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The Evolution of Supranational Differentiation

**Assessing Enhanced Cooperation,
the Area of Freedom, Security & Justice
and the Common Foreign & Security Policy
under the Treaties of Nice and Lisbon**

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I. INTRODUCTION

Whenever the process of European integration enters a critical stage some politicians or observers usually evoke the option of 'multiple speeds' with some EU Member States proceeding towards deeper integration while leaving the laggards behind. In practice, the European Union has so far not embarked upon a wide-spread differentiation of the integration process. There are however several sector-specific arrangements allowing some countries to adopt European legal rules which do not apply throughout the Union. Monetary union, the Schengen law and the general mechanism for enhanced cooperation are the most promi-

nent examples of the existing *acquis* of integration at multiple speeds. As pragmatic legal instruments they provide for the asymmetric realisation of specific policy projects among a limited number of Member States within the existing legal and institutional framework of the European Treaties. Their remarkable achievement is the accommodation of political diversity within the European legal order without contradicting its supranational character with its underlying quest for unity. Designed on the basis of the supranational integration method the existing manifestations of 'supranational differentiation' may not resolve fundamental disagreement about the future course of the European project, but contribute nonetheless to its continued dynamism.

The political debate usually distinguishes between the establishment of a 'federal core Europe' and the *à la carte*-logic of a principled freedom of the Member States to pick and choose the policy areas in which they want to participate. Despite their influence in the political realm these models have not been translated into Treaty provisions and will most probably remain conceptual pipe dreams in the foreseeable future (section II). Instead, the existing examples of supranational differentiation pursue a limited ambition and stem from political compromises at earlier intergovernmental conferences. In comparison to other instruments of flexible policy-making the existing forms of supranational differentiation are characterised by joint and distinct features: The differentiated legal effects do not flow from the contents of the legal act in question, but are the direct result of its general non-application in one or several Member States. Supranational differentiation within the meaning of this contribution is defined by the limited geographic scope of Community law and the corresponding suspension of the voting rights of the non-participating Member States in the Council (section III). It is no coincidence that the new arrangements for supranational differentiation were incorporated into the European legal order at a time when its focus shifted from economic integration to the gradual realisation of political union. Supranational differentiation has always been a tool for the accommodation of national political diversity among the Member States (section IV).

As the general mechanism for enhanced cooperation is not limited to certain Member States or specific policy areas, a better understanding of its procedural requirements and substantive constraints is crucial for the overall evaluation of supranational differentiation. The Treaty of Lisbon, which has replaced the ill-fated Constitutional Treaty, enhances the potential of the generic model of enhanced cooperation as an instrument for intra-constitutional dynamics (section V). The example of the Schengen law and the realisation of the Area of Freedom, Security and Justice illustrate that differentiated supranational law-making can operate smoothly without the participation of all Member States (section VI). Supranational differentiation thus contributes to the continued dynamism of the European project, while acknowledging its limits which are most visible in the field of foreign policy (section VII). On this basis, the theoretical perspective confirms that the asymmetric non-participation of individual Member States in selected areas of Union activity does not hinder the constitutional aspirations of the European Treaties. The existing mechanisms for supranational differentiation do not contradict the Community method; their strength is the accommodation of national political diversity with supranational integration through law (section VIII).

II. POLITICAL DEBATE

In a wider sense, the creation of the Common Market may itself be understood as an example of enhanced cooperation establishing a mutually beneficial customs union in accordance with Article XXIV GATT 1947. The Common Market forged economic bonds beyond the regular obligations under the international trading system of the time.¹ Similarly, the six founding members indirectly rebutted earlier attempts to promote European political, legal and cultural integration within the framework of the Council of Europe by establishing the European Communities as an avant-garde project. When we base our analysis on such a wide understanding of multiple-speed integration many features of international relations and European cooperation may indeed be interpreted as expressions of vanguard cooperation at multiple speeds.² For European lawyers, however, the centrality of the European legal order with its specific institutional and legal design argues for a narrow focus on multiple speeds in relation to the existing Treaties on which we shall zoom our binoculars in the following sections. Here, the political debate about differentiated integration started in earnest during the ‘eurosclerosis’ of the 1970s, when many observers and politicians became frustrated with the lacklustre advance of the integration project and perceived multiple speeds as an elegant way out of the political impasse.

1. Reflection of Economic Differences

In November 1974, the German chancellor Willy Brandt observed during a speech in Paris that ‘stark differences in the economic situation argue against the mechanic equal treatment of the Member States’ rights and obligations which might seriously impede the cohesion of the nine members.’³ One year later, Leo Tindemans followed down the path of multiple speeds when presented his renowned ‘Report on European Union’ in which he presented the blueprint for the realisation of monetary union:

‘It is impossible at the present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time. The divergence of their economic and financial situations is such that, were we to insist on this progress would be impossible and Europe would continue to crumble away. It must be possible to allow that: ... (1) those States which are able to progress have a duty to forge ahead, (2) those States which have reasons for not progressing, which the Council ... acknowledges as valid, do not do so, but will at the same time receive aid and assistance from the other States any to enable them to catch up to the others. This does not mean Europe *à la carte*: each country will be bound by the agreement of all as to the final objective to be achieved in common; it is only the timescales for achievement which vary.’⁴

¹ Cf. Art. XXIV Section 5 GATT 1947: ‘Accordingly, the provisions of this Agreement shall not prevent ... the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; provided that ...’

² For a historic account see Heinrich Schneider, ‘Kerneuropa – ein aktuelles Stichwort und seine Bedeutung’, *Journal für Rechtspolitik* 12 (2004), 136-61; available online as Working Paper No. 54 of the European Institute of the Vienna University of Economics and Business Administration, <http://www.wu-wien.ac.at/europainstitut/pub/workingpaper>.

³ Willy Brandt, ‘Rede vor der Organisation Française du Mouvement Européen’, Europa-Archiv 1975, D33-8 at D36 (own translation).

⁴ Leo Tindemans, Report on European Union, 29 December 1975, Section III.A.2; available online at <http://www.ena.lu/mce.swf?doc=16956&lang=2>.

Tindemans is careful to conceptualise the differentiated realisation of monetary union as a response to objective differences. Different speeds are construed as a necessity to overcome the blockade of the integration process in the light of objective economic and financial differences among the Member States after the oil crisis and the disintegration of the Bretton Woods systems of fixed exchange rates. Not political will but economic discrepancies guide the distinction among Member States. Different speeds were not yet perceived as an instrument for the accommodation of political diversity. One may identify this objective approach as an expression of the neo-functionalist logic of single market integration which construed the progress of economic integration as the result of depoliticised spill-over effects.⁵ Correspondingly, Article 27 TFEU foresees that differences in treatment among the Member States during the establishment of the Single Market may 'take the form of derogations ... of a temporary nature.' Indeed most commentators assumed at the time that European primary law required derogations to be temporary exceptions to be phased out reflecting the approximation of economic realities.⁶

Multiple speeds as an response to objective economic differences were put into practice in the Treaty of Maastricht with the phased realisation of economic and monetary union on the basis of the objective convergence criteria reflecting the Member States' macroeconomic performance. But at the same time, monetary union comprised the political opt-outs of the United Kingdom and Denmark. Similarly, all later examples of supranational differentiation follow the political logic that Member States may decide on political grounds whether to participate in new projects. We shall see that they principally concern policy areas such as justice and home affairs, foreign policy, tax harmonisation or social protection which are closely related to the concept of political union. They do not contradict the original motivation of multiple speeds as a reflection of economic differences, but complement it with political discretion which allows for the accommodation of political diversity in related policy fields of positive integration (sections III and section IV). In the political debate, the introduction of these new forms of differentiation has been accompanied by far-reaching political calls for the establishment of a 'hard federalist core' or the *à la carte*-logic of a variable integration geometry. Both concepts have guided the debate on differentiated integration in recent years, but never found their way into specific Treaty provisions.

2. 'Federal Core Europe'

Whenever the process of European integration enters a critical stage politicians usually evoke the option of 'multiple speeds.' More specifically, the idea of establishing a 'federalist core Europe' became popular among French and German politicians in the 1990s when the experience of the Maastricht Treaty with its opt-outs for the United Kingdom and Denmark

⁵ For neo-functionalism in political science see Philippe Schmitter, 'Neofunctionalism', in: Wiener and Diez (ed.): *European Integration Theory* (OUP, 2004), pp. 45-74.

⁶ See Claus-Dieter Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', *Michigan Law Review* 82 (1984), 1274-93 at 1291-2, Christine Guillard, *L'Intégration différenciée dans l'Union européenne* (Bruylant, 2007), pp. 324-52, Hervé Bribosia, 'Différenciation et avant-gardes au sein de l'Union européenne', *Cahiers de droit européen* 36 (2000), 57-115 at 61 and the typology of the existing forms of differentiations in Community law at the time by Eberhard Grabitz and Constantin Iliopoulos, 'Typologie der Differenzierungen und Ausnahmen im Gemeinschaftsrecht', in: *ibid.* (ed.): *Abgestufte Integration* (N.P. Engel, 1984), pp. 31-46. See also, on the interpretation of the original Art. 226(2)(3) EEC ECJ, Case C-212/96, [1998] ECR I-743, *Chevassus-Marche*, paras. 37 and 41: 'It follows that the Council cannot, on any view, authorise a system of general or systematic exemptions', the Community institutions may 'authorise only strictly necessary derogations for limited periods'.

and the prospect of enlargement signalled that the ultimate aim of the Schuman declaration to be 'a first concrete foundation of a European federation'⁷ could hardly be achieved with the participation of all Member States. Instead the idea gained prominence that the reluctance of some Member States could be circumvented by the establishment of a 'federal core Europe.' When two prominent German politicians first voiced the idea in 1994 they caused a political storm, also because their proposals were largely interpreted as implying that Italy, Spain and some other Member States would not fulfil the convergence criteria for monetary union.⁸ As a result all later proposals were careful to highlight the inclusive character of the core Europe concept: The establishment of the federal core would follow the 'initiative by the founding members ... and some other willing and determined candidates.'⁹

The debate on the 'federal core Europe' gained momentum in the year 2000 when the German foreign minister Joschka Fischer presented his 'personal vision for ... the completion of Robert Schuman's great idea of a European Federation' in a speech at Humboldt-University in Berlin in which he set out his idea how to 'put into place the last brick in the building of European integration, namely political integration.' With a view to the forthcoming enlargement and the prospect of another unimpressive Intergovernmental Conference which eventually agreed upon the Treaty of Nice Fischer predicted that:

'... under pressure from the conditions and the crises provoked by them, the EU will at some time within the next ten years be confronted with this alternative: will a majority of member states take the leap into full integration and agree on a European constitution? Or, if that doesn't happen, will a smaller group of member states take this route as an avant-garde, i.e. will a centre of gravity emerge comprising a few member states which are staunchly committed to the European ideal and are in a position to push ahead with political integration?'¹⁰

His speech contained few specifications which could have guided the redrafting of the European Treaties – apart from the expansion of the general mechanism for enhanced cooperation 'on the further development of Euro 11 to a politico economic union, on environmental protection, the fight against crime, the development of common immigration and asylum policies and of course on the foreign and security policy.' The 'centre of gravity' among integration-friendly Member States thus developed would later 'conclude a new European framework treaty, the nucleus of a constitution of the Federation. On the basis of this treaty, the Federation would develop its own institutions' which effectively meant that 'Europe is established anew with a constitution.'¹¹ Such vague ideas are inherently difficult to evaluate legally, but from the point of view of European law the establishment of a parallel organisation would most probably be illegal.¹²

⁷ Robert Schuman, Declaration of 9 May 1950, available online at <http://www.ena.lu/mce.swf?doc=613&lang=2>.

⁸ Cf. Wolfgang Schäuble and Karl Lamers, Überlegungen zur europäischen Politik, 1994, at p. 7: 'hard core of the five (Germany, France, Benelux).'

⁹ Thus the Franco-German tandem of the 1970s Valéry Giscard d'Estaing and Helmut Schmidt, 'Time to Slow Down and Consolidate Around "Euro-Europe"', *International Herald Tribune* of 11 April 2000, p. 4.

¹⁰ Joschka Fischer, *From Confederacy to Federation - Thoughts on the Finality of European Integration*, Speech at Humboldt-University in Berlin, 12 May 2000, available at <http://www.ena.lu/mce.swf?doc=18824&lang=2>. Fischer borrowed central elements of his concept for the establishment of a 'federal core Europe' from the Quermonne Report of the French Commissariat Général du Plan, *L'Union européenne en quête d'institutions légitimes et efficaces* (Documentation française, 2000).

¹¹ Fischer (note 10).

¹² See Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos, 2004), pp. 315-8 and 359-61, available online at <http://www.ungleichzeitigkeit.de>; for the illegality of the original draft of the EEA

Fischer himself was 'certainly aware of the institutional problems with regard to the current EU that such a centre of gravity would entail.' Probably his proposal was never meant to serve as a blueprint for institutional reform; instead he emphasised that he was not speaking in his official capacity as foreign minister, but presented a 'personal vision' how to realise political union within the European federation. Arguably, the very concept of European political union based on a European constitution would have been rejected as unrealistic, if he had not limited to some willing Member States within a vague 'centre of gravity.' Thus, his speech kick-started the pan-European constitutional debate which later led to the European Convention drafting the Constitutional Treaty in which Fischer participated actively as a member, thereby working towards the realisation of his 'personal vision' with the equal participation of all Member States. Indeed, Fischer later explicitly gave up his original concept idea in favour of the reinforced general mechanism for enhanced cooperation enshrined in the Constitutional/Lisbon Treaty.¹³ His speech is therefore rightly remembered for its contribution to the constitutional debate, while its proposal for differentiated realisation has not been implemented.

One principal reaction to the Fischer speech at Humboldt-University was the address of the French President Jacques Chirac to the first chamber of the German parliament in June 2000 in which he responded directly to Fischer's proposals. Chirac put particular emphasis on the practicability of integration at multiple speeds, which should complement the current legal and institutional framework of the European Union with sector-specific supplements:

'C'est aussi de l'approfondissement des politiques, à l'initiative de ces pays ... qui souhaitent aller plus loin ou plus vite. Rassemblés avec l'Allemagne et la France, ils pourraient se constituer en un "groupe pionnier". Ce groupe ouvrirait la voie en s'appuyant sur la nouvelle procédure de coopération renforcée définie par la CIG et en nouant, si nécessaire, des coopérations hors traité, mais sans jamais remettre en cause la cohérence et l'acquis de l'Union... Faut-il que ces États concluent entre eux un nouveau traité et se dotent d'institutions sophistiquées? Je ne le crois pas. Soyons conscients que ce serait ajouter un niveau supplémentaire à une Europe qui en compte déjà beaucoup! Et évitons de figer des divisions de l'Europe alors que notre seul objectif est de préserver une capacité d'impulsion.'¹⁴

From the perspective of European law Chirac's concept has the advantage of being based on the legal and institutional *acquis* of European integration; it is therefore generally compatible with the current European legal order. His initiative certainly does not go as far as the Fischer proposal, but may serve as a blueprint for pragmatic and intermediate steps, based on the general mechanism for enhanced cooperation and complementary treaties concluded among the Member States on the basis of international law. Here, the linkage between the ultimate and often diffuse goal of political union within a federal Europe is much less evident, but nonetheless underpins Chirac's scheme. The composition of the pioneer group should not be arbitrary, but based on 'la volonté des pays qui décideront de participer à l'ensemble des coopérations renforcées' on the basis of 'un mécanisme de coordination souple, un secrétariat chargé de veiller à la cohérence des positions et des politiques des membres de ce groupe pionnier' with a thematic focus on the enhanced coordination of

Agreement see ECJ, Opinion 1/91, [1991] ECR I-6079, *European Economic Area I*, para. 71-2.

¹³ See his Interview with the Berliner Zeitung of 28 February 2004 and the Frankfurter Allgemeine Zeitung of 6 March 2004; on the reinforced mechanism for enhanced cooperation section V below.

¹⁴ Jacques Chirac, Address given in the Bundestag in Berlin, 27 June 2000, available online at <http://www.ena.lu/?lang=1&doc=18823>.

economic policies, justice and home affairs as well as foreign policy and defence.¹⁵ With its accentuation of intergovernmentalism underpinning of the 'federal core Europe' Chirac certainly presented a very French vision of the *finalité* of European political integration.

