

EDITORIAL COMMENTS

Enhanced cooperation: A Union à taille réduite or à porte tournante?

The Treaty of Amsterdam created a general framework for enhanced cooperation between Member States which the Treaty of Lisbon has refined by introducing Article 20 TEU and Articles 326–334 TFEU.¹ These provisions enable Member States to cooperate more closely within the framework of the Union's non-exclusive competences, under certain substantive and procedural conditions. In doing so, they make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties (Art. 20(1) 1st sentence TEU). Acts adopted in the framework of enhanced cooperation are binding only on participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union (Art. 20(4) TEU). Compared to the previous treaties, the Lisbon versions of the Treaties set uniform conditions for all non-exclusive policy areas of the Union, although the procedure remains slightly different for enhanced cooperation relating to CFSP matters. No recourse was ever made to the possibility of enhanced cooperation until very recently. Indeed, in July 2010, only a few months after the Lisbon Treaty entered into force, the Council approved for the first time a Commission proposal authorizing enhanced cooperation with respect to the law applicable to divorce and legal separation.² Six months later, the Council adopted the Regulation implementing enhanced cooperation in that area.³ Ten days earlier, the Commission made a proposal for such Council approval relative to enhanced cooperation with respect to the creation of unitary patent protection, to which the European Parliament gave

1. These editorial comments do not deal with the specific features of enhanced cooperation in the area of EMU, CFSP (cf. Art. 329(2) TFEU) or the system of automatic enhanced cooperation in the area of the PJCC, which concerns in particular participation of UK and Ireland to the Schengen *acquis*, the “alarm bell” procedure provided for in Arts. 82(3), 83(2) TFEU), the establishment of the European Public Prosecutor's Office and operational cooperation between national law enforcement authorities (cf. Arts. 86(1) and 87(3) TFEU).

2. Council Decision 2010/405/EU of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010, L 189/12. On 24 March 2010, the Commission submitted a proposal for a Council regulation authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation (cf. COM(2010)104 final), at the request of 14 Member States and after the Council had established in June 2008 that the objectives of the regulation proposed by the Commission in July 2006 could not be attained within a reasonable period by the Union as a whole.

3. Council Regulation 2010/1259/EU of 20 Dec. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010, L 343/2.

its consent on 15 February 2011. The formal adoption of the authorizing decision by the Council is foreseen on 10 March 2011.⁴

A number of substantive requirements must be fulfilled in order to embark on enhanced cooperation.⁵ It must aim to further the objectives of the Union, protect its interests and reinforce its integration process (Art. 20(1) 2nd sentence TEU). It must comply with the Treaties and Union law (Art. 326, 1st sentence TEU). It must not undermine the internal market or economic, social and territorial cohesion. It must not constitute a barrier to or discrimination in trade between Member States, nor distort competition between them (Art. 326, 2nd sentence TFEU). It must respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States may not impede its implementation by the participating Member States (Art. 327 TFEU).

The procedural requirements which need to be complied with are:

- Member States wishing to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may (not shall) submit a proposal to the Council to authorize the enhanced cooperation. The Council takes this decision by a qualified majority, after obtaining the consent of the European Parliament (Art. 329 TFEU).
- The decision to authorize enhanced cooperation shall be adopted by the Council as a last resort only, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided at least nine Member States participate in it (Art. 20(2) TEU). It does not need to take that decision by unanimity even if the legal base concerning the policy area in question requires so (Art. 20(2) TEU read with Art. 329(1) TFEU). It is not stated when the Council should make this finding on the last resort. In line with the former

4. It was confirmed at the Council meeting on 10 Dec. 2010 that insurmountable difficulties existed, making impossible then and in the foreseeable future a decision requiring unanimity on a Commission proposal for a regulation on the translation arrangements for the EU patent. As a result of the objections of Italy and Spain, it was considered that the objectives of this proposal and the Commission 2008 proposal for a regulation on the Community patent, to establish unitary patent protection in the entire EU could not be attained within a reasonable period. Therefore, after 12 Member States addressed a formal request to the Commission indicating that they wished to establish enhanced cooperation amongst themselves in the area of the creation of unitary patent protection, the Commission made on 14 Dec. 2010 a proposal for a Council Decision authorizing such cooperation (cf. document COM (2010)790 final).

