grafted on the existing distinction between euro-area and non-euro-area countries. The legal basis allowing for the adoption of euro-area specific legislation on economic governance (Article 136(1) TFEU) was used, very soon after the entry into force of the Lisbon Treaty, for important parts of the ‘six-pack’ and ‘two-pack’ economic governance reforms. This special regime is distinct from the general mechanism of enhanced cooperation, in that there is no requirement for a prior authorization by the Council in its full composition. Rather, the Council in a reduced euro-area composition can directly adopt the necessary measures (naturally, as always, after having received a proposal by the Commission). However, Article 136(1) TFEU limits the domain in which such euro-area-specific EU legislation is allowed to (a) strengthening the coordination and surveillance of eurozone countries’ budgetary discipline, and (b) setting out specific economic policy guidelines for them. Therefore, Article 136(1) TFEU is clearly not a sufficient legal basis for developing a structural cooperation between eurozone countries outside the field of economic governance.

In addition, we have a specific enhanced cooperation regime in the field of defence, also created by the Lisbon Treaty, was implemented in December 2017 through the launch of a permanent structured cooperation scheme (PESCO).¹⁹ This form of cooperation is defined by Article 42(7) TEU. It provides that those member states whose military capabilities fulfil higher criteria and who agree to make binding commitments with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. The format of that cooperation is further described in Protocol nr. 10 to the Lisbon Treaty. As was noted by Cremona, ‘in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol.’²⁰ The drafters of the Constitutional Treaty and of the Lisbon Treaty took care to define in a rather detailed way the institutional and substantial shape of PESCO, making it into an ‘off-the-shelf form of cooperation’, which may have facilitated the launch once the political impetus was there. PESCO’s main institutional characteristic is the fact that decision-making is entirely situated *within* the EU legal order, namely with the Council and its preparatory bodies. Although it was estimated, only a few months before its launch, that only between 10 to 15 member states would be able and willing to participate in PESCO, eventually 25 states (all except the UK, Denmark and Malta)

18 For a detailed discussion of those conditions, see among others: Wessels and Gerards (note 15 above), at 18-23; Steve Peers, ‘Enhanced cooperation: the Cinderella of 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, 2017) 76; Emanuela Pistoia, *Limiti all’integrazione differenziata dell’Unione europea* (Cacucci Editore, 2018) 27-30 and 39-53.

19 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ 2017, L 331/57; and the implementing measure Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, OJ 2018, L 65/24. The suddenness of this development is illustrated by the fact that the European Commission’s Reflection Paper, published only a few months earlier, does not even mention PESCO (European Commission, *Reflection Paper on the Future of European Defence*, COM(2017) 315 of 7 June 2017).

20 Marise Cremona, ‘Enhanced cooperation and the common foreign and security and defence policy’, *EUI Working Papers LAW* 2009/21, p.14.

decided to join the project. Since the participation of Denmark is impeded by its defence opt-out entrenched in the Treaties, the only member state currently staying out of its free will is tiny Malta. PESCO functions according to an *à la carte* model, at two levels.²¹ First, at the time of launching, each state could freely choose to participate in the mechanism or not. The ‘capability’ conditions listed in Art. 42(7) TEU did not really limit that discretion, since all the states had to do at the time of launching was to express a *commitment* to cooperate, rather than meet some quantified criteria for participation. The second level of *à la carte* participation occurs when adopting actual cooperation projects under the PESCO umbrella. So far, none of the 25 PESCO members has taken part in all 47 projects, and participation to the single projects varies between 2 and 24 states.²²

c) Separate international agreements: *à la carte ma non troppo*

The other available instrument for variable geometry is the conclusion of agreements of international law between a group of member states, formally outside the EU legal order, but very much connected to the European Union in substantive terms. The model for this used to be the Schengen Convention and is nowadays the European Stability Mechanism. In a sense, one could say that this form of flexibility exists since the early days of the European integration process. Hundreds of bilateral and multilateral international treaties were concluded between member states of the European Union ever since the 1950’s, in areas such as tax law, environmental protection, defence, culture and education. They typically occur in areas in which the European Union has no law-making competence at all, but also in areas in which the EU possesses shared law-making competence but where a set of member states prefer to use their ‘share’ in order to conclude an agreement among themselves rather than acting in the framework of the European Union. These ‘*inter se* agreements’²³ become a true alternative form of variable geometry when they serve the purpose of allowing a group of member states to move European integration forward in the face of the opposition of other member states. In this respect, the Schengen experience is still referred to, in current discussions, as a positive model; it offers an example of both the potential of such agreements to overcome a blockage within the Union’s decision-making system, and the possibility for their later re-integration within the EU legal system.