3. Europe à la carte

Conservative British politicians are among the most prominent supporters of *à la carte*-integration based on the principled freedom of the Member States to decide upon their degree of participation in common projects. Advocates of this integration method do deliberately not use the terminology of 'Europe à la carte' due to its negative connotations as a deflection from the orthodoxy of the Community method and the free-rider phenomenon of cherry-picking. Instead they speak of 'flexibility'¹⁶, 'network Europe'¹⁷ or 'concentric circles.'¹⁸ I shall nonetheless use the term 'Europe à la carte' in this contribution (in the same way as the term 'federal core Europe' is not used by its supporters). It appears to me as an appropriate description of the concept in a short slogan and shall have no negative undertones. Indeed, the proponents of European integration *à la carte* regularly underline that they do not call into question the *acquis* of European integration centred on the single market and related policies. They argue that it is incorrect to present their view as 'anti-European...; our position is not wrong only because it differs from others.'¹⁹ Instead, their understanding of *à la carte*-integration is designed to reconcile the desire for deeper integration on the European continent with the more Eurosceptic position of other Member States. In his response to the Fischer speech the then shadow foreign secretary of the British Conservative Party Francis Maude explicitly argued:

'I think it is time that in Britain we accepted that among much of the political class on the continent the federalist drive towards full political union is alive and well... There is nothing dishonourable or evil in such a desire. It is simply a desire that very few in Britain share. A modern European Union must accommodate those who wish to retain their nationhood, while accepting that others may wish to abandon their own... So greater flexibility would reduce the constant tension between those countries which feel the process of integration is going too slowly and that others are holding them back, and those which feel they are being dragged against their will into a superstate. In short, a diverse and flexible Europe would be a Europe able at last to be at ease with itself.'²⁰

Being based on the divergent views on the future direction of the integration process Europe *à la carte* does not, in principle, call into question the uniform and joint achievements of past projects, such as the single market, but focuses on future projects such as justice and home affairs, foreign policy or defence instead.²¹ Integration *à la carte* does insofar overlap

¹⁵ *Ibid.*

¹⁶ John Major, 'Rede zur künftigen Gestalt Europas', Europa-Archiv 1994, D547-52.

¹⁷ The former party leader William Hague, 'Harmonization or Flexibility', in: Rosenbaum (ed.): *Britain and Europe* (OUP, 2001), pp. 287-92 and Francis Maude, 'Networks and Nations: Towards the New Europe', in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.): *Die Reform der europäischen Institutionen, Forum Constitutionis Europae, Band 3* (Nomos, 2002), pp. 27-40, available online at <http://whi-berlin.de/documents/maude.pdf>.

¹⁸ Edouard Balladur as French prime minister cited by F. Alain, Pour un nouveau traité de l'Elysée : L'Europe prudente de M. Balladur, Le Monde of 30 November 1994.

¹⁹ Major (note 16), at p. D547; but see repeated calls for the retrogression of existing Community policies at a last resort through an unilateral amendment of the European Communities Act 1972 which would effectively disapply certain European laws in the United Kingdom.

²⁰ Maude (note 17), paras. 50-5.

²¹ Cf. Major (note 16), at p. D549-52 and Maude, *ibid.*, paras. 41 et seq.

with the thematic orientation of ‘core federalism’, while assuming that changing coalitions would cooperate in different policy fields, thereby effectively rejecting the idea that some Member States should gradually move towards the federal end-stage within a prospective ‘federal core.’²² Insofar as the realisation of the Member States’ freedom to decide about their participation in new integration projects follows from clear Treaty provisions, the concept of Europe *à la carte* does not contradict the legal path of European integration. Indeed, the notion of *à la carte*-integration has influenced the completion of monetary union and the development of the Area of Freedom, Security and Justice which have both been realised on the basis of British and Danish opt-outs. Here, the political models about multiple-speed integration had their most tangible impact on the contents of existing Treaty provisions, whose legal analysis shall be the subject of the following sections.

III. MULTIPLE SPEEDS – ENHANCED COOPERATION – SUPRANATIONAL DIFFERENTIATION

Political concepts about European integration at multiple speeds have rarely been translated into specific Treaty provisions. If we adopt a wide understanding of differentiation based on the differential treatment of the Member States in European primary and secondary law, various instruments of flexibility have been an integral part of the European legal order since its beginning. Primary law contains various safeguard clauses which allow Member States to maintain or introduce more stringent national laws²³ or guide the legality of derogations from the fundamental freedoms²⁴. Numerous protocols attached to the European Treaties grant manifold exceptions and privileges to the Member States and their regions²⁵ and are complemented by the Member States’ differentiated treatment in secondary legislation, among which the ‘British exemption’ from the working time directive may be the most prominent example.²⁶ Under such a wide understanding of flexibility even the single market, which is often regarded as the sacrosanct ‘core’ of European integration, is subject to various degrees of flexibility and differentiation.²⁷

The flexible differentiation of the European legal order extends even further when we broaden our view to the national level of implementation and application of European law: From the point of view of citizens and companies concerned the late or imperfect transposition of directives, the differentiated implementation of framework rules and the factual non-application of European law by national authorities and courts result in a highly differentiated patchwork. Moreover, there have always been various forms cooperation among some or all Member States on the basis of international law outside the EU framework complementing European integration. As expressions of ‘old flexibility’²⁸ these ‘satellite’ treaties on the basis of international law were particularly prominent in the early years of European

²² Explicitly, Balladur (note 18): ‘l’Europe à venir ne saurait être ‘fédérale’.’ Similarly, Major, *ibid.*, at p. D548.

²³ See, for example, Art. 114(4)-(10), 153(4) and 193 TFEU.

²⁴ In Case C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmbH*, [2004] E.C.R. 1259 at para. 31 the Court recognises explicitly that ‘the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another.’

²⁵ One ‘minor’ example: the 1992 Protocol on the Acquisition of Property in Denmark.

²⁶ Cf. Art. 22 of Directive 2003/88 (OJ 2003 L 299/9); see also the transitional period for Austria, Belgium and Luxembourg on taxation of savings income in Art. 10 Directive 2003/48 (OJ 2003 L 157/38).

²⁷ See Gráinne de Búrca, ‘Differentiation within the “Core”? The Case of the Internal Market’, in: *ibid.* and Scott (eds.): *Constitutional Change in the EU* (Hart, 2000), pp. 133-72.

²⁸ Bruno de Witte, ‘Old Flexibility’, in: *ibid.*, pp. 31-58.

integration, when the European Communities were still entrusted with limited competencies. Many original examples of complementary treaties such as the WEU, the Schengen agreements, the Brussels Convention or the specific case of Maastricht's Agreement on Social Policy have in the meantime been incorporated into the European legal order after having successfully served as a laboratory for closer cooperation.²⁹

The most recent example of international cooperation as a laboratory for European integration was the 2005 Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration ('Prüm Convention'), which the European Union later integrated into the EU framework.³⁰ As long as international 'satellite' treaties comply with the Member States' prior obligations under Community law, including its primacy, these international treaties complementing the European Union remain an option for extra-Community cooperation to this date.³¹ The introduction of the general mechanism for enhanced cooperation discussed later does not lead to a different conclusion, since it does not prevent the Member States from cooperating internationally outside the Union framework – as long as they respect their prior obligations under Community law.³² In practice, the developments during the past 10 years however illustrate that many potential areas for extra-Community collaboration such as justice and home affairs and defence cooperation are rather being pursued within the EU framework.³³ This illustrates the dynamism of the EU legal framework – intra-EU-integration has proven its appeal, if necessary without the participation of all Member States.

Academic writing has proposed various systematic approaches to analyse and structure the aforementioned variety of flexibility instruments: In 1984, Eberhard Grabitz coined the generic term of differentiated integration (*abgestufte Integration*),³⁴ which Alexander Stubb later broke down to the triad of differentiation along the time factor, in space and on substance matters.³⁵ In their extensive monographs, Filip Tuytschaever and Dominik Hanf have

²⁹ For a more comprehensive analysis of the examples of complementary 'satellite' treaties and their relationship with European primary law see Thym (note 12), at pp. 171-202, De Witte, *ibid.*, and Armin Hatje, 'Grenzen der Flexibilität einer erweiterten Europäischen Union', *Europarecht* 2005, pp. 148-61 at p. 159-60. For the specific case of the Agreement on Social Policy which was linked to Maastricht's EC Treaty by means of the Protocol on Social Policy see Philippa Watson, 'Social Policy after Maastricht', *CML Rev.* 30 (1993), pp. 481-513.

³⁰ The substance of the convention arguably tried to establish *faits accomplis* determining the course of later EU policies, reflecting its 'pioneering role' which was explicitly foreseen in the Convention's preambular indent 3; cf. the critical account by the House of Lords Select Committee on the European Union: Prüm: An Effective Weapon against Terrorism and Crime?, 18th Report, Session 2006/07 and the analysis by Daniela Kietz and Andreas Maurer, 'Der Vertrag von Prüm: Vertiefungs- und Fragmentierungstendenzen in der Justiz- und Innenpolitik der EU', *Integration* 2006, 201-12. In 2008, the Prüm Convention was largely replaced by Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 2008 L 210/1).

³¹ On the primacy of European law over international treaties concluded among the Member States see ECJ, Case C-55/00, [2002] ECR I-413, *Gottardo* and my analysis in Thym (note 12), at pp. 297-320.

³² See Filip Tuytschaever, *Differentiation in European Union Law* (Hart, 1999), at p. 53 and 227, Bribosia (note 6), at p. 76, de Witte (note 28), at p. 57 and Thym (note 12), at pp. 305-8; contra Vlad Constantinesco, 'Les clauses de « coopération renforcée » : le protocole sur l'application des principes de subsidiarité et de proportionnalité', *RTD eur.* 33 (1997), 751-67 at 752 and Helmut Kortenber (pseudonym), 'Closer Cooperation in the Treaty of Amsterdam', *CML Rev.* 35 (1998), 833-54 at 845.

³³ In contrast to political predictions by Fischer, Chirac and others mentioned in section II above that these areas would lead to differentiated cooperation outside the Treaty framework.

³⁴ Grabitz (note 6).

³⁵ Alexander Stubb, 'A Categorisation of Differentiated Integration', *JCMS* 34 (1996), 283-95 at 287-8; this cate-

specified various degrees of ‘actual and potential’, ‘inter-state and intra-state’, ‘temporary and non-temporary’ and ‘general and specific’ differentiation.³⁶ From a legal point of view, the various examples of flexibility mentioned above which all fall within these categories have one thing in common: insofar as they are part of the EU legal order, the legal instruments concerned do in principle apply to all Member States with only their legal effects being suspended or modified with regard to some Member States. The law does not have a limited geographic scope which generally exempts a Member State from its geographic field of application. This common ground extends to transitional periods which have been a regulatory tool of successive enlargements. They also suspend the application of European law in the new Member States for the time period specified in the accession treaty; but once this period has elapsed, European law applies automatically.³⁷

Supranational differentiation as the focus of this contribution follows a more specific legal pattern: The differentiated legal effects do not flow from the contents of the legal act in question, but are the direct result of its general non-application to one or several Member States. Supranational differentiation in this meaning is defined by the limited geographic scope of Community law and the corresponding suspension of the voting rights of the non-participating Member States in the Council. Monetary union, the Schengen law and the general mechanism for enhanced cooperation are the most prominent examples of the existing *acquis* of supranational differentiation. This specific pattern was first introduced by the Treaty of Maastricht, when the Member States agreed on the asymmetric realisation of monetary union on the basis of the convergence criteria and political opt-outs for the United Kingdom and Denmark.³⁸ The initial introduction of supranational differentiation by the Maastricht Treaty illustrates its pragmatic character: Neither did it stem from the desire to establish a ‘hard federalist core’ besides or within the existing Treaty framework nor did it follow the *à la carte*-logic of a principled freedom of the Member States. By granting a political opt-out to two Member States and obliging the others to participate in monetary union on the basis of the convergence criteria, it was simply the only compromise on which the United Kingdom, which opposed monetary union in principle, and its continental partners, which argued for the equal participation of all, could agree.³⁹

The legal construct of country-specific opt-outs was taken up by the Treaty of Amsterdam, which formalised the Danish opt-out from defence cooperation and justice and home affairs under Title IV EC following the political compromise after the negative first referendum on the Maastricht Treaty.⁴⁰ More important, the Treaty of Amsterdam also introduced the gen-

gorisation has been taken up by various authors.

³⁶ See Tuytschaever (note 32) and Dominik Hanf, *Differentiation in the Law of European Integration*, Ph.D. thesis, Université de Liège 2002. Similarly, Guillard (note 6), at pp. 24-8.

³⁷ See, e.g., the 2005 Accession Treaty with Romania and Bulgaria (OJ 2005 L 157) on the possible suspension of the free movement of workers for a period of up to seven years in accordance with Art. 22 of the Act of Accession and the respective Annexes.

³⁸ For the convergence criteria see the transitional arrangements in Art. 139-42 TFEU and for the British and Danish opt-out note 48 below.

³⁹ For the negotiation history of the Maastricht opt-out on monetary Union see Jean-Victor Louis, ‘L’Union économique et monétaire’, in: *Commentaire Mégret, Le droit de la CE, Volume 6*, 2nd edition (Editions de l’Institut d’études européennes, 1995), 1-165 at 148; on the different political concepts of ‘federal core Europe’ and integration *à la carte* section II above.

⁴⁰ See the 1997 Protocol on the Position of Denmark, eliminating the legal uncertainties surrounding the ‘Edinburgh compromise’ of 1992 as analysed by Deirdre Curtin and Roland van Ooik, ‘Denmark and Edinburgh: Maastricht without Tears’, in: O’Keeffe and Twomey (eds.): *Legal Issues of the Maastricht Treaty* (Chancery Law

eral mechanism for enhanced cooperation, which is not limited to certain Member States or specific policy areas and does therefore provide a general framework for supranational differentiation in all areas of EU competence through the adoption of secondary legislation with limited geographic scope and the corresponding suspension of voting rights in the Council.⁴¹ At the same time, the incorporation of the Schengen law into the European legal order established a first example of enhanced cooperation – complemented by the opt-outs of the United Kingdom, Ireland and Denmark from the legislative realisation of the Area of Freedom, Security and Justice beyond the reach of the Schengen law under Title IV EC.⁴² On this basis, one of the growth areas of European integration has been realised without the participation of all Member States in the past years. Besides, specific forms of differentiation without the participation of all Member States are widely used in the Common Security and Defence Policy (CSDP) which will be reinforced by the Constitutional/Lisbon Treaty and shall be analysed later in this contribution.⁴³

Supranational differentiation is being characterised by its legal structure with a limited geographic scope and the suspension of voting rights in the Council. For any political or economic analysis the question of legal structure is not of primary importance, since the effects for the economy and the political effects of the various forms of differentiation understood in a wide sense do not necessarily vary substantially from the specific effects of supranational differentiation. But from the point of European constitutional and institutional law, the general limitation of the geographic scope and the suspension of voting rights in the Council matters, since it deviates from the orthodoxy of the Community method with its quest for unity and equal treatment. Supranational differentiation touches upon core assumptions of legal integration. This tension between supranational differentiation and the Community method and its possible resolution within the overall concept of supranational differentiation shall be the focus of this contribution. I do not engage in the political debate on whether the integration process should embrace new forms of flexibility transcending the present institutional and legal framework.

IV. ACCOMMODATION OF POLITICAL DIVERSITY

The ‘unity dogma’ has long characterised the European law discourse. In many of its landmark judgments the European Court of Justice had recourse to the ‘unity argument,’ such as in *Costa vs. E.N.E.L.*, where it rightly states that ‘the executive force of Community law cannot vary from one state to another ... without jeopardising the attainment of the objectives of the Treaty.’ Unilateral and subsequent national deviations could not be tolerated without the common rules ‘being deprived of their character as Community law and without the legal basis of the Community itself being called into question.’⁴⁴ Other expressions of the ‘unity dogma’ include the principle of non-discrimination enshrined in the fundamental freedoms and Article 18 TFEU which lie at the heart of the single market. Indeed, the establishment of a supranational legal order requires a continued focus on its uniform application in the Member States without which the effectiveness of European law is at stake. My intention is not to call into question the underlying rationale of this quest for unity. The aim of

Publishing, 1994), pp. 349-65.

⁴¹ More details in section V.

⁴² For more details section **Fehler! Verweisquelle konnte nicht gefunden werden.** below.

⁴³ See section VII below.

⁴⁴ Case 6/64, *Costa v. E.N.E.L.*, [1964] E.C.R. 585 at 594.

this contribution is rather to show that the asymmetric non-participation of individual Member States in selected areas of Union activity can be embedded into the existing European legal order and does not contradict its supranational character.