5. See for an overview Lenaerts and Van Nuffel, *European Union Law*, 3rd ed. (Sweet & Maxwell, 2011, forthcoming).

Article 43 A TEU, which is more explicit on this point than the current Article 20(2) TEU, it seems reasonable to argue that the formal confirmation of the last resort must be enshrined in the authorizing decision, but some assessment thereof must be made at Council level prior to the Commission launching the enhanced cooperation process through the submission of a proposal for a Council authorizing decision. If not, the Commission would have difficulty to exercise in a meaningful way its right of initiative in that respect. It seems also clear that by its nature such an assessment of the last resort requires a substantial degree of political assessment.

- When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorizing decision and, where applicable, with the acts already adopted within that framework (hereinafter “the substantive acts”) (Art. 328 TFEU).
- The procedure to be followed in order to adopt such substantive acts is that prescribed in the Treaty provision constituting the legal basis (Art. 20(1) 1st sentence TEU). Although all members of the Council may take part in the relevant deliberations, only those representing participating Member States may take part in the vote (Art. 330 TFEU).⁶ The Council may decide that in cases where a Treaty provision applicable in the context of enhanced cooperation provides for the Council to act unanimously, decisions will be taken by qualified majority (Art. 333(1) TFEU). It may also decide that where a Treaty article requires decisions to be adopted under a special legislative procedure, decisions will be taken under the ordinary legislative procedure (Art. 333(2) TFEU).

Any Member State wishing to participate in enhanced cooperation in progress shall notify its intention to the Council and the Commission. Within four months of the date thereof, the Commission confirms such participation, whilst noting that the conditions of participation have been fulfilled or, as the case may be, adopting any transitional measures necessary with regard to the application of the substantive acts already adopted within the framework of enhanced cooperation. Where the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted within a certain deadline. On the expiry of that deadline, it shall re-examine the request. If the Commission considers that the conditions have still not been met, the Member State concerned may refer the matter to the Council,

6. This follows from the fact that legal acts adopted in the framework of enhanced cooperation are legal acts of the Union to which the rules of the Treaties apply unless otherwise specified; in other words, they cannot be considered to be international agreements between the participating Member States and must therefore be dealt with in accordance with Art. 330 TFEU.

which shall decide on the request and may in that context adopt the necessary transitional measures on a proposal from the Commission (Art. 331 TFEU).

Given the full jurisdiction of the Court of Justice in the context of enhanced cooperation, it would seem that in particular the following decisions referred to above can be reviewed:

- the authorizing decision;
- decisions allowing Member States to participate to enhanced cooperation already established;
- substantive acts.⁷

Some institutional questions

As pointed out by Dougan,⁸ the major question facing the Union in the context of enhanced cooperation is how to manage diversity among the Member States while still preserving the core values of the EU legal order. There are many aspects to this question, on most of which no light can be shed yet failing sufficient practice in the application of the Treaty rules on enhanced cooperation. But the question has an institutional dimension which may be clarified to some extent already now, i.e. whether the establishment of enhanced cooperation leads to a Union *à taille réduite*, i.e. a Union acting within its well-established legal order and only adapted to a reduced number of Member States, or to a Union *à porte tournante*, i.e. a much looser form of EU integration and/or cooperation in a specific area allowing e.g. an individual Member State to subject its participation to enhanced cooperation to its own conditions and to join or leave it as it sees fit. As will be explained below, the answer to this question is relevant in various stages of the process leading to the establishment of enhanced cooperation.

Agreement on scope and objectives of enhanced cooperation.

To begin with it should be recalled that the scope and objectives of enhanced cooperation are determined, above all, by the Council authorizing decision which, however, should not be interpreted in isolation but must be read in conjunction with: (i) the requests of the Member States wishing to embark on enhanced cooperation; (ii) the Commission proposal for a Council authorizing decision; and (iii) the European Parliament's consent to the authorizing decision. Since at least nine Member States must request enhanced cooperation

7. See e.g. Lenaerts and Van Nuffel, op. cit. *supra* note 5, and Blanke in Grabitz, Hilf, Nettesheim (Eds.), *Das Recht der Europäischen Union*, 41. EL 2010, Art. 20 EUV, § 30.