In the post-Lisbon years, the EU member states have reiterated the practice of concluding international treaties among themselves, even when the subject matter of their agreement is close to European Union policies. This happened, in particular, in the domain of Economic and Monetary Union. As part of the collective response to the sovereign debt crisis, a number of such international agreements were concluded between large groups of EU member states. The first one was an informal agreement, namely a Decision of the Representatives of the euro area countries of 10 May 2010 to set up the European Financial Stability Facility (EFSF), which was the first financial rescue fund. Shortly afterwards, two formal international treaties were adopted: the Treaty establishing the European Stability Mechanism (ESM Treaty), and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (commonly known as ‘Fiscal Compact’). These ‘satellite agreements’, situated outside the EU legal order, but closely connected to the policies of EMU, have been the object of much political and scholarly controversy. Many saw them as indicating a general turn to intergovernmentalism in the European integration process, but there were also more contingent and technical reasons explaining the recourse to international law in each of those

21 See, for a detailed explanation of the complex differentiation model of PESCO, Steven Blockmans, ‘The EU’s Modular Approach to Defence Integration; An Inclusive, Ambitious and Legally Binding PESCO?’, 55 *Common Market Law Review* (2018) 1785.

22 Antonio Missiroli and Luigi Lonardo, ‘The evolution of enhanced cooperation in the EU: from EnCo to PeSCo (2009-2019)’, *Bruges Political Research Papers* 80/2020, at p.28.

23 This is an expression from international law. It refers to the case where some, but not all, parties to a first international treaty (in this case, the EU Treaties) conclude a second international treaty among themselves that complements the first one.

cases.²⁴ The conclusion of the ESM Treaty was challenged before the Court of Justice in the Pringle case on a number of legal grounds but the Court of Justice rejected all of them and gave its approval to the creation of the ESM as a separate international organisation.²⁵ In fact, the path towards the conclusion of the ESM Treaty had been constitutionally cleared by an amendment of Article 136 TFEU (the only post-Lisbon amendment of the Treaties) stating that ‘The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.’²⁶

The closeness of the ESM to the European Union legal system is expressed in various ways: by means of references in the Preamble to the EU’s economic governance rules and to the amendment of Art 136 TFEU, and by several provisions of the treaty entrusting supporting roles to three EU institutions, the Commission, the ECB and the Court of Justice. Moreover, the ESM’s highest decision-making organ, the Board of Governors, has the same personal composition as the Eurogroup, which is an EU body. The European Stability Mechanism Treaty, and the decisions adopted by the organs of the ESM, can thus be considered a semi-connected part of EMU law. Politically speaking, it is strongly embedded in the EU’s economic governance regime.

In the past few years, negotiations took place to entrust additional tasks to the ESM and to amend the ESM treaty for that purpose. A political agreement was reached on a revised text of the ESM Treaty at the Eurogroup meeting of December 2019, but it took another year for ironing out all the remaining wrinkles. The Amended ESM Treaty was signed by the Parties in January 2021,²⁷ after which the national ratification procedures started.²⁸ Among the new tasks given to the ESM, we find the creation of a backstop facility to support the operations of the Single Resolution Board (SRB), if the SRB would run out of funds to undertake banking resolution operations. This new task ties in the ESM even more closely with the operation of the European Union.

The negotiation of the Fiscal Compact and the ESM Treaty took place in 2012. They were followed, in May 2014, by the signature of yet another international agreement in the sphere of EMU law, namely the Agreement on the Single Resolution Fund, which is the intergovernmental part of the banking union package. A fourth multilateral agreement closely connected with the functioning of the EU, but in a very different domain, was signed on 19 February 2013 between 25 Member States (all except Croatia, Poland and Spain), namely the Agreement on a Unified Patent Court. That court’s main task is to adjudicate an EU law instrument, namely the Regulation on the creation of unitary patent protection, which is itself, as mentioned above, the outcome of an enhanced cooperation initiative. There was no legal reason why this adjudication task had to be given to a separate court rather than to the EU’s Court of Justice; the ‘patent community’ apparently persuaded the member state governments that it would be preferable to create a separate and allegedly more expert court.

24 For more detailed discussion of the legal reasons for the use of international agreements in the context of the euro crisis, see Bruno De Witte and Thibault Martinelli, ‘Treaties between EU Member States as quasi-instruments of EU law’, in Marise Cremona and Claire Kilpatrick (eds.), *EU Legal Acts – Challenges and Transformations* (OUP, 2018) 157, at 170-181; and Alberto de Gregorio Merino, ‘Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance’, 49 *Common Market Law Review* (2012) 1613. For a critical assessment, highlighting the threat to the EU’s institutional integrity, see Angelos Dimopoulos, ‘The use of international law as a tool for enhancing governance in the Eurozone and its impact on EU institutional integrity’, in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing, 2014) 41.

25 ECJ, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI: EU:C:2012:756.

26 As for the reason why an amendment of the TFEU was considered necessary for the creation of the ESM, see Bruno De Witte, ‘The European Treaty Amendment for the Creation of a Financial Stability Mechanism’ *SIEPS European Policy Analysis* (2011) nr 6.

27 The text of the amendments is available on: consilium.europa.eu/media/47294/sn04244-en19.pdf.

28 See, on the content of the ESM reform: Jasper Aerts and Pedro Bizarro, ‘The Reform of the European Stability Mechanism’, 15 *Capital Markets Law Journal* (2020) 159; and Giovanni Zaccaroni, *The Future of the ESM within a Hybrid EMU Law*, BRIDGE Working Paper 6, September 2020.