The most remarkable achievement of supranational differentiation is the accommodation of political diversity within the European legal order without contradicting its supranational character with its underlying quest for unity. Designed on the basis of the supranational integration method the existing manifestations of 'supranational differentiation' may not resolve fundamental disagreement about the future course of the European project, but contribute nonetheless to the continued dynamism of its existing institutional and legal structure. It is no coincidence that the new arrangements for supranational differentiation were introduced at the time of the Treaty of Maastricht with its shift from economic integration to the gradual realisation of political union. The neo-functional integration logic of the internal market, which arguably dominated European politics until very recently, regularly construed the integration process as an inevitable progress of macro-economic spill-overs. In such a system based on the elimination of barriers to trade through harmonisation and mutual recognition, the invocation of national interests or differences appears as illegitimate. Indeed, the early political debate on integration at multiple speeds emphasised that it responded to objective economic differences and did not construe distinctions among the Member States as an expression of political diversity.⁴⁵ Any call for permanent national opt-outs and privileges provoked the criticism of protectionism or social dumping, such as the initial British opt-out from the Agreement on Social Policy in Maastricht.⁴⁶

By contrast, supranational differentiation is based on the national political decision not to participate in certain integration projects. The existing legal provisions on supranational differentiation deliberately respect the autonomous decision of the Member States concerned. Political will, not objective economic differences, determine the geographic reach of the respective European measures. Economic and monetary union is illustrative of this new political character of supranational differentiation, since it holds a bridging function between the de-politicised integration logic of the internal market and political union: In a traditional vein, the convergence criteria follow the integration logic of the single market by establishing (quasi-)objective economic conditions whose fulfilment results in automatic participation in the single currency.⁴⁷ By granting the United Kingdom and Denmark a political opt-out from the third phase of monetary union, in addition to the convergence criteria applicable to all Member States, the Treaty explicitly recognises that the Union may proceed non-simultaneously. There is no guarantee that the two 'outs' will ever catch up with the *avant-garde* with the asymmetry continuing indefinitely.⁴⁸ The domestic decisions to let the people

⁴⁵ See the summary of the political debate in the 1970s in section II.1 above.

⁴⁶ In this respect Gisbert Brinkmann, 'Lawmaking under the Social Chapter of Maastricht', in: Paul Craig/Carol Harlow (eds.): *Lawmaking in the European Union* (Kluwer, 1998), p. 239-61 at 261 and Watson (note 29). See also, the predominant view in legal writing, referred to in note 6 above, that in the absence of clear Treaty provisions on supranational differentiation any derogation would have to be temporary and phased out reflecting the approximation of economic realities.

⁴⁷ This regime also governs the decision on the gradual participation of the new Member States in accordance with art. 140 TFEU. An evaluation of the new mechanism for enhanced differentiation against the background of the model of the convergence criteria ignores their traditional single market pattern, which the new form of supranational differentiation deliberately transcends; arguably the incorrect question does insofar ask Frédéric Allemand, 'The Impact of the EU Enlargement on Economic and Monetary Union', *ELJ* 11 (2005), 586-617; see however, similar as argued in this contribution, Guillard (note 6), at pp. 446-72.

⁴⁸ Nr. 1 of the Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern

decide in national referenda on their country's participation in the euro underlines the political character of the opt-out.⁴⁹

Similarly, the other forms of supranational differentiation grant the Member States concerned the political discretion to decide autonomously on their participation. They concern policy fields such as immigration and asylum, home affairs, criminal matters or foreign and defence policy, which are all closely associated with the concept and the *finalité* of political union. Here, the call for national opt-outs does not appear as an illegitimate distortion of competition, but as a legitimate positioning in the political discourse. Of course, the initial introduction of the various forms of supranational differentiation was the result of simple compromise packages which allowed the Intergovernmental Conferences concerned to agree on Treaty amendments and did not follow a master plan of supranational differentiation.⁵⁰ Conceptually this does however not contradict the remarkable 'democratic potential' of supranational differentiation underlined by Armin von Bogdandy: It allows respect for national democratic majorities without this majority, as a European minority, preventing the realisation of the European majority preference.⁵¹

Supranational differentiation is thus a specific expression of Europe's ever closer union being 'united in diversity', which the Constitutional/Lisbon Treaty would establish as the Union's symbolic motto. In this respect, supranational differentiation introduces a counterpoint to the teleological understanding of European integration with its presumption that 'more Europe' must be the outcome of the project.⁵² Complementing the principle of subsidiarity, it may serve as a valuable contribution to preserve and fine-tune the federal balance between the Union and its Member States.⁵³ If legal differentiation allows division without fundamental rupture, it requires mutual confidence among the Member States and a political maturity of the integration project, which may be facilitated by the legal and institutional rules of the respective Treaty provisions governing supranational differentiation. The general mechanism for enhanced cooperation deserves particular attention in this respect, since it is not confined to specific Member States or subject matters, but characterised by a geographic and thematic openness. We shall therefore analyse more closely in how far the general mechanism for enhanced cooperation is embedded in the legal and institutional framework of the European Union, facilitating its smooth operation in practice.

Ireland (1992): 'The UK shall notify the Council whether it intends to move to the third stage (of EMU).' Similarly the protocol on Denmark.

⁴⁹ Sweden does not have a similar political opt-out from EMU and its present non-participation in the euro is justified under reference to the incomplete independence of its central bank and the non-participation in the ERM II; see, e.g., European Commission, Convergence Report 2004, COM(2004) 690 fin. The Commission's decision not to press ahead with infringement proceedings against Sweden for failure to undertake the necessary steps to comply with the convergence criteria avoids a constitutional conflict which would call into question the foundations of the Union as a Community based on the rule of law.

⁵⁰ On the negotiating history of EMU see note 39 and accompanying text; similarly, the other country-specific opt-outs are the result of compromise packages during the Maastricht and Amsterdam IGCs.

⁵¹ Armin von Bogdandy, 'Europäische Prinzipienlehre', in: *ibid.* (ed.): *Europäisches Verfassungsrecht* (Springer, 2003), p. 149-204 at 180.

⁵² As argued by Jo Shaw, 'Constitutionalism and Flexibility in the EU: Developing a Relational Approach', in: de Búrca/Scott (note 27), p. 337-58 at 341.

⁵³ See Neil Walker, 'Sovereignty and Differentiated Integration in the European Union', *ELJ* 4 (1998), 355-88 at 375-8 and Hatje (note 29), at p. 151 et seq. and Urrea Corres (note 53), at pp. 171-206.

V. GENERIC MODEL: ENHANCED COOPERATION

A decade ago, the introduction of the general mechanism for enhanced cooperation has been called a 'Copernican revolution'⁵⁴ and hailed as the way out of the alleged dilemma between enlargement and deepening integration 'to strengthen the Union from within.'⁵⁵ Other commentators have however warned of 'constitutional chaos',⁵⁶ a 'blatant assault on'⁵⁷ and 'natural contradiction with'⁵⁸ the uniform application of Community law. This sharp contrast in opinion results from the overestimation of the potential of the general mechanism for enhanced cooperation on which the commentators project their respective hopes and fears which they associate with political concepts of flexible integration. After the first years of experience with mechanisms of supranational differentiation the time our evaluation of the functioning of the different instruments supports a different reading. In practice, neither the high expectations nor the deep concerns have materialised. Enhanced cooperation is neither the magic potion for the future success of European integration nor a deadly poison leading to a constitutional heart attack. Instead, it appears as a pragmatic new institute allowing for limited asymmetrical progress in specific situations, if the Member States cannot agree on the appropriateness of European action.

A closer look at the Treaty rules governing the establishment and functioning of enhanced cooperation shows that this is no coincidence. The constitutional regime for enhanced cooperation has been deliberately designed on the basis of the supranational integration method. As a pragmatic legal instrument it provides for the asymmetric realisation of specific policy projects among a limited number of Member States within the existing legal and institutional framework of the European Treaties. As a general mechanism it complements the specific forms of differentiation, such as monetary union and the Schengen cooperation, without laying the ground for a 'hard federalist core' or paving the way for the *à la carte*-logic of a principled freedom of the Member States to pick and choose the policy areas in which they want to participate. As enhanced cooperations are not limited to certain Member States or specific policy areas, a better understanding of their procedural requirements and substantive constraints is crucial for the overall evaluation of supranational differentiation. First introduced by the Treaty of Amsterdam under the name of 'closer cooperation', the legal bases were fundamentally reformed in Nice.⁵⁹ The Lisbon Treaty further increases the potential of enhanced cooperation as an instrument for intra-constitutional dynamics.

Generally speaking, enhanced cooperation provides for the adoption of regular European laws with a limited geographic scope and the corresponding suspension of the voting rights

⁵⁴ Renaud Dehousse cited by Constantinesco (note 32), at p. 752.

⁵⁵ A few weeks before the Nice IGC the Belgian prime minister Guy Verhofstadt, *A Vision for Europe*, Speech to the European Policy Centre, Brussels 21 September 2000 characterised enhanced cooperation as 'an instrument to strengthen the Union from within, an instrument of integration, not exclusion.'

⁵⁶ Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *CML Rev.* 30 (1993), 17-69 at 67, albeit not with regard to enhanced cooperation.

⁵⁷ Stephen Weatherhill, 'If I'd Wanted You to Understand I Would Have Explained It Better', in: O'Keeffe/Twomey (note 40), pp. 21-40 at p. 22.

⁵⁸ Constantinesco (note 32), at p. 758.

⁵⁹ On the reform agreed upon in Nice in contrast to the earlier Amsterdam provisions see Xavier Pons Rafols, 'Las cooperaciones reforzadas en el Tratado de Niza', *Revista de derecho comunitario europeo* 2001, 145-195, Stéphane Rodrigues, 'Le Traité de Nice et les coopérations renforcées au sein de l'Union européenne', *RMCUE* 2001, 11-16 and Tobias Bender, 'Die Verstärkte Zusammenarbeit nach Nizza', *Heidelberg Journal of International Law* 61 (2001), 729-770 (available online at <http://www.zaoerv.de>).

of the non-participating Member States. So far the mechanism has not contributed widely to the facilitation of European integration. Instead, the Lisbon Treaty undertakes the third reform of its legal regime without a single case of application besides the pre-existing Schengen Protocol, which is legally construed as a specialized form of enhanced cooperation.⁶⁰ The only occasion on which a recourse to the procedure has so far been seriously discussed was during Silvio Berlusconi's initial refusal to agree to the framework decision on the European Arrest Warrant in December 2001 – with the alternative of enhanced cooperation contributing to the softening of the Italian opposition as a 'veto-buster'.⁶¹ One future scenario illustrates how enhanced cooperation could operation in practice: the creation of a Common Consolidated Corporate Tax Base (CCCTB) as a first step towards the harmonisation of corporate taxation in Europe, which various Member States deem necessary to combat 'unfair tax competition'.⁶² Since the unanimous consent of all Member States is required for the adoption of the harmonisation measures appears unlikely, the Commissioner for taxation indicated his readiness to have recourse to the mechanism for enhanced cooperation.⁶³ A 'coalition of the willing' could then have adopted the respective directive(s) with limited geographic scope. But again, the proposal never got off the ground.

The hitherto limited practical impact of enhanced cooperation should however not come as a big surprise. It has already been argued that its introduction did not stem from an underlying drive for the realisation of 'hard federal core' or *à la carte*-integration, but rather offers a pragmatic compromise when the Member States disagree on the suitability of Union action. Arguably, a situation in which the non-participation of one or several Member States would have resolved a political impasse has not arisen so far. Enlargement from 15 to 27 Member States has not blocked the regular decision-making process which seems to function reasonably well despite the participation of more Member States. Moreover, the Member States seem to be inhibited by the idea of excluding themselves from European laws until the repeated and possibly trouble-free recourse to enhanced cooperation overcomes this stigma. Nonetheless, some commentators hold the Treaty regime responsible for its practical irrelevance.⁶⁴ By contrast, this contribution intends to show that its substantive constraints and procedural requirements are no excessive limitation, but rather guarantee its integration into the supranational legal order. Under the Nice Treaty we have to distinguish between the substantive criteria for any enhanced cooperation (see subsection 1) and pillar-

⁶⁰ For the incorporation of the Schengen law see section VI below.

⁶¹ See the letter to the editor by the then-chairman of the EP-Committee on Justice and Home Affairs and present leader of the ALDE-group in the EP Graham Watson, 'Go Ahead on Arrest Warrant Without Italy', *Financial Times* of 8 December 2001. The debate on the differentiated introduction of carbon dioxide taxes with a view to Spanish opposition never went much further; but see 'Europas Umweltschützer fordern „Öko-Schengen“', *Frankfurter Allgemeine Zeitung* of 15 August 2000.

⁶² This terminology was used by the coalition agreement of German 'grand coalition' of CDU, CSU and SPD of 11 November 2005, Section II.2.1.

⁶³ See the Commission Communication, Implementing the Community Lisbon Programme: Progress to date and next steps towards a CCCTB, COM(2006) 157 fin. of 5 April 2006 and the support for its differentiated realisation by Commissioner László Kovács in the interview: Single EU tax base planned for companies, *Financial Times* of 15 October 2005 in contrast to the opposition voiced by the internal market commissioner Charlie McCreevy, cited in the *Financial Times* of 11 November 2005.

⁶⁴ See, among many, the criticism of the Amsterdam and Nice regimes by Giorgio Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty', *CML Rev.* 35 (1998), 855 at 870; Wolfgang Wessels, 'Die Vertragsreform von Nizza', *Integration* 2001, 8 at 15; Jo Shaw, 'The Treaty of Nice: Legal and Constitutional Implications', *European Public Law* 7 (2001), 195 at 202; Josef Janning, 'Zweiter Anlauf: die ,verstärkte Zusammenarbeit' in Vertrag von Nizza', in: Weidenfeld (ed.), *Nizza in der Analyse* (Bertelsmann, 2001), 145 at 146.

specific procedural provisions (subsection 2). This regime was again reformulated in the Lisbon Treaty mirroring the changes first agreed upon in the European Convention which drafted the Constitutional Treaty (subsection 3). The table at the end of this section facilitates the comparison of the different Treaty regimes.

1. Substantive Constraints

Under the Treaty of Nice, the central Article 43 EU provides for a general catalogue of ‘ten commandments’⁶⁵ which any enhanced cooperation has to respect and which are complemented by sector-specific procedural rules described later. These ten substantive constraints facilitate the integration of enhanced cooperation into the European legal order and do not appear as excessive limitations of its potential. First, Article 43a EU guarantees the pragmatic character of enhanced cooperation as a way out of the blockade of the decision-making process by obliging the Council only to embark upon enhanced cooperation ‘when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.’⁶⁶ This procedural safeguard of ‘last resort’ is supplemented by other measures which guarantee that the complementary character of enhanced cooperation: it may not call into question the existing *acquis* binding all Member States⁶⁷ and precludes the later withdrawal of participating Member States.⁶⁸ Conceptually, enhanced cooperation does therefore not reverse the status quo and continues the tradition of ‘ever closer union’ as a one-way street which aims ‘at reinforcing (the) process of integration.’⁶⁹

Integrationist dynamics in some Member States are thereby aligned with the political wish of other Member States to refrain from participation. The only break with the integration logic of the Union’s founding years is the harmonious alignment of integrationist dynamics in some Member States with national political decisions to stay out of new projects. The latter may result from political disagreement over the orientation of the proposed action or the conviction that the issue under debate should better be dealt with at national level – in line with my earlier conclusion of supranational differentiation as a tool for the accommodation of political diversity (section IV). Indeed, most substantive requirements laid down in the ten commandments of Article 43(a)-(j) EU are declaratory confirmations of general principles of

⁶⁵ Kieran Bradley, ‘Institutional Design of the Treaty of Nice’, *CML Rev.* 38 (2001), 1095-124 at 1114.

⁶⁶ The new wording under the Treaty of Nice leaves this assessment with the Council and does not require a formal failure of the legislative process among all Member States; on dogmatic difficulties how to assess the a failure of the decision-making process in the absence of a Council decision see Guillard (note 6), at pp. 396-9 and Eric Philippart and Geoffrey Edwards, ‘The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union’, *JCMS* 37 (1999), 87-108 at 92. Art. 20(2) EU as amended by the Lisbon Treaty further clarifies the role of the Council in determining the compliance with the last resort criterion; cf. Hervé Bribosia, ‘Les coopérations renforcées’, in: Amato/ibid./de Witte (eds.): *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), pp. 623-44 at 631-3.

⁶⁷ Art. 43(c) EU explicitly states that any enhanced cooperation has to ‘respect the *acquis communautaire*.’ One may only consider the repeal of existing Community legislation for all Member States and the simultaneous initiation of enhanced cooperation for a grouping of some Member States on the same topic, effectively providing for the asymmetric retrogression of the integration process.

⁶⁸ In obvious contrast to the extensive procedural rules on the initiation of enhanced cooperation and the later participation of the initial ‘outs’ (see subsection 2 below), the Treaty does deliberately not foresee a later withdrawal. We may only consider the repeal of the measure in accordance with the Community legislative procedures (requiring the consent of the other Member States and Community institutions) and its re-adoption within a newly establish enhanced cooperation encompassing a limited circles of Member States.