8. Dougan, "The unfinished business of enhanced cooperation: Some institutional questions and their constitutional implications", in Ott and Vos (Eds.), *Fifty Years of European Integration – Foundations and Perspectives* (T.M.C. Asser Press, 2009), p. 157.

and are required under Article 329(1) TFEU to specify the scope and objectives of the proposed enhanced cooperation, their respective requests must converge on these two elements.⁹ If that were not to be the case, a formal requirement for enhanced cooperation set by the Treaty is simply not met. Indeed, if they don't fully agree on these two elements, the threshold of nine is not reached. For the same reason, the three subsequent acts of the EU institutions should not diverge from the views of at least nine Member States in that respect either. In other words, there must be a *tronc commun* as regards scope and objectives of enhanced cooperation. If a Member State other than the first nine or more Member States wishes to participate, either by submitting on the basis of Article 329(1) TFEU a request *before* the authorizing decision is adopted or by notifying on the basis of Article 331(1) TFEU the Commission of its intention to participate *after* the adoption of that decision, each of these requests or notifications must be *unisono* in terms of scope and objectives as well, at the risk of being inadmissible, leaving thus little or no room for specific conditions deviating from the *tronc commun*. Of course, one cannot rule out that the first nine or more Member States and the EU institutions are willing to accept additional conditions, but in that case their respective original positions need to be formally adjusted in accordance with the Treaty rules or, alternatively, must have been drafted in such wide terms that one can reasonably argue that they encompass the changes as requested.

Joining enhanced cooperation

It is true that the Treaty deals with the initial trigger whereby the Commission must decide what follow-up it gives (Art. 329(1) TFEU) and it deals with participation after authorization has been given by the Council (Art. 331(1) TFEU), but it does not deal with the intermediate phase. However, the whole *rationale* of the Treaty in relation to enhanced cooperation is to have as many Member States as possible and thus not to have impediments to such participation.¹⁰ Thus no impediments should be put in the path of Member

9. See e.g. the joint letter of the first 10 Member States formally requesting the establishment of enhanced cooperation between themselves in the area of a unitary patent protection. The letter can be found at <www.diplomatie.gouv.fr/fr/IMG/pdf/Request_leeter_enh_coop_definitive.pdf>. It was followed by a letter of the UK Government also requesting the Commission to submit a proposal to that effect (<www.ipo.gov.uk/commissairebarrier.pdf>). In the same letter, the UK Government nevertheless expressed reservations about its continued participation in this request "in the event that the Court concludes that it requires additional jurisdiction not currently available under the Treaties". This refers to the Court opinion announced on 8 March 2011, which has been requested in relation to the compatibility of the EU Patent Agreement and the role of the Court in these arrangements.

10. See the deliberations of the European Convention on enhanced cooperation (document CONV 723/03): "Moreover, in accordance with the principles of openness, it is suggested that

States wishing to be part of the personal scope of the authorizing decision, although one could argue that it requires a formal modification of the Commission's proposal for such a decision. As to the matter of Member States joining in after the authorization decision and the interpretation of Article 331(1), it is submitted that that provision cannot be read in isolation. Again, one must start from the premise that enhanced cooperation being a regulated exception to the general rule of a Union à 27 the *leitmotiv* is to have wide participation. This is set out in Article 328(1)(2) TFEU: "The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible". It is also to be noted that Article 328(1)(1) talks about enhanced cooperation "being established" and thereafter of enhanced cooperation also being open at any other time. Reading this in combination with Article 331 TFEU which refers to enhanced cooperation "in progress", it seems reasonable to conclude that in order to give a meaning to both concepts – that of being "established" and "in progress" – and to abide by the notion of "no impediments", the Article 331 TFEU procedure implying Member States notifying and the Commission confirming can be invoked at any time after the authorizing decision has been taken and irrespective of whether a substantive act has been adopted or not.

When and how can a Member State withdraw from enhanced cooperation?

Can an individual Member State withdraw from enhanced cooperation and if so, is there a time limit to do so? Again, this is a question not dealt with explicitly by the Treaty and to which therefore no crystal clear answer can be given. It is striking that academia has given little attention to it.¹¹

the discretionary power of the Commission (or the Council) be limited by stating that a negative decision on participation may be based solely on failure to meet any objective conditions which may have been laid down in the basic authorizing decision."