In light of this recent practice, we can see the advantages and disadvantages of recourse to *inter se* agreements as compared to other forms of variable geometry. The main advantage is that the participants to the cooperation project can freely choose their partners to the agreement: a self-proclaimed core group can indeed decide to act together without having to offer (as is the case with enhanced cooperation) a standing invitation to the other EU states to join at any time. Furthermore, again unlike enhanced cooperation, states can conclude separate international agreements on matters that fall outside the scope of EU competences and can therefore extend the integration project beyond the existing EU policies without the need for a prior revision of the EU Treaties. From the perspective of national sovereignty, it is true that the negotiation of an international agreement leaves the member state governments fully in control, since they cannot formally be outvoted by the others. However, they face the extra transaction costs of setting up a little diplomatic conference instead of being able to discuss within the tried and tested institutional framework offered by the EU system. Altogether, this method of differentiated integration, despite its great flexibility, has major shortcomings not only from the perspective of constitutional integrity (its intergovernmental nature excludes the institutional balance that is characteristic of EU decision-making), but also from a pure national interest perspective.

Given these shortcomings, the initiators of the earlier satellite agreements insisted on the temporary character of those agreements. The Schengen Agreement did not include an expiry clause setting a time limit for its existence, but, in a separate declaration, the Schengen states announced that the content of the agreement they had concluded would serve them as a basis for the negotiation of equivalent measures to be adopted within the EU framework.²⁹ The Schengen regime was indeed integrated within the EU legal order, although this took some time. The Treaty of Amsterdam brought the Schengen Agreement and its implementing measures within the boundaries of the EU legal order based on an additional Protocol.³⁰ As for the more recent satellite agreements, there are no signs yet that the participating states are willing to reintegrate them within the EU legal order. The European Commission made proposals, in December 2017, to transform part of the Fiscal Compact into an EU directive,³¹ and to transform the intergovernmental European Stability Mechanism into an EU body called European Monetary Fund,³² but neither of these proposals met with approval from the side of the national governments, and they are not going to be adopted any time soon. On the contrary, as we saw, the parties to the ESM are currently negotiating an extension of the tasks of this intergovernmental organisation.

3. The Legal Constraints of Differentiated Integration

The European Commission published a White Paper on the Future of Europe on 1 March 2017.³³ Among the five possible scenarios for the EU's future, one was identified by the Commission as: 'Those who want more do more': this scenario envisages the creation of several 'coalitions of the willing' that would carry forward new cooperation projects in areas such as defence, security and justice, taxation and social policy; and the other member states would be able to join those projects at a later stage, as soon as they would be ready or willing to do so. The Commission did not add

29 This declaration is cited and discussed by Julian Schutte, 'Schengen: its Meaning for the Free Movement of Persons in Europe', 28 *Common Market Law Review* (1991) 549, at 567-568.

30 Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union, OJ 2012 C 326/290.

31 Commission proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term orientation in the Member States, COM(2017) 824 of 6 December 2017.

32 Commission proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827, 6 December 2017.

33 European Commission, *White Paper on the Future of Europe – Reflections and scenarios for the EU27 by 2025*, COM(2017) 2025 of 1 March 2017.

further detail, for example on the legal form that those cooperation projects would take. Indeed, the White Paper states that the scenarios ‘deliberately make no mention of legal or institutional processes – the form will follow the function’. However, the form is crucially important for deciding which projects of differentiated integration are legally possible or not. There is no simple answer to that question. The abstract notion of the unity of the EU legal order is not, as such, an impediment to differentiated integration, since primary EU law itself (namely the TEU and TFEU) explicitly allow for, and organise, forms of differentiated integration.

In the following pages, we will first discuss the main legal constraints that affect the two main forms of differentiated integration that are on the table for future projects: the mechanism of enhanced cooperation on the one hand, and the conclusion of separate international agreements on the other. We will then discuss some of the flexibility projects that are currently being canvassed in the political and academic arena, in order to assess their legal feasibility. We will not discuss the future implementation of the opt-out regimes that exist for monetary policy and justice and home affairs, since the scope and limits of these regimes are firmly laid out in the text of the Treaties and do not allow for further-going differentiation in the absence of a Treaty revision.

a) Enhanced cooperation

The main attraction of the general mechanism of enhanced cooperation is its open-ended nature, namely the fact that it is available in any area of EU shared competence and, thus, in most EU policy domains. It was used, until now, only for piecemeal projects, where a shift to enhanced cooperation served to overcome the opposition of one or more countries in the course of the legislative process. This use of enhanced cooperation, as veto-avoidance instrument, had always been one of the contemplated usages, and the Court of Justice clearly approved this when the patent project was challenged by Spain and Italy. We are likely to see more such cases of single-project enhanced cooperation in the future.