⁶⁹ Art. 43(a) EU.

Community law substantiating its supranational credentials. The declaratory confirmations include the obligation to further the objectives of the Union and protect its interests – as any other Community law the institutions agree upon in the legislative process.⁷⁰ Likewise, the obligation to comply with the Treaties and the existing *acquis* adopted with the participation of all Member States⁷¹ and the condition to remain within the limits of the Union powers in line with the principle of conferral (and the exception of exclusive competences)⁷² are self-evident features of secondary European law which do not come as a surprise to any European lawyer. Other criteria are linked to the participation procedure discussed below.⁷³

Among the ‘ten commandments’ the minimum threshold for the participation of at least eight Member States is the only effective restriction⁷⁴ – excluding an enhanced cooperation of the ‘mythical’ six founding members and preventing a geographic fragmentation of European law. The necessary respect for the competences, rights and obligations of the non-participating Member States are inherent in the limited geographic scope of asymmetric Community law and does not require additional safe-guards beyond the non-application of the legislative acts adopted within enhanced cooperation in the territory of the *outs*.⁷⁵ This implies the limitation of the Community’s implied external *ERTA*-powers to the participating Member States, which the Court of Justice unfortunately ignores in its advisory opinion on the new Lugano Convention, when it stipulates an exclusive Union competence for its adoption despite the Danish opt-out from the internal Community measure of the Brussels Regulation.⁷⁶ Correctly, the Court should have stated that the Union has an exclusive external competence for the territory of 24 Member States, while Denmark may participate as an independent party to the convention in an asymmetric mixed agreement.⁷⁷

Since many Community policies such as social policy, tax harmonisation, environmental or consumer protection (as potential areas for the establishment of enhanced cooperations) have an economic dimension, the interpretation of Article 43(e), (f) EU is an important legal bottle-neck for any enhanced cooperation. Here, the obligation ‘not (to) undermine the internal market as defined in Article 14(2) EC’ is still relatively easy to define. Read in combination with the said reference, the Treaty of Nice commands compliance with the fundamental freedoms explicitly referred to in Article 14(2) EC – while European harmonisation measures

⁷⁰ Cf. Art. 43(a) EU; the requirement of protecting the Union’s interests and reinforcing the integration process do not constitute independent legal hurdles, since they are inherent in the Union’s objectives and assessed during the complicated authorisation procedure discussed below.

⁷¹ See note 67 above.

⁷² Art. 43(d) EU; the difficulty of defining the borderline of exclusivity will be facilitated by the enumeration of exclusive competences in Art. 3 TFEU. Also, the obligation to respect the principle of attributed powers is self-evident for every European activity under Art. 5 EU-Lisbon.

⁷³ On the openness for initial outs see Art. I-44(1) EU; the additional reference to the Schengen Protocol in Art. 43(i) EU corresponds to the *lex specialis*-principle.

⁷⁴ Art. 43(g) EU.

⁷⁵ Art. 43(h) EU; the rather unclear Amsterdam obligation to respect the ‘interests’ of the non-participating Member States had already been deleted by the Treaty of Nice.

⁷⁶ In its Advisory Opinion 1/03 [2006] ECR I-1145, the ECJ rightly notes in para. 135 that Denmark is not bound by Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1) and nonetheless concludes that the EC does insofar have an exclusive external competence to enter into agreements with third states on the same matter which would then bind Denmark as an integral part of the Community legal order.

⁷⁷ For more details see Thym (note 12), at pp. 269-95 and Catherine Schmitter, ‘Coopérations renforcées et compétences externes de la Communauté européenne’, in: Dony (Hrsg.): *L’Union européenne et le monde après Amsterdam* (Université libre de Bruxelles, 1999), pp. 77-106 at pp. 97-9.

under Article 14(1) EC are deliberately excluded from the prohibition and may therefore be enacted in the framework of enhanced cooperation. In this respect, asymmetry is again not treated any better or worse than regular European law or joint Member State activities: Member States are bound directly by the fundamental freedoms, also when they cooperate on the basis of international law.⁷⁸ And according to the Court's case law the European institutions are also bound by the fundamental freedoms as general principles of law⁷⁹ – an obligation which Article 43(e) EU now codifies for enhanced cooperation.

The additional prohibition in Article 43(f) EU to 'constitute a barrier to or discrimination in trade between Member States' presents us with the challenge of multilingualism and the eccentricities of European Treaty change. Space precludes a comprehensive presentation, but in short the following history supports my argument that the rule contains an additional obligation to respect fundamental freedoms and is therefore not as prohibitive as some commentators suggest.⁸⁰ The linguistic version of the Treaty of Amsterdam in, *inter alia*, English and German took up the wording of Article 36 TFEU and the Court's *Dassonville* jurisprudence and obliged enhanced cooperation not to constitute a 'discrimination or restriction of trade between the Member States'⁸¹ – a reference which was generally interpreted as a reference to the free movement of goods, also by French commentators.⁸² Only the French version of the Amsterdam Treaty contained a different wording. Comprehensibly, the French presidency based its reform proposals for the new Article 43(f) EU on the French text of the Amsterdam Treaty during the IGC drafting the Treaty of Nice – and aligned the other linguistic versions to it, thereby eliminating the textual reference to the free movement of goods and the *Dassonville* jurisprudence. This drafting history and the absence of another convincing interpretation suggests that Article 43(f) EU essentially obliges enhanced cooperation to respect the free movement of goods.⁸³ Thereby, the harmonisation of national legislation on the environment, consumer protection, taxes or social standards is not generally excluded from the scope of enhanced cooperation, while the fundamental freedoms as the 'core' of the internal market guarantee a level-playing field of equality of Union citizens and economic actors also in cases of enhanced cooperation.

⁷⁸ Cf. for double taxation agreements ECJ, Case C-307/97, *Saint-Gobain ZN*, [1999] ECR I-6161 and for cooperation in the field of culture ECJ, Case 235/87, *Matteucci v. Communauté française de Belgique*, [1988] ECR 5589.

⁷⁹ Thus the explicit case law since ECJ, Case 240/83, *Procureur de la République v. ADBHU*, [1985] 531 at para 9: "(I)t should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance." More generally, Miguel Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart, 1998), at p. 77.

⁸⁰ For example Armin Hatje, in: Schwarze (ed.), *EU-Kommentar* (Nomos 2000), Art. 11 EGV at para 11: 'entscheidend einschränkt.'

⁸¹ Art. 11(1)(e) EC (Amsterdam version) and, similarly, Case 8/74 *Dassonville*, [1974] ECR 837 at para 7.

⁸² See 3 commentators working in different languages: Kortenberg (note 32), at p. 849, Rainer Hofmann, 'Wie viel Flexibilität für welches Europa', *Europarecht* 1999, 713-35 at 724 and Constantinesco (note 32), at p. 761.

⁸³ I have developed this argument in more detail in Thym (note 12), at pp. 69-72. There, I also show that the additional prohibition of distortions of competition in Art. 43(f) EU should be interpreted in line with competition law, i.e. the Commission is obliged to assess and explain possible distortions in its decision (not) to propose the authorisation of enhanced cooperation under Art. 11(1) EC, while judicial review of these complex economic evaluations is largely confined to an examination of the underlying facts and the legal consequences the Commission deduces therefrom.

2. Procedural Requirements

If the substantive constraints for enhanced cooperation are largely declaratory confirmations of general principles of Community law, this does not imply that any enhanced cooperation supported by a sufficient number of the Member States will eventually be put into practice. Instead, European constitutional law foresees a sophisticated authorisation procedure which is – as any decision-making procedure – meant to feed different political opinions into a formalized outcome. Along the procedural requirements, the institutions will first assess compliance with the substantive constraints discussed above, whose adjudication is eventually left to the Court of Justice in cases of conflict.⁸⁴ But compliance with these largely declaratory legal constraints will probably not dominate the debate (although many academic observers tend to overstretch the implications of the substantive constraints and underestimate the role of political considerations). The main purpose of the authorisation and participation procedures is the exchange of the political pros and cons of asymmetric progress with various procedural safeguards guaranteeing that the issue is not hastened but thoroughly debated, thereby ideally guaranteeing that the Union as a whole agrees or can at least live with the new asymmetric arrangement.

The monopoly of initiative of the Commission lies at the heart of the Community method, since it guarantees that the legislative process is from the beginning orientated towards the ‘pure Community interest which it embodies and represents.’⁸⁵ It is therefore crucial that the Commission’s role as gatekeeper is extended to the authorisation of enhanced cooperation.⁸⁶ But in contrast to the regular legislative process the Commission may only table a proposal after a request from the Member States which want to cooperate. This divergence from Community orthodoxy would never have been accepted by the Commission in other policy fields to protect its independence, but was specifically sought for in cases of enhanced cooperation. It lays the, politically divisive, initiative for the initiation of enhanced cooperation on the Member States and allows the Commission to focus on its role as a neutral guardian of the Community interest without bias for the (non-)participating Member States. Again, it should be underlined that the Commission does not only assess compliance with the substantive constraints of the ‘ten commandments’ in its decision, but exercises an original political discretion on the suitability of asymmetric action. Even if all the legal requirements are met, the Commission may decide not to table an official proposal and ‘shall inform the Member States concerned about the reasons for not doing so.’⁸⁷

Any Commission proposal on the authorisation of enhanced cooperation is forwarded to the Council and the Parliament for further discussion and adoption. Mirroring its role in the legislative procedure, the Parliament has to give its assent when enhanced cooperation relates

⁸⁴ Any Member State or institution may challenge the authorisation to establish an enhanced cooperation (or the refusal of the Commission to present a proposal) in accordance with the general rules on access to the Court; see also Thym (note 12), at pp. 60-62.

⁸⁵ This characterization is given by its first President Walter Hallstein, *Der unvollendete Bundesstaat* (Econ, 1969) at 56 (own translation).

⁸⁶ Art. 11(1) EC; for the specific procedure in criminal matters under the third pillar see Art. 40a EU and its description by Mariola Urrea Corres, *La cooperación reforzada en la Unión europea* (Colex, 2002), at pp. 261-83. On the specificities in the field of CFSP see section VII below.

⁸⁷ Art. 11(1) EC. The academic literature does not always highlight the political discretion of the Commission; some authors even assume an obligation to present a proposal, if all the legal requirements are met; an overview of the debate may again be found in Thym (note 12), at pp. 48-50. In cases of conflict the ECJ will have to delimit the freedom of manoeuvre of the Commission on the basis of an action for failure to act.

to an area covered by co-decision and is only consulted in all other cases.⁸⁸ Eventually, the Council decides by a qualified majority vote (possibly after referral to the European Council for mediation purposes at the highest political level⁸⁹) on the go-ahead for supranational differentiation.⁹⁰ The procedural requirements governing the establishment of any enhanced cooperation are insofar no more restrictive than the substantive constraints – in contrast to the prohibitive version of the Treaty of Amsterdam which granted the non-participating Member States an effective right to veto its initiation.⁹¹ Josef Janning had insofar coined the term of ‘dynamism in a straightjacket’⁹² and Giorgio Gaja called for a ‘more flexible general mechanism of flexibility.’⁹³ The replacement of the unanimity requirement with its inherent veto option by qualified majority voting in the Treaty of Nice has met the criticism and ‘removed the straightjacket.’⁹⁴

As mentioned earlier the procedural requirements are meant to channel the political debate into a typical European decision-making procedure with two supranational (Commission, Parliament) and two intergovernmental (Council, European Council) control bodies evaluating the suitability of supranational differentiation. They are neither too restrictive nor too loose but, as often in Europe, a vehicle for compromise and eventual consensus, thus guaranteeing that political diversity is accommodated within the supranational legal order. On the basis of the initial authorisation, the Community institutions and the participating Member States may proceed with the adoption of the measures envisaged in the authorisation decision. With the sole exception of the suspension of the voting rights of the non-participating Member States in the Council the regular decision-making procedure applies in this respect.⁹⁵ Also enhanced cooperation must be open for non-participating Member States, if it is to facilitate division without fundamental rupture. Indeed, the European Treaties have always guaranteed this “‘essential principle of openness’⁹⁶: Any closer cooperation shall initially ‘be open to all Member States’ and ‘at any time ... subject to compliance with the basic decision and with the decisions taken within that framework.’⁹⁷ The decision authorising the later participation of initial ‘outs’ is taken by the Commission alone and will usually be positive, in line with its obligation to ‘ensure that as many Member States as possible are encouraged to take part.’⁹⁸

⁸⁸ See Art. 11(2) EC.

⁸⁹ The referral to the European Council was demanded by the British delegation in Nice in return for their agreement to the establishment of enhanced cooperation by qualified-majority voting, expressing the British understanding of the European Council as the ultimate arbiter among the Member States; for more details see, again, Thym (note 12), at pp. 50-2.

⁹⁰ See Art. 11, 11a EC; for police and judicial cooperation in criminal matters see Art. 40a(2) EU and for the common foreign and security policy Art. 27c EU, which require unanimity in most circumstances.

⁹¹ See the Amsterdam version of Art. 40(2) EU, 11(2) EC in contrast to Art. 40a(2) EU, 11(2) EC as amended by the Treaty of Nice.

⁹² Josef Janning, ‘Dynamik in der Zwangsjacke: Flexibilität in der Europäischen Union nach Amsterdam’, *Integration* 1997, 285 at 285.

⁹³ Gaja (note 64), at p. 870.

⁹⁴ Claus Giering and Josef Janning, ‘Flexibilität als Katalysator der Finalität?’, *Integration* 2001, pp. 146 at p. 154.

⁹⁵ As foreseen explicitly in Art. 44(1) EU.

⁹⁶ Claus Dieter Ehlermann, ‘Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty’, *EUJ* 4 (1998), pp. 246-70 at p. 254.

⁹⁷ Art. 43b EU.

⁹⁸ *Ibid.*; the Commission decision on participation is foreseen in Art. 11a EC; for the rather sophisticated participation procedure in criminal matters see Art. 40b EU.

3. Lisbon Treaty

Differentiation did not feature prominently on the agenda of the European Convention drafting the Constitutional Treaty. Instead, its pan-European composition favoured homogeneous constitutional solutions for the entire Union. Questions of institutional reform which dominated the debate necessarily required the consent of all Member States by means of Treaty amendment. Thus the Convention did not set up a working group on differentiation and discussed related issues only at the margins of substantive policy questions.⁹⁹ It nonetheless agreed on a comprehensive rearrangement of the Treaty regime for enhanced cooperation, which was later integrated into the Lisbon Treaty signed in Lisbon in December 2007. In a remarkable dry-run exercise of legal drafting the future Treaty regime for enhanced cooperation constitutes the second successive revision of the original Amsterdam version and later Nice provisions, which both have not been put into practice a single time and remained *lettre morte*. In substance, not much has changed however besides the numeration and order of the Treaty articles. The synopsis in the annex to this chapter supports academic observers in their orientation between the different regimes of the Treaties of Amsterdam and Nice as well as the Constitutional and the Lisbon Treaty.

In line with the original idea of distinguishing between general provisions in the Constitution's Part I and detailed rules in Part III, the Convention Presidium proposed a general article on enhanced cooperation which later became Article I-44 Constitutional Treaty and was complemented by procedural and substantive details in Part III of the Constitutional Treaty.¹⁰⁰ The Lisbon Treaty continues this drafting technique with a general Article 20 in the EU Treaty and detailed rules on the establishment and functioning of enhanced cooperation in the Treaty on the Functioning of the European Union (Part VI, Title III, Articles 326-334). Since both Treaties 'shall have the same legal value' (Article 1(3) EU) the distinction between the general provision and technical rules has no direct legal implications.¹⁰¹ Rather the introductory Article 20 EU presents students and interested citizens with the general idea of enhanced cooperation, while the procedural and substantive details in the Treaty on the Functioning of the European Union remain the domain of the legal experts and policy-makers. The prominent position of the general article in the EU Treaty may nevertheless be regarded as a symbolic expression that the Union takes the option of supranational differentiation seriously and does not hide it in obscure protocols attached to the main Treaty as it did with the first examples of flexibility.

The new order of the Treaty provisions continues the substance of most rules governing the establishment and functioning of enhanced cooperation which are laid down in the Treaty of Nice and were described earlier. More specifically, the substantive requirements of the new Treaty regime are largely identical with the 'ten commandments' of the present Article 43(a)-(j) EU. The explanatory memorandum accompanying the original draft version of the new provisions explicitly states that: '(t)he aim of these draft articles is principally to simplify the wording and structure of the current provisions on enhanced cooperation... The proposed new structure is based more on thematic criteria than on the present grouping by pillar, which will no longer be present in the Constitution.'¹⁰² In some cases, the simplification

⁹⁹ Such as in the field of defence cooperation presented in line with section VII below.

¹⁰⁰ See Articles III-416-23 in Title VI, Chapter III.