11. An exception is Blanke, op. cit. *supra* note 7, § 53 who points out that, arguably, the right to withdraw could be considered as an *actus contrarius* of the right to participate and that there are parallels with the question whether withdrawal of the EU is possible, but that question, in the meantime, has been resolved through the introduction of Article 50 TEU. Blanke himself considers that a Member State can be authorized to withdraw but does not specify which procedure to follow in such a case. As regards the admissibility of unilateral withdrawal or withdrawal on serious, exceptional grounds, he merely claims that this should be decided along the lines of Arts. 354 and 344 TFEU and (unwritten) general principles of EU law. Finally, he argues that in such a situation there is no room for applying the partly diverging rules of international public law as codified in Arts. 54 et seq. of the Vienna Convention on the Law of Treaties. See also Derpa, *Die verstärkte Zusammenarbeit im Recht der Europäischen Union – Dogmatik, Interpretation und Praxis eines alternativen Integrationskonzeptes* (Boorberg Verlag, 2003), p. 225, claiming that for withdrawal of one participating Member State the agreement of the others is necessary and the number of participants as a result of the withdrawal may not drop below 9. The question is nevertheless whether such a decision, insofar as it would not take the form of a for-

Withdrawal of enhanced cooperation before the adoption of the authorizing decision

Prior to the adoption of an authorization decision, there is nothing to withdraw from. If the Commission has already submitted a proposal for an authorizing decision in reaction to requests from at least nine Member States, a Member State remains free to demand the removal of its name from the list of Member States listed in the proposal prior to its adoption by the Council. It is submitted that this is also possible in the case that as of result of such withdrawal, the number of requesting Member States drops below nine, the consequence being that the Commission proposal for an authorizing decision becomes obsolete since a formal requirement to launch enhanced cooperation is no longer met.

Withdrawal from enhanced cooperation after the adoption of the authorizing decision

What about withdrawal after the authorizing decision has been adopted but no substantive acts have been adopted yet? The answer to that question depends more than anything else on how the nature of enhanced cooperation should be defined.

Pursuant to Article 330 TFEU (and Art. 20(3) TEU) all members of the Council may participate in its deliberations in the context of an enhanced cooperation, but only members of the Council representing the Member States participating in the enhanced cooperation take part in the vote. Unanimity will be constituted by the votes of the representatives of the participating Member States only. Enhanced cooperation thus constitutes an exception to the rule that all Member States vote in the Council (see Art. 16 TEU). In that sense, one could argue that it establishes a Union *à taille réduite*. Participation in this reduced circle of Member States is entirely voluntary. Member States that do decide to participate are, however, bound by acts adopted in the framework of enhanced cooperation (Art. 20(4) TEU). While these acts do not bind non-participating Member States or candidates for accession to the EU as part of the *acquis*, for participating Member States they are just as binding as “regular” acts of the EU which, subject to the legal base in the Treaty, can be adopted by qualified majority against the will of some Member States and nevertheless bind them. In other words, according to this view, for participating Member States in a Union *à taille réduite* the framework of enhanced cooperation is no less binding than the framework established by the TEU and TFEU in a Union à 27.

mal modification of the authorizing decision, would not be founded on a (prohibited) derived legal base in the sense of the ECJ’s judgment in Case C-133/06, *Parliament v. Council*, [2008] ECR I-3189.