Can enhanced cooperation also be used in a more systemic and strategic way? Given the rather open-ended formulation of the relevant Treaty articles, it has sometimes been suggested that enhanced cooperation should not be limited to single-project cases, but could also be used in a systematic way by a group of same-minded member states so as to constitute a true ‘pioneer group’ that operates together in a whole range of policy areas. This option was even mentioned in the Treaty on Stability, Coordination and Governance (more commonly known as Fiscal Compact). Its Article 10 states that the Parties to that treaty ‘stand ready to make active use, whenever appropriate and necessary, of measures ... of enhanced cooperation ... on matters that are essential for the proper functioning of the euro area, without undermining the internal market.’ This statement seems to contain a promise (or threat) of concerted action to multiply the usage of enhanced cooperation as a tool to build a euro-area integration project. Yet, no action of this nature was taken during the eight years since the entry into force of the Fiscal Compact. Rather, the usages of enhanced cooperation were based, so far, on other fault lines than the one between euro-area and non-euro-area countries.

In fact, the rules on enhanced cooperation contain a number of legal constraints making it rather unlikely that this mechanism could serve for the construction of a closed and coherent pioneer group operating across a whole range of policy areas. The conditions and procedures for enhanced cooperation operations have been spelled out in rather great detail in the text of the TEU and the TFEU. Because of the hierarchy between primary law (the Treaties) and secondary law (the enhanced cooperation instruments), it is clear that enhanced cooperation can only validly come into being if it respects the constraints imposed by the Treaties. These constraints are judicially enforceable, as was shown when enhanced cooperation in the field of patent law was challenged before the Court of Justice by two non-participating states, Italy and Spain, and when the project for an enhanced cooperation on a financial transaction tax was challenged by the United Kingdom.³⁴ Those challenges

³⁴ ECJ, Case C-209/13, *United Kingdom v Council*, ECLI:EU:C:2014:283.

were unsuccessful on the merits, but the Court left no doubt that the Treaty conditions are indeed binding on the states that want to engage in enhanced cooperation.

The first procedural constraint is the 'last resort' rule, which is taken rather seriously since all cases of enhanced cooperation so far were preceded by genuine attempts to achieve the desired result through legislation applicable to all states. A second constraint is that the authorization for launching an enhanced cooperation project must be given by the Council acting by qualified majority, so that any pioneer group initiatives should receive the blessing of a large part of EU membership, as well as the active support of the Commission and the European Parliament. A third constraint is the right for every member state to join an enhanced cooperation project, so that a self-defined pioneer group cannot exclude states that do not form part of the group. Indeed, Article 328(1) TFEU provides that 'the Commission and the member states participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.' If one takes together these procedural constraints, it is clear that a self-appointed vanguard cannot engage in a broad cross-policy cooperation project whilst ignoring the other member states. The enhanced cooperation mechanism was, from the start in the 1990s, conceived as antithetical to the core Europe idea, and it remains so today.

Finally, it deserves to be mentioned that enhanced cooperation operates within the existing limits of EU competences: it cannot be used to extend EU competences beyond the domains currently defined by the Treaties. In addition, laws adopted under enhanced cooperation laws cannot modify existing EU legislation, because that would affect the rights of the non-participating states.

b) Separate international agreements

Whereas the legal constraints for enhanced cooperation are listed in the text of the TEU and the TFEU, the constraints that limit recourse to separate international agreements cannot be found in the Treaty text; they rather result from the inherent primacy of EU law over the national law of the member states.

Indeed, it has always been clear that a group of EU states cannot resort to the conclusion of a separate *inter se* treaty in order to escape from their obligations under EU law. Satellite agreements may not contain norms conflicting with EU law proper; they cannot derogate from either primary or secondary EU law. In its case law, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more member states, which must be disapplied by national courts if they are inconsistent with EU law. Similarly, in direct actions for infringement, the Court has not distinguished between infringements caused by a state acting on its own and infringements caused by a bi- or multilateral agreement concluded between several member states.³⁵ This is entirely logical. It would otherwise be easy for the member states to escape from their EU law obligations by concluding a treaty with each other.

The practical importance of the principle of primacy of EU law over *inter se* agreements between member states was illustrated by a judgment of the European Court of Justice in 2006. The Court found the application of a Schengen Convention rule to be incompatible with the rights of free movement, which third country nationals who are family members of EU citizens derive from Union law.³⁶ The Court's finding was facilitated by the fact that Article 134 of the Schengen Convention contained an express conflict rule giving priority to (what was then) Community law, but there was no doubt that the ECJ would have come to the same conclusion with regard to an agreement that does not contain such an express primacy rule.

³⁵ See, for a judgment of the Court of Justice in this sense, Case C-546/07, *Commission v Germany*, ECLI:EU:C:2010:25, para 42 to 44.

³⁶ ECJ, Case C-503/03, *Commission v Spain*, ECLI:EU:C:2006:74, particularly the paras. 33 to 35.

Indeed, it did so in the more recent *Achmea* judgment in which it held that a bilateral investment treaty (BIT) between the Netherlands and Slovakia was contrary to EU law.³⁷ This particular agreement dates from the time that one of the parties (namely Slovakia or, in fact, its predecessor state Czechoslovakia) was not yet a member state of the Union, and it is one among hundreds of similar BITs that were concluded in the 1990s between Western European and Central or Eastern European countries. The incompatibility of those BITs with EU law is not at all obvious from their wording. The Court of Justice rather objected against a structural characteristic of these BITs, namely the fact that they submit investment disputes to a 'neutral' arbitration tribunal rather than to the domestic courts of either of the two states (in this case Slovakia or the Netherlands). Since those arbitration tribunals could, when settling an investment dispute, be called to interpret and apply norms of EU law, this implies that questions of interpretation of EU law would be decided by bodies that are not part of the EU judicial system (which is composed of the ECJ and the national courts of its member states). This rather radical position adopted by the ECJ is a clear reminder that the EU member states are not at all free to engage in *à la carte* cooperation with each other. They must refrain from agreeing anything that could undermine the integrity of the EU legal order.