¹⁰¹ The simplified amendment procedure under Art. 48(6) EU does not extend to Part VI of the Treaty on the Function of the European Union with its provisions on enhanced cooperation.

¹⁰² Presidium Draft on Enhanced Cooperation, 14 May 2003, Convention doc. CONV 723/03, at p. 2.

tion implies new ambiguities, especially in the case of the prohibition not to 'undermine the internal market or economic, social and territorial cohesion'¹⁰³, which discontinues the references to the fundamental freedoms and the legal bases for regional policy in the Treaty of Nice. This ambiguity can however be overcome by means of historic interpretation under recourse to the present Article 43(e) EU which the Convention did not intend to modify.¹⁰⁴

The only substantive amendment, which was also debated with some controversy in the Convention plenary, was the Constitutional Treaty's participation threshold of one third of the Member States instead of 8 Member States in the Nice Treaty¹⁰⁵ – before the Lisbon Treaty returned to a quantitative quota of nine Member States in Article 20(2) EU. Participation was thereby made slightly more difficult – although this need not to be qualified as a 'retrogression'¹⁰⁶, since the cooperation of some Member States only would arguably be too small a group, especially when composed mainly of smaller countries. With this exception, the substantive restraints for enhanced cooperation do remain unchanged under the Lisbon Treaty, which in itself is of course an important conclusion given that some commentators hold the Treaty regime responsible for the practical irrelevance of enhanced cooperation in the past years (incorrectly, in the view of this contribution). From their point of view, the continuity of the substantive restraints fails to lower the hurdles for the realisation of enhanced cooperation.¹⁰⁷

While the substantive constraints remain largely intact, the procedural requirements were revisited in various respects. First, the possibility of referral (without formal decision-making power) to the European Council as the ultimate instance of political mediation within the Union in the former Article 11(2) EC-Nice is deleted with the Convention Presidium rightly noting that '(s)uch referral could in any case take place de facto, if the initiation of enhanced cooperation posed a major problem for any Member State.'¹⁰⁸ Also, the specific procedure for enhanced cooperation in the former third pillar on cooperation in criminal matters is abandoned in line with the general decision to communitarize this policy field.¹⁰⁹ Only specific procedures for the former second pillar remain in place, reflecting the continued difference between CFSP decision-making and the supranational Community method in both the Constitutional and the Lisbon Treaty.¹¹⁰ The most important amendment however concerns the role of the European Parliament which will be granted the right to consent (or object) to the establishment of any enhanced cooperation irrespective of whether the rules adopted in its framework affect its co-legislative powers.¹¹¹ This extension of the parliamentary consent requirement reinforces the supranational element in the authorisation procedure and gives

¹⁰³ Article 326 TFEU.

¹⁰⁴ On Art. 43(e) EU-Nice and its interpretation see section 1 above; the comment in the original proposal of a new Article J in the Presidium Draft on Enhanced Cooperation, *ibid.*, at p. 20 simply states that the wording was taken from the Treaty of Nice and does not indicate any changes.

¹⁰⁵ The debate in the Convention is discussed in more detail by Bribosia (note 66), at pp. 625-8.

¹⁰⁶ Christian Deubner, 'Verstärkte Zusammenarbeit in der verfassten Europäischen Union', *Integration* 2004, pp. 274-87 at p. 279.

¹⁰⁷ As argued with a view to the new provisions in the Constitutional Treaty by Jürgen Schwarze, 'Ein pragmatischer Verfassungsentwurf', *Europarecht* 2003, pp. 535-73 at p. 555 and Hatje (note 29), at p. 157-8.

¹⁰⁸ Presidium Draft on Enhanced Cooperation (note 102), at p. 24.

¹⁰⁹ But see on the extension of the British-Irish-Danish Opt-outs section VI.3 below.

¹¹⁰ For more details on differentiation in the CFSP see section VII.2 below.

¹¹¹ Cf. Art. 329(1) TFEU; within enhanced cooperation the legislative procedure is governed by the regular Treaty articles and procedures.

the Parliament a right to veto any enhanced cooperation which it deems harmful to the integration process or insist on amendments which it deems necessary.

The participation of the initial 'outs' is facilitated by the limitation of the accession procedure to a simple Commission decision without the participation of any other institution to 'confirm the participation of the Member State concerned.'¹¹² In striking contrast to the authorisation procedure, the wording of the Lisbon Treaty seems to exclude any political discretion on the side of the Commission, let alone a veto of the participating Member States. Instead, the Lisbon Treaty emulates the earlier formulation in the Constitutional Treaty by explicitly providing for 'conditions of participation laid down in the European authorisation decision', whose non-fulfilment seem to be the only ground on which the Commission may base its decision against participation.¹¹³ The concept of participation criteria is modelled on the convergence criteria of monetary union and the Schengen evaluation procedure, but ignores the political character of supranational differentiation described earlier. In the case of monetary union and the Schengen system the political decision for participation had already been taken in the Maastricht or the Accession Treaty, with the convergence criteria and the Schengen evaluation procedure only guiding the implementation of the prior political decision on participation.¹¹⁴ Indeed, contrary to the Schengen evaluation procedure and the convergence criteria of monetary union, the participation of the initial outs of any enhanced cooperation shall *not* be obligatory, once the criteria are met.

One must therefore question the rationale underlying the reference to participation conditions in the Lisbon Treaty. Much will depend on their handling in practice, but probably questions of political preference will continue to characterise the composition of asymmetric integration groups.¹¹⁵ In situations of 'deadly embrace' where a Member States only wants to join the avant-garde in order to block the agreement of measures among some Member States, one may indeed consider a rejection of the application for participation. In practice, such confrontation should however not materialise in practice. As argued earlier the purpose of the sophisticated authorisation procedure with the involvement of the Commission, the Council, the Parliament and, possibly, the European Council and the Court of Justice aims at fostering a consensus among all the Member States and the European institutions on the appropriateness of supranational differentiation.¹¹⁶ If this exercise is successful the non-participating Member States will not block asymmetric progress. It would in any case be difficult to distinguish between the legitimate desire to redirect the debate within the core group and illegitimate motivations of blockade as a means in itself.¹¹⁷

¹¹² Art. 331(1) TFEU.

¹¹³ See Art. 328(1) and 331(1) TFEU.

¹¹⁴ The Presidium Draft on Enhanced Cooperation (note 102), at p. 10 and 22 explicitly refers to monetary union, structured defence cooperation discussed in section VII below and the Schengen evaluation procedure mentioned in note 125 (which is no example of asymmetry, since the new Member States are – contrary to the UK and Ireland – in principle obliged to participate in the Schengen law, with the transition period depending on technical adaptations which also existed in cases of earlier Schengen enlargements).

¹¹⁵ The contrast is similarly spelt out by Guillard (note 6), at pp. 507, while Eric Philippart and Monica Sie Dhian Ho, 'Flexibility and the New Constitutional Treaty of the European Union', in: Pelkmans/Dhian Ho/Liomard (eds.): *Nederland en de Europese grondwet* (Amsterdam University Press, 2003), pp. 109 et seq. in section 4.1.3. point out that the criteria shall guarantee the efficiency of the cooperation.

¹¹⁶ See section V.2 above.

¹¹⁷ For a more detailed discussion see Thym (note 12), at pp. 56-7 and, more generally, Bribosia (note 66), at p. 640, Gaja (note 64), at p. 860 and Christian von Buttlar, 'Rechtsprobleme der „verstärkten Zusammenarbeit“ nach dem Vertrag von Nizza', *Zeitschrift für europarechtliche Studien* 2001, pp. 649-88 at pp. 672 et seq.

Another reform measure proposed by the European Convention at the very last minute, which is taken up by the Lisbon Treaty, may in the medium run considerably enhance the attractiveness of supranational differentiation. In the text submitted to the Convention for its *last* working session on 9 July 2003 (one day before the text was solemnly adopted by consensus) the Convention Presidium proposed a clause on the differentiated introduction of qualified majority voting within enhanced cooperation.¹¹⁸ Despite some controversial debate during the Intergovernmental Conference 2004 and the partial rollback of substantive reform measures after the demise of the Constitutional Treaty the provision on the extension of qualified majority voting within enhanced cooperation survived the debate and found its way into the Lisbon Treaty as the future Art. 333 TFEU.¹¹⁹ On its basis, some Member States may for instance embark on the harmonisation of tax-law on the basis of qualified majority voting in the Council without non-participating Member States being able to veto this move unilaterally. In contrast to the general provision on the extension of qualified majority voting under the simplified revision procedure of Article 39(7) EU-Lisbon national parliaments are not involved in the extension of qualified majority voting within enhanced cooperation and do therefore not hold a formal veto right.¹²⁰ It may well turn out that the option of qualified majority-voting provides additional motivation to use enhanced cooperation more proactively. If the cooperation proves successful and attracts a growing number of Member States, qualified majority voting would gradually become the norm in more and more policy areas. Enhanced cooperation could eventually become the facilitator of intra-constitutional dynamics which its proponents have long desired.

¹¹⁸ See the later Art. III-328 Constitutional Treaty, first proposed in doc. CONV 847/03 of 9 July 2003.

¹¹⁹ On the debate in the 2004 IGC see Bribosia (note 66), at pp. 627-8.

¹²⁰ The 2007 IGC drafting the Lisbon Treaty gave national parliaments the right to veto the extension of qualified majority voting under Art. 48(7) EU as amended by the Lisbon Treaty, but did not change the specific provisions on enhanced cooperation; of course, any national parliament may at its own initiative and in accordance with national constitutional requirements mandate the national government not to agree to the extension of qualified majority voting within enhanced cooperation – while the national parliaments of non-participating Member States cannot prevent asymmetric law-making.

Synopsis of the Treaty provisions on Enhanced Cooperation in the Treaties of Amsterdam and Nice, the Constitutional Treaty and the Lisbon Treaty

Treaty of Amsterdam	Treaty of Nice	Constitutional Treaty	Lisbon Treaty
–	Art. 27a, b EU	–	–
–	Art. 27c EU	Art. III-419(2)	Art. 329(2) TFEU
–	Art. 27d EU	Art. III-418(2)	Art. 328(2) TFEU
–	Art. 27e EU	Art. III-420(2)	Art. 331(2) TFEU
Art. 40 EU	Art. 40-40b EU	–	–
Art. 43(1)(a) EU	Art. 43(a) EU	Art. I-44(1)	Art. 20(1) EU
Art. 43(1)(b) EU	Art. 43(b) EU	Art. I-44(1), III-418(1)	Art. 20(1) EU, Art. 328(1) TFEU
Art. 43(1)(e) EU	Art. 43(c) EU	Art. III-416	Art. 326 TFEU
Art. 11(1)(a), (d) EC	Art. 43(d) EU	Art. I-43(1), III-417	Art. 20(1) EU, Art. 327 TFEU
Art. 11(1)(b), (c) EC	–	–	–
–	Art. 43(e) EU	Art. III-416	Art. 326 TFEU
Art. 11(1)(e) EC	Art. 43(f) EU	Art. III-416	Art. 326 TFEU
Art. 43(1)(d) EU	Art. 43(g) EU	Art. I-44(2)	Art. 20(2) EU
Art. 43(1)(f) EU	Art. 43(h) EU	Art. III-416	Art. 326 TFEU
Art. 4(5) EU, 11(5) EC	Art. 43(i) EU	(Schengen-Protocol)	(Schengen-Protocol)
Art. 43(1)(g) EU	Art. 43(j) EU	Art. I-44(1)	Art. 20(1) EU
Art. 43(1)(c) EU	Art. 43a EU	Art. I-44(2)	Art. 20(2) EU
Art. 43(1)(g) EU	Art. 43b EU	Art. III-418(1)	Art. 328(1) TFEU
Art. 43(1)(h) EU	–	–	–
Art. 44(1) EU	Art. 44(1) EU	Art. I-44(1), (3)	Art. 20(1), (3) EU, Art. 330 TFEU
–	Art. 44(1) EU	Art. I-44(4)	Art. 20(4) EU
Art. 43(2) EU	Art. 44(2) EU	Art. I-44(4)	Art. 20(4) EU
Art. 44(2) EU	Art. 44a EU	Art. III-421	Art. 332 TFEU
–	Art. 45 EU	Art. III-423	Art. 334 TFEU
Art. 45 EU	–	–	–
Art. 11(2) EC	Art. 11 EC	Art. III-419(1)	Art. 329(1) TFEU
Art. 11(3) EC	Art. 11a EC	Art. III-420(1)	Art. 331(1) TFEU
–	–	Art. III-422	Art. 333 TFEU

VI. DIFFERENTIATION IN ACTION: AREA OF FREEDOM, SECURITY & JUSTICE

Supranational differentiation is not merely an abstract concept, but political reality as both monetary union and the Area of Freedom, Security and Justice illustrate. Since monetary union is characterised by various legal and institutional specificities, the progressive realisation of the Area of Freedom, Security and Justice is particularly apt to exemplify the operation of supranational differentiation 'in action.' The asymmetric realisation of border control, visa, asylum, immigration and civil law cooperation within the Area of Freedom, Security and Justice demonstrates that differentiated supranational law-making may operate smoothly in practice without the participation of all Member States. Since the entry into force of the Treaty of Amsterdam considerably progress has been achieved on the basis of the Tampere and The Hague programmes which establish justice and home affairs as a 'priority ... responding to a central concern of the peoples of the States brought together in the Union.'¹²¹

The dynamic realisation of the Area of Freedom, Security and Justice benefited from the historic dowry of the intergovernmental Schengen cooperation which the Treaty of Amsterdam integrated into the framework of the European Union (subsection 1) and which is complemented by country-specific opt-outs for the United Kingdom, Ireland and Denmark (subsection 2). We shall see that within the Area of Freedom, Security and Justice the differentiated non-participation of some Member States has become a daily practice of the European institutions. Differentiation 'in action' did not result in major frictions. It remains to be seen however whether the extension of the country-specific opt-outs with its option of differentiated 'roll-back' in the final version of the Lisbon Treaty will create more problems in the future (subsection 3). The differentiated realisation of the Area of Freedom, Security and Justice may thus again serve as an illustration for legal and practical problems and their solution associated with concepts of supranational differentiation in general.

1. Intergovernmental Schengen Cooperation

The creation of the internal market as an 'area without internal frontiers'¹²² implied the abolition of intra-European border controls as a 'constant and concrete reminder to the ordinary citizen that the construction of a real European Community is far from complete.'¹²³ After an initial debate about its intra-European realisation, the Benelux countries, France and Germany seized the initiative and signed the 1985 Agreement on the gradual abolition of checks at their common borders, whose general provisions of political intent were later specified in the 'Schengen Convention' among the same five Member States signed in the border town of Schengen on the river Moselle in Luxemburg on 19 June 1990. All other Member States of the European Union, except for Ireland and the United Kingdom, later acceded to the Schengen conventions on the basis of international accession treaties.¹²⁴ Their obligations were

¹²¹ The Hague Programme Strengthening Freedom, Security and Justice in the European Union (OJ 2005 C 53/1), Section I and the earlier European Council in Tampere of 15/16 October 2000, Presidency Conclusions, both available online at <http://www.consilium.europa.eu>.

¹²² Art. 26(2) TFEU.

¹²³ Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310, para. 47.

¹²⁴ For an historic account of the main developments see Francesco Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System', in: Walker (ed.): *Europe's Area of Freedom, Security and Justice* (Cambridge, 2004), pp. 89-142. After the integration of the Schengen law into the EU framework, the participation of the new Member States flows from the respective Acts of Accession.

progressively put into effect after an evaluation procedure has confirmed that a Member State fulfilled the technical requirements necessary for the implementation of the Schengen rules on the ground.¹²⁵ On this basis, border controls between Western Europe and the new Member States of Central and Eastern Europe were removed in late 2007/early 2008, finally establishing a truly pan-European travel area (with the exception of the UK and Ireland).

Whereas to many citizens of the Union 'Schengen' simply means that they do not need a passport to go from one country to another in continental Europe, the flanking measures on external border controls, police cooperation and illegal immigration are the focus of academic interest. The Court of Justice prominently confirmed the linkage between the flanking measures on security cooperation and the abolition of internal border controls which 'pre-supposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions.'¹²⁶ First agreed upon between interior ministers of the five original Schengen participants these flanking measures, such as the Schengen Information System SIS, soon developed a momentum of their own and constitute to this day the backbone of justice and home affairs cooperation within the Area of Freedom, Security and Justice. This success of the intergovernmental Schengen cooperation confirmed that flexible integration outside the Treaty framework can serve the European project.¹²⁷ The Schengen success story encouraged politicians and observers to pursue the path of supranational differentiation within the Treaty framework on the occasion of the Treaty of Amsterdam, which agreed on the introduction of the general mechanism for enhanced cooperation – and added legal flesh to the skeleton of enhanced cooperation through the incorporation of the Schengen corpus into the European legal order.