As indicated above, the main act establishing this binding framework is the authorizing decision pursuant to Article 329(1)(2) TFEU. This authorizing decision determines which Member States of the EU take part in the enhanced cooperation and thus take part in the vote in that framework. In addition to the personal scope of the enhanced cooperation, the authorizing decision also determines the material scope and objectives thereof (see Art. 329(1)(1) TFEU). Thus, one could argue that it crystallizes a new framework of cooperation between Member States and is therefore constitutional in nature. The scope – both material and personal – and objectives of the Commission’s proposal for this authorizing decision are established on the basis of Member States’ requests addressed to the Commission pursuant to Article 329(1) TFEU. One could infer therefrom that once the authorizing decision is adopted, withdrawal is only possible during this period subject to a procedure based on Article 329(1) TFEU, i.e. such a withdrawal would require an adjustment of the authorizing decision to reflect the reduced number of participants. Following this reasoning, this modification would, like the initial authorizing decision, need to be proposed by the Commission and receive the consent of the European Parliament. This modification would be necessary to ensure that the authorizing decision and the subsequent substantive acts are identical in personal scope, i.e. as regards the list of participating Member States. In other words, allowing unilateral withdrawals without adapting the authorizing decision would be irreconcilable with the alleged constitutional nature of the authorizing decision. As pointed out earlier, in view of this constitutional act, Article 331 TFEU explicitly provides for a *unionized* procedure for Member States to join an authorized enhanced cooperation in progress, i.e. for a procedure involving the EU institutions in order to enlarge the personal scope of the authorizing decision. The Commission’s involvement would be justified given the fact that as a “Guardian of the Treaty” it needs to ensure that the conditions for enhanced cooperation continue to be observed,¹² whereas the Parliament’s involvement would provide some democratic legitimacy. More generally, Article 334 provides that the Council and Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union. If withdrawal, i.e. a reduction in the personal scope of the enhanced cooperation, were possible as a result of a unilateral decision of the Member State in question, this would be strangely asymmetrical – especially since a reduction in the number of participating Member States may be detrimental to reaching the objectives of the

12. Cf. also the European Convention deliberations (document CONV 723/03 referring to the French-Dutch contribution CONV 644/03): “Furthermore, some members have stressed the importance of the Commission’s role in initiating and implementing enhanced cooperation in order to protect the interest of the Union as a whole.”

enhanced cooperation as proposed by the Commission and authorized by the Council with the European Parliament's consent. At least in theory, one cannot rule out that the institutions might not have proposed, adopted or given their consent to an enhanced cooperation with fewer Member States participating than originally (i.e. at the moment of adopting the authorizing decision) foreseen. In other words, one could argue that through the modification of the authorizing decision the EU institutions should be put in a position to assess matters afresh.

The Treaties are clearly open to increasing the number of participating Member States (see Arts. 328(1), 331 TFEU), but there would not seem to be such "inherent bias" for a reduction of that number, unless one takes the view that participation to enhanced cooperation is based on a voluntary act of each individual participating Member State and the corollary thereof should be a Member State's freedom to change its will at any stage of the process. Without such flexibility, arguably, it would be more difficult for a Member State to participate to any enhanced cooperation, whereas the purpose of the Treaty rules governing such cooperation is exactly to promote as much as possible participation thereto. In simpler terms, one could imagine a Member State wondering whether it is reasonable to expect from it that it gets into something if it doesn't know how to get out of it, in particular if it does not know beforehand what the substantial acts will look like? This approach, implying the availability of a revolving door (*porte tournante*) in cases of enhanced cooperation, would be an expression of the view, albeit not uncontroversial, according to which each Member State remains free to do what it sees fit unless the Treaty explicitly restricts that freedom. Such a view, of course, affects the stability of the legal framework that the authorizing decision is supposed to create. Indeed, the authorizing decision would in that case not allow the Council to establish with certainty how many votes constitute a qualified majority for the purpose of adopting future substantive acts in the framework of the enhanced cooperation. If Member States can simply leave in the middle of the process leading to the adoption of such substantive acts, the authorizing decision would have failed to provide the necessary legal certainty in order to ensure the orderly course of the legislative proceedings. One could imagine a situation where a qualified majority during the first reading of a proposal is different from that applicable in the second reading, simply because a Member State does not like the evolution the legislative process has taken in the first reading and therefore decides to pull out during the second reading. But again, one cannot deny that in the event a Member State decides after the adoption of the authorizing decision to join enhanced cooperation in accordance with the procedure set out in Article 331(1) TFEU, the calculation of votes in order to determine whether a qualified majority is in favour of a proposal also changes. However, in such a

hypothesis that would be the result of a *unionized* procedure in the sense described above and not merely of a unilateral act of that Member State. These anomalies need to be nuanced, though, for practical reasons. Enhanced cooperation will normally be engaged in cases where the unanimity rule has prevented the Union à 27 to proceed in a given policy area. Consequently, the same unanimity rule will apply in the framework of enhanced cooperation and would enable the Member State wishing to withdraw to *de facto* force the other Member States and EU institutions to accept such withdrawal, failing which the Member State in question can simply veto the adoption of any substantive act in the framework of enhanced cooperation.¹³

Withdrawal from enhanced cooperation after the adoption of substantive acts

Once acts have been adopted in the framework of an enhanced cooperation, withdrawal should no longer be possible. Indeed, acknowledging in such a scenario a right to withdraw would lead to an unmanageable situation in that no legal certainty would exist as to which Member States are and remain bound by the substantive acts already adopted within the framework of enhanced cooperation, to what extent, and *vis-à-vis* which Member States.