One area of friction was the recent plan to extend the tasks of the European Stability Mechanism, by giving it a role as a financial backstop in the case of a major banking crisis, to complement the action of the EU's Single Resolution Board (SRB). This reform leads to direct interaction between an EU law agency (the SRB) and an intergovernmental organisation (the ESM), possibly affecting the autonomous operation of the EU agency. In a paper published during the negotiations, the European Commission stated that 'the reform of the Treaty establishing the European Stability Mechanism must not create obstacles to future amendments of EU legislation, which would give rise to fundamental problems affecting the autonomy of the EU legal order.'³⁸ This statement expressed a concern of the Commission about the fact that intergovernmental solutions may politically pre-empt EU action; but it sounds paradoxical from a legal point of view: indeed, agreements between groups of member states (such as the ESM Treaty) can never affect the primacy of EU law. The EU legislator can always modify existing EU law (such as the rules on banking resolution) and if that leads to a conflict with the ESM treaty, then the new rule of EU law will apply and the conflicting provision of the ESM treaty can no longer be applied.

In addition to the basic rule that EU law has priority over agreements between EU member states, a further legal constraint is discussed in the literature, namely whether enhanced cooperation should have priority over extra-EU agreements, meaning that a group of member states should first try to use the former mechanism before engaging in the latter. A positive answer to that question could be grounded on the principle of sincere cooperation, contained in Article 4(3) TEU, which requires the member states to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.³⁹ To date, the European Court of Justice has never directly addressed that question. In any case, when the enhanced cooperation mechanism was introduced in the text of the Treaties, that innovation was not accompanied by an express prohibition of closer cooperation

37 ECJ, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2018:158. Among the many comments of this judgment and of its implications for international investment law, see Maria Fanou, 'Intra-European Union investor-State arbitration post-Achmea: RIP?', 26 *Maastricht Journal of European and Comparative Law* (2019).

38 Commission Communication of 12 June 2019, *Deepening Europe's Economic and Monetary Union: Taking stock four years after the Five Presidents' Report*, COM(2019) 279, p.9. See, for further discussion of this question, Jean-Paul Keppenne et al., 'An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution: A Reflection', in Diane Fromage and Bruno De Witte (eds), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union*, Maastricht Faculty of Law Working Papers 2019/03, 38.

39 For the view that priority should be given to enhanced cooperation, see for instance Carmen Martínez Capdevila, 'Son los acuerdos inter se una alternativa a la cooperación reforzada en la UE? Reflexiones al hilo del Tratado de Prüm', *Revista Española de Derecho Europeo* n. 40 (2011) 419. See also Kaarlo Tuori, *European Constitutionalism* (CUP, 2015) at 208: 'a powerful case can be made for Member States not being allowed to resort to international agreements where enhanced cooperation is legally possible'. For a balanced view of the question, see Emanuela Pistoia, *Limiti all'integrazione differenziata dell'Unione europea* (Cacucci Editore, 2018) at 160-164.

on EU-related matters outside the EU framework. There are, in fact, several reasons why such a systematic priority should not be given to enhanced cooperation, and why an international agreement may be a preferable option, compared to the adoption of EU legislation in enhanced cooperation mode. One of these reasons is that the international treaty instrument can more easily be opened to third countries who may want to join in a project. For example, when the aim is to develop a system of environmental protection for the Alpine region, this could, in principle, be done through EU legislation, but it makes more sense to involve the non-EU states of the Alpine region by means of an international treaty.⁴⁰ Another reason for preferring intergovernmental agreements is when a policy initiative requires funding from the national budgets. This was the case when the EFSF and later the ESM were created during the sovereign debt crisis: the EU budget did not have enough 'firepower' to stabilize the financial markets, and much larger contributions were needed from the national budgets of the participating states. It made sense to organize such national budget contributions by means of a treaty between participating states such as the ESM treaty.

c) A legal assessment of some recent and current differentiation projects

The newly elected French president Macron gave a fresh political boost to the idea of variable geometry in speeches held in Athens⁴¹ and at the Sorbonne⁴² in September 2017. In calling more generally for a *refondation* of the European Union, he advocated a decisive turn towards more differentiation. His Athens speech did not go into much institutional detail, but he did advocate the creation of separate budget of the Eurozone, as well as a single executive organ and a separate parliamentary assembly for that Eurozone. At the same time, he generally pleaded for more differentiation and considered it necessary to create a vanguard of States willing to take the integration project forward.