Legally, the Schengen cooperation is construed as a specific form of enhanced cooperation, whose establishment does not require prior authorisation by the European institutions. Instead, the differentiated evolution of the Schengen law is being granted directly by the Protocol Integrating the Schengen *acquis* into the Framework of the European Union (Schengen Protocol) annexed to the European Treaties.¹²⁸ This protocol also contains technical details on the integration of the Schengen law into the EU legal order, limiting itself to some basic principles and procedures under which the details of the integration were later decided by the Council. After having defined what exactly made up the Schengen law,¹²⁹ the Council allocated each provision of the Schengen law – with the preliminary exception of the SIS – to a legal basis in either the first (mainly Articles 61-9 EC) or the third (Articles 29-42 EU) pillar. The Council completed this work in May 1999 just after the entry into force of the Treaty of Amsterdam.¹³⁰ Irrespective of the allocation of legal bases all 'proposals and initiatives to

¹²⁵ See Art. 3(2) of the 2003 Act of Accession.

¹²⁶ ECJ, Case C-378/97, [1999] ECR I-6207, *Wijzenbeek*, para. 40 rejecting the direct applicability of Art. 26 TFEU.

¹²⁷ See among other David O'Keeffe, 'The Schengen Convention: A Suitable Model for European Integration', *Yearbook of European Law* 11 (1991), pp. 185-219 and Roland Bieber, 'Schengen als Modell zukünftiger Integration?', in: Achermann/*ibid.*/Epiney/Wehner (eds.): *Schengen und die Folgen* (Nomos, 1995), pp. 179-86.

¹²⁸ Art. 1 Schengen Protocol: The 'signatories to the Schengen agreements are authorised to establish closer cooperation among themselves within the scope of those agreements and related provisions... This cooperation shall be conducted within the institutional and legal framework of the European Union.'

¹²⁹ Council Decision 435/99/EC (OJ 1999 L 176/1).

¹³⁰ Council Decision 436/99/EC (OJ 1999 L 176/17). For an analysis of the legal and political problems raised see Kay Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty', *CML Rev.* 35 (1998), pp. 1047-67 at pp. 1059-65, Laura Corrado, 'L'intégration de Schengen dans l'Union Européenne: problèmes et perspectives', *RMC* 1999, pp. 342-9, Eckart Wagner, 'The Integration of Schengen into the Framework of the

build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties.¹³¹ Indeed, many Schengen rules have in the meantime been replaced by new Community/Union measures adopted under the legislative procedures applicable to their respective legal bases, thus illustrating that the Schengen law has become regular European law – including judicial supervision by the Court of Justice.¹³² The Schengen Protocol also defines the position of the United Kingdom, Ireland and Denmark which shall be analysed in more detail in the following subsection.

2. Treaty of Nice

For the purposes of our analysis the respective opt-outs of the United Kingdom, Ireland and Denmark from the Schengen *acquis* after its incorporation into the EU framework are of primary interest. Their examination reveals that they flow from different motivations which resulted in different legal structures. Denmark did not object to the principle of abolishing internal border controls and had indeed subscribed to the intergovernmental Schengen Conventions together with its Northern European neighbours prior to the Treaty of Amsterdam. Its objection concerned its integration into the EU framework, which called into question the caveats on justice and home affairs cooperation with which the government secured the Danish ‘yes’ in the second referendum on the Treaty of Maastricht.¹³³ Denmark therefore secured a ‘political opt-in’ and ‘legal opt-out’¹³⁴ which maintained its participation in the Schengen group, while guaranteeing that the supranational integration method would not apply; its position is based on ‘methodology rather than ideology.’¹³⁵ The Danish opt-out continues the line of compromise agreed after the initial Danish rejection of the Maastricht Treaty, whose termination remains the prerogative of another referendum.

Since Denmark’s objection concerns the communitarisation of justice and home affairs as such, it may not opt in the decision-making procedure – in contrast to the United Kingdom or Ireland. Instead, the Protocol on the Position of Denmark grants Denmark the right to ‘decide within a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen *acquis* under the (Title IV EC), whether it will implement this decision in its national law. If it decides to do so, this decision will create an obligation under international law between Denmark and the other Member States.’¹³⁶ In practice, Denmark fully implemented its obligations under the Schengen law in March 2001 when border controls in Northern Europe were discontinued. It also fully participates in the third-pillar dimension of the Schengen law, whenever a measure building upon the Schengen *acquis* has its legal basis in Title VI EU, based on the assumption that the third pillar remains grounded

European Union’, *Legal Issues of European Integration* 25 (1998), Issue 2, pp. 1-60 and Daniel Thym, ‘The Schengen Law: A Challenge for Legal Accountability in the European Union’, *ELJ* 8 (2002), 218-245.

¹³¹ Art. 5 Schengen Protocol.

¹³² See most prominently the ‘Schengen Borders Code’ adopted as Regulation (EC) No. 562/2006 (OJ 2006 L 105/1) and among the Court cases ECJ, Joint Cases C-187/01 & C-385/01, [2003] ECR I-1345, *Gözütok & Brügger* and Case C-257/01, [2005] ECR I-345, *Commission vs. Council*.

¹³³ Cf. the references in note 40 above.

¹³⁴ Monica den Boer, ‘Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity despite Communitarization’, *Maastricht Journal* 4 (1997), pp. 310-6 at p. 311.

¹³⁵ Martin Hedemann-Robinson, ‘The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark’, in: O’Keeffe/Twomey (note 40), pp. 189-302 at p. 297.

¹³⁶ Art. 5(1) Protocol on the Position of Denmark; if Denmark decides against participation the other Member States may under Art. 5(2) ‘consider appropriate measures to be taken’, which might in extreme cases include the reintroduction of border controls; for more details see Thym (note 12), at pp. 110-4.

on intergovernmental cooperation.¹³⁷ From an academic perspective the substantial changes to cooperation in criminal matters under the Treaty of Amsterdam and subsequent ECJ jurisprudence calls into question the rationale behind this principled distinction between intergovernmental third pillar and supranational first pillar law, but the Danish choice to participate in the former while staying away from the latter remains the legal rule.

In a similar vein, Denmark has decided not to participate in all other areas of justice and home affairs cooperation which have been communitarised in Amsterdam and do not fall within the realm of the Schengen cooperation.¹³⁸ Unfortunately, the Intergovernmental Conference drafting the Amsterdam Treaty did not negotiate the respective opt-outs from the Schengen law and other Title IV EC measures in parallel. As a result, we are confronted with two different legal regimes governing the respective opt-outs of Denmark, the United Kingdom and Ireland which adds an unnecessary layer of complexity to the law of supranational differentiation. The expectation that the application of those rules would prove too complicated so that a future IGC would change them,¹³⁹ was not met in Nice and during the constitutional debate, which in the final version of the Lisbon Treaty, discussed later, rather added another procedure on retrospective withdrawal.

With a view to the first pillar dimension of the Area of Freedom, Security and Justice which does not build upon the Schengen law Denmark holds an unconditional opt-out which it may only renounce in general in accordance with its constitutional requirements, which usually require a referendum.¹⁴⁰ As a result, Denmark is not bound by the various legal instruments realising the emerging European asylum and immigration policy as well as judicial cooperation in civil matters which all have their legal bases in Title IV EC and do not build upon the Schengen *acquis*. In a rather peculiar step Denmark has associated itself with the Brussels Regulations and the Dublin law on asylum matters through the conclusion of international agreements with the Community on the subject matter of the new Community regulations and directives.¹⁴¹ This peculiarity confirms that the Danish opt-out is not directed against the idea of European cooperation in justice and home affairs, but rather objects to the application of the supranational integration method in line with the compromise on Danish EU membership following the initial rejection of the Maastricht Treaty.

¹³⁷ Art. 5 Protocol on the Position of Denmark covers only measures adopted under Title IV EC.

¹³⁸ In practice, it sometimes remains difficult to define whether a measure build upon the Schengen law (and is therefore subject to the Schengen-related rules on British, Irish or Danish participation) or constitutes an autonomous measure under Title IV EC with its specific system for the participation of the said countries; more details may again be found in Thym (note 12), at pp. 96-9.

¹³⁹ Expressed by Pieter Kuijper, 'Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis', CML Rev. 37 (2000), pp. 345-66 at p. 352.

¹⁴⁰ Under Art. 1 Protocol on the Position of Denmark it 'shall not take part in the adoption by the Council of proposed measures' and is therefore neither bound under international (as with measures building upon the Schengen *acquis*) nor may it opt in (as the UK and Ireland may).

¹⁴¹ On the adoption of the international agreement with Denmark on the jurisdiction, the recognition and enforcement of judgments in civil and commercial matters Council Decision 2005/790/EC (OJ 2005 L 299/61); on the corresponding service of judicial and extrajudicial documents Council Decision 2005/794/EC (OJ 2005 L 300/53) and on the association with the Dublin law on asylum jurisdiction incl. the Eurodac database on fingerprints Council Decision 2006/188/EC (OJ 2006 L 66/37). One may argue that this step circumvents Art. 7 of the Protocol on the Position of Denmark which foresees the revocation of the opt-out in accordance with national constitutional requirements.

In contrast to Denmark, the United Kingdom objects to the underlying idea of the Schengen cooperation to enhance both the process of European integration and internal security through the abolition of internal border controls and the corresponding flanking measures. The British government maintains that besides the symbolism of abolishing border controls the position of the United Kingdom as an island and traditional limits of domestic control options (including the absence of identity cards) distinguish the British situation and give it ample reason to maintain border controls for all people coming from the continent.¹⁴² Irrespective of these policy reasons, the newly elected Labour government under Tony Blair was willing to concede in Amsterdam that the other Member States integrate the Schengen *acquis* into the EU framework, while maintaining the special British position on the basis of an opt-out. Ireland was factually obliged to follow the British decision, since it wanted to maintain the *Common Travel Area* with the United Kingdom which provides for passport-free travel on the British isles, including Northern Ireland. Like in the case of monetary union the asymmetric communitarisation of the Schengen law is characterised by its pragmatism: Granting an opt-out to three Member States was the only compromise on which the Member States could agree. Without the opt-outs Britain would not have given its consent to the integration of the Schengen law into the EU framework.

At closer inspection, the British-Irish opt-out is nevertheless the most prolific expression of the *à la carte*-logic of a principled freedom of the Member States to decide upon their participation in new integration projects to this date.¹⁴³ First, Britain and Ireland 'may at any time request to take part in some or all of the provisions of this *acquis*'¹⁴⁴ – which both countries have done with a view to substantive areas of the original Schengen cooperation, albeit without subscribing to the abolition of internal border controls.¹⁴⁵ Moreover, the United Kingdom and Ireland may during the legislative process 'notif(y) the President of the Council in writing ... that they wish to take part' in a measure building upon the Schengen *acquis*.¹⁴⁶ In parallel, the United Kingdom and Ireland may determine their position vis-à-vis other legislative projects realising the Area of Freedom, Security and Justice under Title IV EC which do not build upon the Schengen *acquis*, such as most aspects of the immigration and asylum policy and judicial cooperation in criminal matters. Here, both countries may again 'notify the President of the Council of their intention to take part'¹⁴⁷ in the adoption of the measure or apply for their participation at any later stage in accordance with the procedure governing the participation of initial 'outs' in any enhanced cooperation.¹⁴⁸

¹⁴² Cf. the evidence in House of Lords Select Committee on the European Communities: Schengen and the United Kingdom's Border Controls, 7th Report, Session 1998/99 and Antje Wiener, 'Forging Flexibility – The British 'No' to Schengen', *European Journal of Migration and Law* 1 (1999), 441-63.

¹⁴³ On the corresponding political concept see section 3 above.

¹⁴⁴ Art. 4 Schengen Protocol.

¹⁴⁵ See on the UK Council Decision 2000/365 (OJ 2000 L 131/43) and on Ireland Council Decision 2002/192 (OJ 2002 L 64/20). It should be noted that the selective participation in measures facilitating security cooperation without the parallel enhancement of individual freedoms through the abolition of border controls abandons the original balance between freedom and security in the Schengen conventions.

¹⁴⁶ Art. 5(1) Schengen Protocol.

¹⁴⁷ Art. 3(2) Protocol on the Position of the United Kingdom and Ireland; in contrast to the Schengen Protocol the said provision does not guarantee the UK and Ireland an unlimited right to participation; rather Art.3(2) provides: 'If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland.'

¹⁴⁸ Cf. Art. 4 *ibid.*; irritatingly, Art. 4 Schengen Protocol foresees a different accession procedure on the basis of unanimous Council decisions.

This hitherto unique realisation of the political hypothesis of European integration *à la carte* granting two Member States an unilateral opt-in possibility has in practice operated rather smoothly and supported the participation of the United Kingdom and/or Ireland in many measures adopted in recent years. This wide-spread use of the opt-in option suggests that even radical *à la carte*-integration may result in integrationist dynamics supporting the gradual realisation of the Area of Freedom, Security and Justice throughout the European Union (even if we have to certify in each individual case whether the United Kingdom and/or Ireland are bound by the measure¹⁴⁹). Moreover, the present Treaty regime does not provide for the later retrogression or withdrawal from measures into which the United Kingdom and/or Ireland have opted in. Their opt-outs are, like any enhanced cooperation, a one-way street towards the realisation of the Community's objectives.¹⁵⁰ It is to be regretted that the new provisions in the Lisbon Treaty, discussed below, will reverse this integrationist orientation of supranational differentiation by granting both Member States an option for unilateral withdrawal from existing European measures.

Moreover, the coherence of European law inherently requires us to limit the British-Irish freedom of choice to 'proposals and initiatives based on the Schengen *acquis* which are capable of autonomous application.'¹⁵¹ The practical relevance of this limitation is illustrated by the Council's rejection of the British request for participation in the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) and the Council Regulation on standards for security features and biometrics in passports and travel documents which the United Kingdom has both challenged unsuccessfully before the Court of Justice.¹⁵² Irrespective of the specificities of the cases before the Court, the principle that the special status of some Member States should not impede upon the effectiveness, coherence and uniformity of European law is a central safeguard to guarantee that differentiation does not lead to legal rupture. Otherwise, the integrationist dynamics of the Danish, British and Irish opt-outs from the Area of Freedom, Security and Justice might have negative repercussions on the uniformity of European legal integration upon which the European Union as a Community based on the rule of law depends.

3. Lisbon Treaty

In the European Convention drafting the Constitutional Treaty the British, Irish and Danish opt-outs from the integrated Schengen law and the first pillar dimension of the Area of Freedom, Security and Justice were – despite an early challenge by the Commission¹⁵³ – not discussed in detail after the governments had indicated their desire to continue the status quo and include the existing rules in the Constitutional Treaty without modification.¹⁵⁴ The

¹⁴⁹ In practice, the recitals of all legislative acts building the Area of Freedom, Security and Justice identify the respective position of the United Kingdom, Ireland and Denmark.

¹⁵⁰ For more details see note 68 above.

¹⁵¹ Advocate General Verica Trstenjak, opinion of 10 July 2007, Case C-77/05, *Untied Kingdom vs. Council*, para. 107; and similarly *ibid.*, Case C-137/05.

¹⁵² The British claim was rejected by ECJ, Cases 77 & 137/05 [2007] ECR I-11459, *Untied Kingdom vs. Council*. The legal question before the Court was rather technical and asked under which circumstances the op-in option under Art. 5 Schengen Protocol applies without prior participation in the original Schengen instruments upon which the new measures are building in accordance with Art. 4 Schengen Protocol (*in casu*, participation in Frontex without participation in the external border control regime which implies the abolition of intra-Community border controls).

¹⁵³ See note 214 below and accompanying text.

¹⁵⁴ See the Protocols No. 17, 19 and 20 attached to the Treaty establishing a Constitution for Europe.

United Kingdom, Ireland and Denmark were however willing to support the abolition of the current third pillar on cooperation in criminal matters, thereby effectively communitarising this policy field. While Denmark followed the example of the Amsterdam Treaty and extended the scope of its opt-out to criminal matters, the United Kingdom and Ireland somewhat surprisingly subscribed to the communitarisation of cooperation in criminal matters without extending their opt-out/opt-in option for the existing Title IV EC.¹⁵⁵ Instead, the United Kingdom strongly argued in favour of a general opt-out opportunity concerning the harmonisation of criminal law and procedure, which is in principle applicable to all Member States. The Lisbon Treaty does not only continue this earlier compromise on the harmonisation of criminal law but now also extends the scope of the British-Irish opt-outs to criminal matters, thereby creating two layers of supranational differentiation for both countries. Furthermore, it introduces the novel option of differentiated retrogression.