Concluding remarks

Some commentators¹⁴ have expressed surprise at the fact that, despite the proliferation of EU membership and the increasing diversity of the EU, enhanced cooperation has not been more successful. Following an examination of the requirements that need to be met in order to enable this type of cooperation to be launched, they conclude that this lack of success could be explained by the fact that the relevant Treaty provisions give a clear preference to ensuring the uniformity of the EU legal framework over the effectiveness of the enhanced cooperation mechanism as an instrument of “flexibility”. Quoting the example of the Prüm Convention on stepping up cross border cooperation particularly

13. A related but distinguishable case is the rather hypothetical situation, commonly referred to as the “Trojan horse” scenario, where an “unwilling” Member State would join the enhanced cooperation with the sole objective of using its veto right in order to “kill” it. see Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos, 2004), p. 57, using the expression “deadly embrace” (*tödliche Umarmung*) in this context and claiming that from general rules of EU law it follows that in such case a Member State may be prevented from joining enhanced cooperation. Probably, the author refers implicitly to the duty of sincere cooperation enshrined in Art. 4(3) TEU. See also J.-J. Kuipers, “The law applicable to divorce as a test ground for enhanced cooperation”, (2011) ELR (forthcoming).

14. Amtenbrink and Kochenov, “Towards a more flexible approach to enhanced cooperation”, in Ott and Vos, op. cit. *supra* note 8, p. 181; Gaja, “How flexible is flexibility under the Amsterdam Treaty”, 35 CML Rev. (1998), 855.

in combating terrorism, cross border crime and illegal migration,¹⁵ concluded at a time that the subject matter of that Convention did fall within the remit of the Treaty's Third Pillar and the possibility of enhanced cooperation was (at least in theory) available under the Treaty for the parties to that Convention, they go as far as arguing that enhanced cooperation has failed effectively to constrain the emergence of closer cooperation *outside* the Treaty framework, and that the involvement of the EU institutions in the procedure may have deterred Member States from requesting participation to enhanced cooperation ("...this comes at the price of a potentially cumbersome inter-institutional bargaining in the run-up to the initiation of an enhanced cooperation"¹⁶). They therefore plead in favour of a "re-interpretation of the available provisions in a way that would allow them to serve their stated objective of providing flexibility".¹⁷ Still, one wonders whether these statements are entirely free of bias. As another commentator noted already in 1998 "scarcely any other area of European political and academic debate can offer such a wealth of terms and designations as our topic. These terms and designations are by no means value free. Thus, the choice of a particular term often means taking sides".¹⁸ It is indeed true that behind the use of different terms which *prima facie* seem to refer to the same phenomenon, such as those used in the title of these editorial comments, but also "flexibility", "differentiation", "closer cooperation", "multispeed", *géométrie variable*, "*à la carte*", often lie diverging views on what the precise nature is of the enhanced cooperation sought and how it should relate to normal cooperation/integration *à 27*. There is no doubt, therefore, that these views determine the interpretation of the treaty requirements for enhanced cooperation, and the looser that interpretation, the more the heterogeneity of the EU, as it becomes larger, will also lead to greater heterogeneity of (not only substantive but also institutional) EU law.

15. Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria, signed on 27 May 2005 in Prüm, Germany.

16. Amtenbrink and Kochenov, *op. cit. supra* note 14, p. 187. *Contra* Kortenberg, (1998) CML Rev: "The advantage of the provisions set out in the Treaty of Amsterdam is that they enable action to be taken in the Community framework which otherwise would be taken outside that framework". The author claims that seen in this way, enhanced cooperation, which in his view must be temporary, should be a factor for dynamism in the Union, and not division.

17. Amtenbrink and Kochenov, *op. cit. supra* note 14, p. 195.

18. Ehlermann, "Differentiation, flexibility, closer co-operation: The New Provisions of the Amsterdam Treaty", (1998) *ELJ*, 29.