This sounds like an endorsement of the old Core Europe idea. That idea had emerged shortly after the entry into force of the Maastricht Treaty with the Schäuble-Lamers paper of 1994 envisaging the creation of a *Kerneuropa* of five or six states, and it was reinvigorated at regular intervals ever since, mostly by French or German scholars and politicians.⁴³ These ideas remained, however, mostly at the level of political discourse and were not translated into concrete institutional designs tabled by one or more member state governments. Jean-Claude Piris, the former director general of the Council's legal service, developed a concrete legal model, in a study published in 2012.⁴⁴ He envisaged a Eurozone-based avant-garde that would break away from the rest and create its own organisation with new institutions, namely a Council, an 'administrative authority' (parallel to the Commission) and a 'parliamentary organ' (parallel to the EP), running together a number of policies. This model had a distinctly pre-Brexit flavour, as the author had openly designed it to overcome the blockage by the UK government of further deepening of European integration. Despite the concrete explanations on the legal mechanisms that were envisaged, this model seems hardly feasible in practice, not least because it would create an 'EU-bis' alongside the 'old EU', with each of the two organisations having its own complete institutional framework.⁴⁵ In addition, it is not all clear that the euro area countries (or any other group of member states) have common objectives across a

40 Alpine Convention, done at Salzburg, 7 November 1991.

41 *Discours du Président de la République, Emmanuel Macron, à la Pnyx, Athènes le jeudi 7 septembre 2017*. The texts of this speech and of the one mentioned in the next footnote are available on www.elysee.fr.

42 *Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie et démocratique*, 26 September 2017.

43 For a short overview of the first decade of that debate, see Bruno De Witte, 'Future paths of flexibility: Enhanced cooperation, partial agreements and pioneer groups', in Japp De Zwaan, Jan Jans, Frans Nelissen and Steven Blockmans (Eds.), *The European Union an Ongoing Process of Integration. Liber Amicorum Alfred E. Kellermann* (T.M.C. Asser Press, 2004), 141; and Daniel Thym, *Un-gleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos, 2004), 28-38.

44 Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (CUP, 2012).

45 See the criticism by Paul Craig, 'Two-speed, multi-speed and Europe's future: A review of Jean-Claude Piris on the future of Europe', 37 *European Law Review* (2012) 800.

whole range of policy domains. It rather seems to be the case, today as in earlier periods, that EU states form shifting alliances depending on their interests in particular policy domains or even the particular policy project within a given domain. Still, despite its lack of political and legal plausibility, the core Europe idea keeps emerging in the discussions on the future of Europe, although the views on who should compose that core vary widely. In a newspaper article, the economist Thomas Piketty recommended that France, Germany, Italy and Spain create a close political and fiscal union, open to others if they wish to join.⁴⁶ Another economist, writing in the same newspaper in the same period, estimated that the 'hard core' would consist of 10 to 12 countries.⁴⁷ Anyway, even if the political will to create a vanguard were to emerge in future years, the enhanced cooperation mechanism does not seem to be a suitable vehicle for its creation, as we argued in the previous section.

Situated at the opposite intellectual pole of the core Europe idea, but equally unfeasible under the current Treaty rules, is the old *Europe à la carte* idea. The Bruegel group presented a reformulation of the latter idea in a policy brief in 2018.⁴⁸ The model they propose is based on a distinction between (a) a set of core rules and policies applicable to all member states and (b) four policy areas in which the member states can choose to participate or not. Those four 'clubs' would be Economic and Monetary Union, migration, foreign & security policy, and all the remaining 'lesser' policies of the EU. Each club would have its own specific institutions in which only the participating countries would participate. As the authors of the policy paper admit, such a 'hub-and-spoke' Europe could not be established by means of separate international agreements, since it would involve a radical change in the current institutional structure. Rather, one would need a revision of the EU Treaties.

Turning now to more specific reform proposals of differentiated integration, one that attracted a lot of attention in the academic debate is the proposal to reinforce the democratic quality of economic governance by creating a special *Parliamentary Assembly for the Eurozone*. The French president Macron endorsed this idea in his Athens speech of the late summer of 2017, but no longer with so many words in his later Sorbonne speech. Earlier that year, a group of French scholars around Thomas Piketty had developed this idea. They presented this new assembly as a key element of a new international treaty aiming at the 'democratization of Europe'.⁴⁹ That assembly would be composed of a large majority (4/5) of national members of parliament and a much smaller number (1/5) of MEPs. However, and quite apart from the dubious merits of creating a separate European Assembly alongside the EP, it is far from clear which countries should be represented in such an assembly. Indeed, EMU law is marked by a complex system of variable geometry, with various non-euro area states participating in various bits of EMU law and even Euro-crisis law.⁵⁰ Moreover, attributing genuine decision-making powers to that European Assembly, as envisaged by the Piketty group, would not be compatible with current EU law. As we noted above, a separate international agreement between some EU member states does indeed allow for an extension of European cooperation beyond the limits of EU competences, but it does not allow for the adoption of legal rules that conflict with EU law as it stands. A parliamentary assembly for the euro area could not exercise any powers that are conferred by the EU Treaties to the EU institutions. Yet, this is what the initiators

46 Thomas Piketty, 'Pour une Union dans l'Union', *Le Monde* 11-12 March 2018: 'La seule solution est que la France, l'Allemagne, l'Italie et l'Espagne ... mettent enfin en place une Union politique et fiscale renforcée au sein de l'UE, ouverte à tous les membres bien sûr, mais sans que personne ne puisse la bloquer.'