Concerning the harmonisation of criminal law and procedure, the original compromise agreed upon by the European Convention foresees that any Member State which considers during the regular legislative procedure that a proposal 'would affect fundamental aspects of its criminal justice system' (e.g. basic principles of the British common law¹⁵⁶) may refer the issue to the European Council, which – acting by consensus – may either send the matter back to the Council or request the Commission to submit a new draft. In case this procedure does not lead to an agreement on the way forward, a group of at least one third of the Member States may notify their intention to adopt the measure on the basis of enhanced cooperation, the authorisation of which will 'be deemed to be granted and the provisions on enhanced cooperation shall apply.'¹⁵⁷ The automatic continuation of the legislative procedure already underway avoids the time-consuming initiation of the regular authorisation procedure – but side-lines the Commission and the Parliament which do not get the opportunity to voice their opinion (or prevent the asymmetric action¹⁵⁸). The absence of any specific authorisation procedure is also based on the assumption that the substantive constraints for the establishment of enhanced cooperation are met, which will regularly be the case in matters of criminal law and police cooperation.¹⁵⁹

These specific rules on supranational differentiation for the harmonisation of criminal law and procedure were deemed necessary to facilitate the British approval of the Constitutional Treaty during the 2004 Intergovernmental Conference.¹⁶⁰ This situation surfaced again after the demise of the Constitutional Treaty during the 2007 IGC drafting the Lisbon Treaty, when the said procedure was not only maintained for the harmonisation of criminal law and procedure but extended to the European Public Prosecutor and police cooperation.¹⁶¹ It is not

¹⁵⁵ Cf. the different scope of Protocols 19 and 20 on the United Kingdom, Ireland and Denmark *ibid.*

¹⁵⁶ It remains to be seen whether the Member State's assessment of 'conflict with fundamental aspects of its criminal justice system' are just an euphemism for political considerations or will be scrutinized in detail, potentially even by national or European courts. One wonders why the IGC chose this rather opaque rule instead of opting for the arguably honest solution of granting Member States a political opt-out opportunity from these specific policy areas.

¹⁵⁷ Art. 82(3), 83(3), 86(1) and 87(1) TFEU mirroring the earlier rules in Art. III-270(3), (4) and III-271(3), (4) Treaty establishing a Constitution for Europe.

¹⁵⁸ The Member States may table a new initiative under Art. 76(b) TFEU, if the Commission repeals its proposal.

¹⁵⁹ Criminal matters do regularly not affect the crucial internal market caveats discussed in section V.1 above.

¹⁶⁰ The provisions did not feature in the Convention's draft and were first mentioned during the later IGC in the Presidency Proposal for the 12 and 13 December 2003, 9 December 2003, doc. CIG 60/03 Add 1.

¹⁶¹ See Art. Art. 82(3) and 83(3) TFEU; the respective provisions of Art. III-274 and III-275 Constitutional Treaty did not contain a similar opt-out.

immediately clear who insisted upon this extension of the opt-out, since the British delegation had already secured that the scope of the existing opt-out from Title IV EC would be extended to criminal matters, thus giving the United Kingdom and Ireland the choice not to participate in new measures on the basis of their opt-out without invoking 'fundamental aspects of its criminal justice system.'¹⁶² Irrespective of this rather inconclusive drafting history with its double layer of flexibility the extension of supranational differentiation once again seems to have provided the Union with a constitutional compromise which allowed for the communitarisation of criminal matters without obliging all the Member States to subscribe to these constitutional advances.¹⁶³

During the Intergovernmental Conference drafting the final version of the Lisbon Treaty the United Kingdom brought up another demand which the other Member States were eventually willing to concede after some controversy at expert level. It is laid down in three largely identical and rather complicated amendments to the Schengen Protocol, the Protocol on the British/Irish position towards the Area of Freedom, Security and Justice and the new Protocol on transitional provisions (governing the legal affects of existing third pillar law, which after a transitional period of five years shall automatically become regular Community law, effectively transforming existing framework decisions into directives). In essence, these new provisions grant the United Kingdom and Ireland the right to opt out of the amendment procedure for European measures in whose adoption they had earlier decided to participate (for instance any future reform of the European Arrest Warrant or amendment of the Brussels Regulation on jurisdiction and enforcement in civil matters).¹⁶⁴ Whenever the United Kingdom and/or Ireland decide to withdraw themselves from the progressive development of these European rules building the Area of Freedom, Security and Justice, the Council may nonetheless proceed with their adoption after the expiration of a reflection phase specified in the new provisions. This option of withdrawal does not extend to the Danish opt-out, which however may be replaced by a new rule resembling the British-Irish position in accordance with Danish constitutional requirements.¹⁶⁵

After the adoption of the amendment without the United Kingdom and/or Ireland, the Member State concerned will cease to be bound by the original measure, thereby avoiding the unacceptable situation in which two different versions of one legal act apply to different Member States. This guarantees a minimum degree of coherence, without however resolving the difficulty to decide to what extent the disapplication of certain European rules requires the parallel repeal of other measures.¹⁶⁶ Since it will only be possible to decide this

¹⁶² See the amended version of Protocol (No. 19) on the Schengen *acquis* Integrated into the Framework of the European Union and the Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice – both attached to the Lisbon Treaty.

¹⁶³ The extension of the British opt-out was part of the 'package deal' of the IGC Mandate, Annex I to Brussels European Council, Presidency Conclusion, 21/22 June 2007, Council doc. 11177/07. Politically, the United Kingdom insisted upon the extension of its opt-out to the cooperation in criminal matters in order to justify towards British public opinion not to hold a referendum on the ratification of the Lisbon Treaty arguing that it differs substantially from the Constitutional Treaty.

¹⁶⁴ See the future Art. 5(2)-(5) Schengen Protocol (No. 19), the new Art. 4a Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice and At. 10 Protocol (No. 36) on Transitional Provisions.

¹⁶⁵ See Art. 8 Protocol (No. 22) on the Position of Denmark and the new protocol annexed to the article, which Denmark may put into effect at any time in accordance with its national constitutional requirements.

¹⁶⁶ *E.g.*, may Britain or Ireland opt-out from an amendment of the mutual recognition of jurisdiction in civil matters, while continuing to be bound by the rules on insolvency proceedings?

question *in concreto*, the Council will effectively decide ‘the extent (of disapplication) considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission.’¹⁶⁷ The challenge of coherence addressed by this provision reflects the Court’s decision not to allow for the British participation in the Frontex agency and the Regulation on passport security.¹⁶⁸ The dynamics are however reversed: in the case of the Schengen law Britain and Ireland want to join the avant-garde of European integration; under the new provisions both Member States would effectively withdraw themselves from European laws through a unilateral decision which the other Member States could not prevent. This endangers not only the effectiveness, coherence and uniformity of European law, but calls into question the orientation of supranational differentiation at the Community interest.¹⁶⁹

VII. LIMITS OF DIFFERENTIATION: COMMON FOREIGN AND SECURITY POLICY

The proliferation of supranational differentiation in the past decade has focused on domestic European policies, which have only a corollary external dimension – such as the agreement between the Schengen group and Norway and Iceland on the latter’s association with the Schengen law.¹⁷⁰ In contrast, differentiation has hitherto been deliberately limited to exceptional circumstances within the Common Foreign and Security Policy (CFSP), acknowledging the limits of differentiation in the foreign policy field (subsection 1). The Lisbon Treaty expands the use of differentiated instruments, especially in the field of defence cooperation, whose practical implications will however be limited, since they largely codify the existing practice of the Security and Defence Policy (subsection 2). This limited relevance of supranational differentiation in the foreign affairs does not come as a surprise. The added value of European foreign policy stems from the combination of political clout and the strength inherent in united action. This benefit would be contradicted, if the Union pursued a differentiated foreign policy on behalf of some Member States, while the others openly express a diverging view. We shall see that the existing examples of differentiation in the field of foreign policy respect this inherent limitation.

1. Treaty of Nice

When the Treaty of Amsterdam introduced the general mechanism for enhanced cooperation it deliberately limited its scope to the first and the third pillar. For the Common Foreign and Security Policy (CFSP) it introduced the specific instrument of constructive abstention under Article 23(1) EU instead. This instrument is designed to prevent Member States from reverting to their right of veto, when they are not willing to support a CFSP measure by a positive vote or a ‘regular’ abstention (which would not prevent the Member State in question to be bound by the measure). Instead of hindering decision-making in a policy field where unanimity remains the regular case, a Member State ‘constructively’ abstains by

¹⁶⁷ Art. 5(3) Schengen Protocol (No. 19), which specifies further that the ‘decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence.’ Declaration (No. 47) and Art. 4a(3) Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice foresee that the United Kingdom and/or Ireland may have to cover financial costs arising from their withdrawal.

¹⁶⁸ See note 152 above and the accompanying text.

¹⁶⁹ On the asymmetric constitutionalism underlying supranational differentiation see section VIII below.

¹⁷⁰ Council Decision 1999/439/EC (OJ 1999 L 176/35) adopted on the basis of Art. 7 Schengen Protocol.

qualifying its abstention ‘by making a formal declaration’ under Article 23(1)(2) EU as a result of which it shall ‘not be obliged to apply the decision.’ Despite not being bound the Member State concerned does nonetheless accept ‘that the decision commits the Union’ and ‘shall refrain from any action likely to conflict with or impede Union action.’ The other Member States shall in return ‘respect its position.’¹⁷¹

These limitations of the constructively abstaining Member State’s freedom of manoeuvre are characteristic for CFSP flexibility and originate in the desire to preserve the uniformity of European action from an external perspective. In domestic policies, supranational differentiation may be an effective trigger for further integration by providing a pragmatic solution to a political deadlock on specific policy issues by adopting rules with limited geographic scope. But foreign policy is not primarily about statutory regulation. Instead, foreign policy and international relations are by nature strategic. They require the identification of strategic goals and the development and constant adaptation of methods for their realization and implementation. The main regulatory instrument of the Community method are legal rules adopted by the European institutions, published in the Official Journal, transposed and implemented by national legislators and administrations and interpreted uniformly by the European court system. Here, the limited geographical scope does not generally hinder the effectiveness of internal rules as the examples of monetary union and the Schengen law illustrate. But foreign policy is primarily about political positioning in favour or against something: North Korea will not give up its nuclear weapons, only because the European Union says so in its Official Journal. You may call it diplomacy, but in any case it differs substantially from domestic politics.¹⁷² The added value of European foreign policy would be seriously impeded, if some Member States openly expressed a diverging view.

The substantive reach of constructive abstention is currently limited to the unanimous adoption of common positions and joint actions by the Council. This seems to be motivated by the desire to limit CFSP differentiation to specific policy issues dealt with in common positions or joint actions, while excluding long-term flexibility on the principles of and general guidelines for the CFSP, which may be the subject of common strategies.¹⁷³ This illustrates a second specificity of differentiation in the foreign policy field: It shall in principle be limited to the implementation of policy decisions shared by all Member States, thereby preventing a cleavage among the Member States over the general orientation of European foreign policy. This general consideration can be illustrated with the new Articles 27a-e EU as amended by the Treaty of Nice which extended the scope of enhanced cooperation to the CFSP. What seems to be a far-reaching reform at first sight, is only a minor adaptation of the European Union’s foreign policy constitution when looked at more closely. Its field of application is explicitly limited to the ‘*implementation* of a joint action or a common position’¹⁷⁴ and therefore requires the prior adoption of a common position or joint action binding all Member

¹⁷¹ Art. 23(1) EU. For a comprehensive analysis see Diego Liñán Noguerras, ‘Flexibilité et politique étrangère et de sécurité commune de l’Union européenne’, in: Dony (ed.): *Mélanges en hommage à Michel Waelbroeck*, Volume II (Bruylant, 1999), pp. 1139-59 and Thym (note 12), at pp. 151-9.

¹⁷² See also Daniel Thym, ‘Foreign Affairs’, in: von Bogdandy/Bast (eds.): *Principles of European Constitutional Law*, 2nd edition (Hart, 2009), Forthcoming.

¹⁷³ Liñán Noguerras (note 171), at p. 1146 convincingly rejects the idea considered, but not necessarily supported, by Ehlermann (note 96), at p. 265 that constructive abstention *de lege lata* extends to qualified majority voting. Since common strategies are formally adopted by the European Council, the wording of Art. 23(1) EU referring to the ‘Council’ excludes constructive abstention, when common strategies are adopted.

¹⁷⁴ Art. 27b EU (emphasis added).

States (except for cases of constructive abstention). Thereby, Nice-style CFSP asymmetry not only attempts to preserve a basic uniformity of the Union's external appearance similar to the legal regime of constructive abstention. Instead, it assumes that the Member States share the political approach laid down in the common position or joint action, which may be implemented with the participation of some Member States only.

The procedure governing the authorisation of enhanced cooperation in the CFSP remains decidedly intergovernmental and excludes any substantive influence of the supranational institutions.¹⁷⁵ Surprisingly, Article 27c EU provide for the Council authorisation by qualified majority voting – based on the assumption that all Member States had agreed to the initial joint action or common position, which the enhanced cooperation is supposed to implement.¹⁷⁶ Moreover, decisions 'having military and defence implications' will continue to be exempted from differentiated progress¹⁷⁷ – complementing the Danish opt-out from defence matters on the basis of the Protocol on the Position of Denmark attached to the Treaty of Amsterdam which perpetuated the line of compromise after the initial Danish rejection of the Maastricht Treaty.¹⁷⁸ Besides, specific forms of differentiation without the participation of all Member States are wide-spread in defence cooperation outside the European Union framework. They include multinational forces, such as the Eurocorps or the European Gendarmerie Force, and the reinforced coordination of public defence procurement within the European Armament Organization (OCCAR), which coordinates among others the joint purchase of the Airbus A400 M military transport aircraft.¹⁷⁹ These are only three examples of the manifold fora of bi- and multilateral cooperation in defence matters¹⁸⁰ which the European Convention tried to formally ascribe to the European integration process in the Constitutional Treaty and which survive under the Lisbon Treaty.

2. Lisbon Treaty

The European Convention drafting the Constitutional Treaty set itself the task to reconstruct and reinforce the dynamic development of Common Security and Defence Policy (CSDP) through the introduction of a detailed Treaty section.¹⁸¹ For the purposes of our analysis three developments deserve particular attention, since they found their way into the Lisbon Treaty: First, the introduction of new specific forms of supranational differentiation in defence policy concerning the execution of operations and the improvement of military capabilities. Second, the unconditional extension of enhanced cooperation to all areas of the CFSP and CSDP and, third, the establishment of the European Defence Agency. We shall see that all these changes continue the general line of foreign policy differentiation by limiting

¹⁷⁵ For more details see Art. 27c-e EU and their analysis by Urrea Corres (note 53), at pp. 299-317.

¹⁷⁶ The reference in Art. 27c EU to Art. 23(2) EU implies that the enhanced cooperation, which necessarily concerns the 'implementation of a joint action or a common position' (Art. 27b EU), is adopted by qualified majority. If a proposed policy contravenes 'important reasons of national policy', a non-participating Member State may hinder the establishment of the enhanced cooperation by reverting to the modified version of the Luxembourg compromise codified in Art. 27c, 23(2)(2) EU.

¹⁷⁷ Art 27b EU, for the scope of 'military and defence implications' see Thym (note 12), at pp. 167–9.

¹⁷⁸ See Art. 6 of the said Protocol.

¹⁷⁹ OCCAR is based on an international convention of 9 Sep 1998 (entry into force 28 Jan 2001) to which Belgium, France, Germany, Italy, Spain and the UK have subscribed; for details see <http://www.occar-ea.org/>.

¹⁸⁰ For an overview of existing fora for cooperation see Josiane Auvret-Finck, 'Les moyens de la force armée', in: Azoulai/Burgorgue-Larsen (ed.): *L'autorité de l'Union européenne* (Bruylant, 2006), pp. 183-210.