47 Christian Saint-Etienne, 'Une institution intergouvernementale peut faire de l'Europe une puissance', *Le Monde* 17 March 2018. See also, more elaborately: Christian Saint-Etienne, *Osons l'Europe des nations* (Editions de l'Observatoire, 2018).

48 Maria Demertzis, Jean Pisani-Ferry, Andre Sapir, Thomas Wieser and Guntram Wolff, *One size does not fit all: European integration by differentiation*, Bruegel Policy Brief, September 2018.

49 Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste and Antoine Vauchez, *Pour un traité de démocratisation de l'Europe* (Seuil, 2017), translated in several other languages. A number of comments on this proposal were collected in the journal *European Papers* (2018), nr 1, Special section – Democratizing the Euro Area through a Treaty.

50 Ian Cooper, 'A separate parliament for the Eurozone? Differentiated representation, Brexit and the quandary of exclusion', *70 Parliamentary Affairs* (2017) 655, at 661-665.

of the project propose: their parliamentary assembly would not be a mere talking shop, but would have, among others, the power to approve or reject the country-specific recommendations of the Council before they reach the member states. This conflicts with the current attribution of powers in the TFEU that does not allow for a decision-making role of other institutions than the Commission and the Council in the field of economic coordination. Hence, the creation of a parliamentary assembly for the euro area with real decision-making powers in the field of economic governance would be illegal, unless a revision of the European Treaties took place to make it possible.

Let us consider now another recent reform plan, namely the creation of a *budgetary capacity for the euro area*, in order to allow for investments or the funding of structural reforms that would increase the long-term stability of the euro area and avoid the recurrence of crises such as the one that happened in the past years. If created outside the EU budget, by means of a separate agreement among all the euro area states, or a sub-group among them, there do not seem to be major legal problems. A similar extra-EU budget was created when the European Stability Mechanism was set up in 2012. In fact, one option could be to extend the tasks of the ESM in order to allow it to fund investment programmes improving the long-term stability of the euro area. An alternative approach would consist in creating this new budgetary capacity for the euro area within the EU budget, and using the tools of EU law. This is, for obvious reasons, the preferred option of both the European Commission and the European Parliament. Depending on the envisaged size of this new budgetary capacity, several legal problems might arise but none seems to be insurmountable.⁵¹ In this context, one may note the recent experimentations in EU budgetary practice that led to the creation of a variety of special funds (such as the Emergency Trust Fund for Africa or the Facility for Refugees in Turkey). These funds are partly disconnected from the main EU budget in terms of their revenue and expenditure, and are expressly designed to allow for additional and differentiated contributions by the EU member states.⁵²

Eventually, by the end of 2019, the governments of the Euro area states agreed on setting up a new European financial instrument, called the Budgetary Instrument for Competitiveness and Convergence (BICC), which would support structural reforms in national economic policy.⁵³ This project would have been implemented as a hybrid action between the EU and the member states of the euro area, as it would have consisted of an EU regulation setting out its governance⁵⁴, and an intergovernmental agreement concluded by the member states of the euro zone in order to co-finance the instrument out of their national budgets.⁵⁵ The size of the programme had shrunk during

51 See the discussions of those legal options by Rene Repasi, *Legal options for an additional EMU fiscal capacity*, Study for the European Parliament (2013); by Luca Lionello, 'Establishing a budgetary capacity in the Eurozone. Recent proposals and legal challenges', 24 *Maastricht Journal of European and Comparative Law* (2017) 822. The latter author lists the many political proposals made in recent years to create such a budgetary capacity, at 826-828. See also the in-depth analysis for the Constitutional Affairs Committee of the European Parliament: Federico Fabbrini, *A fiscal capacity for the Eurozone: constitutional perspectives*, February 2019.

52 See, on this institutional phenomenon, Richard Crowe, 'The European Budgetary Galaxy', 13 *European Constitutional Law Review* (2017) 428. The budgetary implications of variable geometry were discussed in the Monti report, *Future financing of the EU – Final report and recommendations of the High Level Group on Own Resources*, December 2016.

53 The main content of the instrument, as politically agreed in October 2019, can be found in: Eurogroup, 'Term Sheet on the Budgetary Instrument for Convergence and Competitiveness', Council Press Release 642/19, 10 October 2019.

54 European Commission, Proposal for a Regulation of the European Parliament and the Council on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area, COM(2019) 354, 24 July 2019.

55 See Eurogroup report on a possible inter-governmental agreement for the budgetary instrument for convergence and competitiveness, Eurogroup press release of 17 February 2020. Finding a consensus on such an agreement had been far from straightforward as it caused considerable tension between, on the one hand, France and Germany, which supported it, and, on the other hand, the group of 'frugal' states led by the Netherlands. See Marijn Van der Sluis, 'A Euro Area Budget: Another Seedling?', in Diane Fromage and Bruno De Witte (eds.), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Maastricht University, Faculty of Law Working Paper series, 2019/03, 18, at 24. On the negotiations leading to the BICC, see also Magnus Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU', 27 *Journal of European Public Policy* (2020), advance publication.

the negotiations to little more than 10 billion, to be spent during the course of the 2011-2017 period. This meant that the BICC could hardly be considered as providing the eurozone with a true fiscal capacity. In fact, one could wonder whether an instrument aiming at facilitating structural reform of national economic policy should be limited to eurozone countries, since that reform objective could seem equally pressing in non-eurozone states. At any rate, the finalization of the BICC, that was supposed to take place in 2020, was superseded by the pandemic crisis and the elaboration of a much more ambitious NGEU programme, which includes structural economic reform as one of its many aims.

In fact, the NGEU (also known as the EU's Covid recovery plan), which was adopted in December 2020, is marked by an orthodox EU law approach.⁵⁶ The entire plan was enacted within the bounds of the EU legal order, and thus, unlike what happened during the euro crisis, without recourse to intergovernmental agreements between the member states. The plan will be implemented by the member states in cooperation with the EU's main institutions. No new European agencies or extra-EU bodies were created to assist with its implementation. The European Union now has an increased fiscal capacity, which is not based on an increase of the contributions by its member states, nor on the creation of the EU's own taxes, but on the emission of bonds. That fiscal capacity is fragile and temporary. Time will tell whether it can be transformed into a permanent tool for common fiscal policy and macro-economic stabilization. As the NGEU programme is limited in time, the question will arise, towards the end of it, whether there is still a need for a euro-area specific reform instrument or whether the recovery plan has marked a decline of the trend towards differentiated integration in the economic policy domain. For sure, the development of the Eurozone into an autonomous organization, separate from the European Union, is halted by the legal evolution of 2020, as NGEU is an EU-wide programmes.⁵⁷ The adoption of the NGEU programme also calls into question the role of the European Stability Mechanism. Indeed, the pandemic crisis loan programme of the ESM has remained unused, as the euro area Member States could access funding in more appealing ways through the ECB's debt purchase programme and through the loans and grants provided by the EU through its new programmes.⁵⁸

New forms of differentiated integration could, however, be envisaged in other areas than that of EMU law and economic governance. Indeed, the Commission scenario of 'Those who want more do more'⁵⁹ listed a number of other areas in which new projects of differentiated integration could be experimented, such as defence, justice and security, taxation and social policy. For areas such as taxation, migration and criminal justice, where the TFEU provides clear and rather broad legal bases, enhanced cooperation would seem the most appropriate tool. It would allow for the circumvention of the unanimity requirement where it is still in place (especially for taxation), and more generally would allow like-minded states to take forward their cooperation, using the instruments of EU law and side lining the acrimonious resistance of other states. In the field of social law, the scope for enhanced cooperation is more problematic, as some of the most frequently invoked reform measures, such as the creation of a European minimum wage system, or of a European minimum income benefit,

56 See discussion of the legal characteristics of the Recovery Plan by Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) 635.

57 Diane Fromage, 'Towards Increasing Unity and Continuing Executive Predominance within the E(M)U Post-COVID?', 47 *Legal Issues of Economic Integration* (2020) 385.

58 See Lucas Guttenberg, 'Time to come home – If the ESM is to stay relevant, it should be reinvented inside the EU', *Hertie School Jacques Delors Centre Policy Brief*, 11 November 2020.

59 European Commission, *White Paper on the Future of Europe – reflections and scenarios for the EU27 by 2025*, COM(2017) 2025 of 1 March 2017.

possibly fall outside the scope of EU competences.⁶⁰ In that case, the tool of enhanced cooperation would not be available, and the conclusion of a separate international agreement by socially minded states would be the only available option for a joint initiative in this domain.

Some among the many reform ideas that have been proposed and discussed in recent years will not fly because they would require a revision of the Treaties that will not be forthcoming any time soon. Other ideas may be successful, if they gather the political support of a sufficiently large group of member states, and they might take the form of either intra-EU enhanced cooperation or extra-EU international agreements, the choice among these two instruments depending mainly, though not exclusively, on the competence resources offered by the European Treaties. The European Parliament, in its recent resolution on this subject,⁶¹ expresses considerable reluctance to move towards more differentiated integration, and is particularly hostile towards the conclusion of separate international treaties in which parliamentary participation seems, almost by definition, to be limited or inexistent. However, faced with the impossibility of formal treaty reforms, and with limits of EU competence under the current Treaties, the conclusion of a separate international agreement among a group of 'willing and able' member states may, under certain conditions, be an appropriate solution of last resort. It is even possible to ensure a meaningful role also for the European Parliament in such an intergovernmental construction.

60 The Commission proposed a directive on a European minimum wages in October 2020 (COM(2020) 682), but it is met with strong opposition from a number of member states, and with claims that it exceeds the Union's competences. See discussion of the competence question by Ane Aranguiz and Sacha Garben, 'Combating Income Inequality in the EU: A Legal assessment of a potential EU Minimum Wage Directive', 46 *European law Review* (2021) 156.

61 European Parliament resolution of 17 January 2019 on differentiated integration, P8_TA-PROV(2019)0044.

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