¹⁸¹ See Art. III-309-12 Treaty establishing a Constitution for Europe and European Convention, Final Report of Working Group VIII 'Defence', 16 December 2002, doc. CONV 461/02.

asymmetric progress to the preparatory phase of capability improvement and the implementing phase of crisis management, while guaranteeing that the Member States are not split in two or more groups pursuing divergent foreign policy objectives externally which would hinder the CFSP to unfold the added value of strength inherent in united European action. In this regard, the absence of a common European response to the Iraq war – in parallel to the debate about defence differentiation in the European Convention drafting the new provisions – provided an ample illustration for the necessity to prevent differentiation in the foreign policy field to lead to political rupture.¹⁸²

The new rules on permanent structured cooperation are illustrative of the challenges of differentiated integration in the defence field. According to the future Articles 42(6), 46 EU '(t)hose Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.' In principle, this new mechanism could lead to wide-spread differentiation and foster the improvement of military capabilities on the basis of qualified majority voting.¹⁸³ Within permanent structured cooperations the new and 'more binding commitments'¹⁸⁴ are meant to emulate the success story of the convergence criteria of monetary union in order to remedy the perceived inefficiency of the voluntary commitments of the Member States within the present Capabilities Commitments Conference. Reinforcing European oversight and control over national defence spending and military assets was also meant to bypass the continued lack of original European capabilities, such as proper EU brigades as a first step towards the establishment of a European army.¹⁸⁵ Against this background, the idea underlying permanent structured cooperation was indeed a central scheme for the improvement of military capabilities, which many observers had long identified as an important field of application for differentiated integration reflecting the huge discrepancy between the military capabilities of the Member States and the need for substantive improvements.¹⁸⁶

During the debate in the European Convention and the Intergovernmental Conference drafting the final version of the Constitutional Treaty the introduction of permanent structured cooperation was however met with fierce criticism. This is not surprising given the context of the initial Franco-German proposal during the winter of 2002/03 at the height of Europe's

¹⁸² On the background and context of the Iraq war and the European response to it see Peter van Ham, 'The EU's War Over Iraq. The Last Wake-up Call', in: Mahncke/Ambos/Reynolds (eds.): *European Foreign Policy: From Rhetoric to Reality?* (Peter Lang, 2005), pp. 209-27.

¹⁸³ Qualified majority voting is foreseen for the establishment of permanent structured cooperation in Art. 41(2)-(4) EU-Lisbon, while Art. 41(6) maintains unanimity for the realisation of individual projects.

¹⁸⁴ Sebastian Graf Kielmannsegg, *Die Verteidigungspolitik der Europäischen Union* (Boorberg, 2005), pp. 421-2 convincingly argues that the commitments specified in the protocol discussed later are (despite being legally binding) formulated too generally to considerably reduce the Member States' primary responsibility for the organisation of their military forces. Similarly, Martin Trybus, 'On the Common Security and Defence Policy of the EU Constitutional Treaty', in: *ibid./White* (eds.): *European Security Law* (OUP, 2007), pp. 43-59 at 50-1.

¹⁸⁵ Instead, Art. 42(1), (3) EU confirm explicitly that the Union may not establish military capabilities of its own; while the ESDP 'shall provide the Union with an operational capacity drawing on civil and military assets ... (t)he performance of these tasks shall be undertaken using capabilities provided by the Member States.' On the legal status quo see Graf von Kielmannsegg, 'The European Union's Competences in Defence Policy – Scope and Limits', *EL Rev.* 32 (2007), pp. 213-31.

¹⁸⁶ See for example Thomas Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the CFSP', *EFA Rev.* 7 (2002), pp. 297-316 at pp. 306-11 and Udo Diedrichs and Matthias Jopp, 'Flexible Modes of Government: Making CFSP and ESDP Work', *The International Spectator* 2003, Issue 3, pp. 15-30.

foreign political schism about the Iraq war.¹⁸⁷ Permanent structured cooperation was perceived as an exclusive and 'self-selecting club'¹⁸⁸ which would undermine the solidarity among the Member States and endanger the uniform support for CFSP action on which the success of European foreign policy arguably depends. After heated debate and repeated changes the eventual compromise allowed for the consent of all Member States to the new rules – while similarly diminishing the dynamism for the reorganisation of military capabilities which permanent structured cooperation was originally meant to provide.¹⁸⁹ The general rules in the EU Treaty remain as open and dynamic as the original draft foresaw with a view to both the generalised field of application for 'military capabilities' and qualified majority voting in the Council.¹⁹⁰ At the same time, the dynamism was however flattened by the reference to the new Protocol (No. 10) on Permanent Structured Cooperation which restricts cooperation to the specific issues identified in the Protocol.

A closer look at the Protocol (No. 10) on Permanent Structured Cooperation shows that its field of application is limited to reinforced cooperation within 'the main European equipment programmes' (*i.e.* in particular the Capabilities Commitments Conference where all Member States decide by consensus) and 'targeted combat units..., structured at a tactical level as a battle group, with support elements including transport and logistics' (*i.e.* the battle groups which the Member States have in the meantime set up without recourse to formalised forms of differentiation).¹⁹¹ As a codification of existing European practice the introduction of permanent structured cooperation under the Lisbon Treaty will therefore not add substantial dynamism to European defence integration. Any extension of collaboration within permanent structured cooperation would require an amendment of the Protocol, which – as any Treaty amendment in CFSP/CSDP – requires the involvement of all Member States and national parliaments.¹⁹² It is therefore not to be expected that the new provisions on permanent structured cooperation will play an important role in the improvement of military capabilities. Instead, the Member States will to continue to have recourse to spontaneous, non-formalised forms of cooperation at the European and national level.

Similarly, the formalisation of the European Defence Agency in Article 45 EU will be no great leap forward for European defence integration. Indeed, the Member States have already established the European Defence Agency on the basis of Article 17 EU as amended by the Treaty of Nice through the adoption of a Joint Action in July 2004.¹⁹³ This should not be misunderstood as a *de facto* implementation of the Constitutional/Lisbon Treaty circumventing the ratification requirements. To the contrary: the project of establishing the European Defence Agency was not developed by the European Convention, which rather borrowed the

¹⁸⁷ For the initial proposal by the French and the German foreign minister see Dominique de Villepin and Joschka Fischer, CONV doc. 422/02 of 22 November 2002.

¹⁸⁸ As argued with a view to both the Atlanticist, US-friendly camp and the new Member States with their lesser military capabilities which did not want to be excluded from permanent structured cooperation by Jolyon Howort, 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', *EFA Rev.* 9 (2004), pp. 482-508 at 486-92.

¹⁸⁹ Hervé Bribosia, 'Les nouvelles formes de flexibilité en matière de défense', in: Amato/ibid./de Witte (note 66), pp. 835-848 at pp. 840-2 tracks the drafting history.

¹⁹⁰ Cf. Art. 46(1) EU-Lisbon.

¹⁹¹ See Art. 1 Protocol (No. 10) on Permanent Structured Cooperation and Ramses A. Wessel, 'Differentiation in EU Foreign, Security and Defence Policy', in: Trybus/White (note 184), pp. 225-48 at p. 247.

¹⁹² The simplified revision procedure under Art. 48(6)-(7) EU-Lisbon does not extend to defence policy.

¹⁹³ Council Joint Action 2004/551/CFSP (OJ 2004 L 245/17); for more details see Martin Trybus, 'The new European Defence Agency', *CML Rev.* 43 (2006), pp. 667-704.

idea from the general political debate at the time in an attempt to reproduce the dynamic development of the ESDP in the text of the European Treaties.¹⁹⁴ In a similar vein, the Lisbon Treaty's future emphasis on the European Defence Agency should not deflect from other fora of armaments cooperation within and outside the Treaty framework, including the European Armament Organization (OCCAR) mentioned earlier.¹⁹⁵ This reminds us that the ESDP is by far no autonomous undertaking and depends to a large extent upon the activities undertaken by the Member States individually or collectively with the different existing fora for defence cooperation in Europe.

The extended debate about the introduction of permanent structured cooperation had implications for the Treaty regime for enhanced cooperation, which under the Treaty of Nice excluded 'matters having military or defence implications' and concerned the 'implementation of a joint action or a common position'.¹⁹⁶ By simply deleting both limitations the Convention (or rather its Presidium) effectively opened the whole of the CFSP and the CSDP to enhanced cooperation – and the way it proceeded with this change is no masterpiece of democratic decision-making; neither did the Convention establish a working group on flexibility nor did the working group on external action deal with the issue.¹⁹⁷ In so far as defence policy is concerned not even the amendment tabled by the French and German foreign ministers had wished such a radical extension of flexibility.¹⁹⁸ One reason why the issue did not surface in the debate may be the unanimity requirement for the initiation of enhanced cooperation in the CFSP and the CSDP.¹⁹⁹ This is not necessarily the worst solution, since it prevents an open split of the Union which would seriously impede the solidarity among the Member States. Enhanced cooperation may therefore only be established if all Member States agree and respect the general conditions for enhanced cooperation which include compliance with the EU Treaty and the principle of attributed powers.²⁰⁰

The political solidarity among the Member States and the coherence of European foreign policy would in particular suffer, if a core group of Member States pursued military action on behalf of the Union without the political support of the other Member States – an open split which the unanimity requirement for the establishment of enhanced cooperation prevents. Also, the option in Articles 42(5), 44 EU to 'entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task' does

¹⁹⁴ See Daniel Thym, 'Weiche Konstitutionalisierung – Optionen der Umsetzung einzelner Reformschritte des Verfassungsvertrags ohne Vertragsänderung', *Integration* 2005, pp. 307-15 at 313-4.

¹⁹⁵ On OCCAR see the last paragraph of the previous section and more generally the survey of different activities within and outside the EC /EU framework by Aris Georgopoulos, 'The European Armaments Policy: A *condition sine qua non* for the European Security and Defence Policy?', in: Trybus/White (note 184), pp. 198-223.

¹⁹⁶ Art. 27b EU-Nice discussed in section VII. **Fehler! Verweisquelle konnte nicht gefunden werden.** above.

¹⁹⁷ Possibly, the extension of enhanced was meant to construe permanent structured cooperation as a special form of enhanced cooperation as foreseen by Art. III-213(5) of the Draft Treaty establishing a Constitution for Europe; the IGC instead organised permanent structured cooperation as an independent form of differentiation, also to guarantee that the suspension of participation under Art. 46(4) EU-Lisbon does not run foul of the principle of openness enshrined in the general regime for enhanced cooperation. The extension of enhanced cooperation was however maintained.

¹⁹⁸ See the Amendments Concerning Enhanced Cooperation, 6 June 2003, CONV doc. 791/03, at p. 2.

¹⁹⁹ Cf. Art. 329(2) TFEU, while Art. 27c, 23(2) EU-Nice currently foresee qualified majority voting in certain circumstances as shown in note 176 above.

²⁰⁰ See also Daniel Thym, 'Reforming Europe's Common Foreign and Security Policy', *ELJ* 10 (2004), pp. 5-22 at p. 11-2; Graf Kielmannsegg (note 184), at p. 424-7 rightly points out that any enhanced cooperation in the field of military capabilities must respect the limit of Union competences which do in principle not cover the establishment of European military assets at Union level.

not lead to political rupture among the Member State, since the joint action on the initiation of military action must have been adopted among all Member States in advance; only its implementation may be mandated upon a core group. Again, the provision therefore looks more far-reaching at first sight than a closer analysis may confirm. As mentioned earlier the European Union holds no military assets of its own and does instead rely on national military capabilities. Under the general rules governing the CFSP a Member State is also at present not obliged to commit personnel even if it agrees to the Joint Action establishing the European mission; the provision of national military assets is based on the Member States' 'sovereign decision'²⁰¹ and in practice not all Member States do contribute to all ESDP mission. The new provision on the execution mandate does insofar build upon an existing differentiation in defence policy implementation

While the Council and the Political and Security Committee exercise the political control and strategic direction over regular CSDP operations under the current Treaty regime, the operational control is also at present entrusted upon the force commander and the Committee of Contributors in which the participating Member States and third countries are represented.²⁰² The new execution mandate will insofar guarantee and possibly reinforce the autonomy of the Member States contributing military assets. It is not immediately clear from the Treaty language in how far the execution mandate may directly or indirectly restrict the influence of the Member States which do not contribute troops. The close association of the High Representative and the general preservation of the Council's prerogatives under Article 38 EU indicate however that the drafters did not foresee far-reaching changes.²⁰³ This reminds us of the general need to limit foreign policy differentiation to questions of policy implementation, while maintaining the uniform support of the Member States for the policy formulation, including in cases of military operations. It should therefore be welcome that the new provision do in principle respect the conceptual limits of differentiation in the defence field by limiting themselves to the improvement of military capabilities and the execution of EU operations.²⁰⁴ Without this principled uniformity the added value of united action upon which the success of European foreign policy arguably depends would be lost.

VIII. ASYMMETRIC CONSTITUTIONALISM

More than thirty years ago Hans-Peter Ipsen, the founding father of European law doctrine in post-war Germany, warned against 'prejudicing the Community's future or even its final appearance: the unity of its legal structure as it allegedly (has to) emanate from the rationale of its construction and its tasks.'²⁰⁵ Supranational differentiation is such a manifestation of the integration process, which transcends the original assumptions of uniform legal integration. It was introduced into the European legal order at a relative late point of its development at the time of the Treaty of Maastricht. This is no coincidence: In the first decades of

²⁰¹ Presidency Progress Report on Strengthening the Common European Policy on Security and Defence, Annex 1 to Annex IV, Presidency Conclusions, Helsinki European Council, 10/11 December 1999.

²⁰² See Art. 25 EU-Nice and Presidency Report on the ESDP, 4 December 2000, Council doc. 14056/2/00.

²⁰³ Much will depend upon the future practice; for an emphasis on continuity see Graf Kielmannsegg (note 184), at p. 417-9 against my more critical assessment in Daniel Thym, 'Die neue institutionelle Architektur europäischer Außen- und Sicherheitspolitik', *Archiv des Völkerrechts* 42 (2004), pp. 44-66 at pp. 57-8.

²⁰⁴ Similarly, Csaba Törö, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty', *EUJ* 11 (2005), pp. 641-56 at 650 against the more critical voice of Wessel (note 191), at p. 247.

²⁰⁵ Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck, 1972), p. 1050 with a view to the state – confederation dichotomy.

its existence the political and legal fragility of the integration project mandated an emphasis on unity-building principles.²⁰⁶ The flexibility of European rules was generally limited to situations of economic differences with derogations appearing as temporary exceptions which were expected to be phased out reflecting the approximation of economic realities.²⁰⁷ Supranational differentiation differs by nature: It is based on the national political decision not to participate in certain integration projects; political will not objective economic differences determine the geographic reach of the respective European rules.²⁰⁸

In practice, the existing examples of supranational differentiation concern policy fields such as justice and home affairs or foreign and defence policy which are closely associated with the concept of political union. Their major achievement is the alignment of the integrationist dynamics in some Member States with the political wish of others to refrain from participation. It underlines the political maturity of the integration project, if supranational differentiation allows for division without fundamental rupture. This outcome is no coincidence: The existing mechanisms for supranational differentiation have been deliberately designed on the basis of the supranational integration method with its distinct institutional and legal features.²⁰⁹ Arguably, this conceptualisation of supranational differentiation on the basis of the orthodoxy of the Community method is crucial for the realisation of European integration at multiple speeds. The European Union is, much more than the nation-state, a creation of the law whose abstract equality and normative neutrality have always been essential tools in overcoming the political differences between the Member States and integrate them into a supranational legal order.

The importance of legal integration is underlined by the Court when it qualifies the European Union as a 'a Community based on the rule of law.'²¹⁰ Or, as the first President of the European Commission and law professor Walter Hallstein observed in his book 'the incomplete federation': 'equality results in unity – this is the rationale behind the Treaty of Rome.'²¹¹ At the same time, integration through law appears as a statement on the limits of political and social cohesion, since the democratic solidarity among European citizens remains fragile and the Community does not control the ultimate use of force within its territory but depends upon national authorities to enforce European legislation.²¹² Against this background, we shall now come back to the primary tension between supranational differentiation and the quest for unity inherent in the concept of integration through law. Can supranational differentiation be accommodated with the concept of legal integration and the understanding of the European Treaties as a supranational constitution²¹³?

²⁰⁶ See Armin von Bogdandy, 'Constitutional Principles', in: *ibid./Bast* (eds.): *Principles of European Constitutional Law, 1st edition* (Hart, 2006), pp. 3-52 at 36-42.

²⁰⁷ See for more details section II.1 above.

²⁰⁸ As argued in section IV above.

²⁰⁹ Indeed, the very term 'supranational differentiation' is supposed to characterise the special institutional and legal set-up of the existing expressions of supranational differences presented in section III above – in contrast to the much wider political conceptualisations of flexible European integration analysed in section II.

²¹⁰ ECJ, Opinion 1/91, *European Economic Area*, [1991] ECR I-6079 at para 21.

²¹¹ Walter Hallstein, *Der unvollendete Bundesstaat* (Econ, 1969), at p. 33 (own translation).

²¹² Cf. Paul Kirchhof, 'The Legal Structure of the European Union as a Union of States', in: von Bogdandy/Bast (note 206), pp. 765-802 at 787.

²¹³ On the constitutional character of the *present* European Treaties irrespective of the fate of the Constitutional Treaty which would have formalised the constitutional character of primary law see among others Ingolf Pernice, 'Multilevel Constitutionalism in the European Union', *EL Rev.* 27 (2002), 511-29 and the conceptual approaches of the contributors to Joseph H.H. Weiler/Marlene Wind (eds.), *European Constitutionalism Beyond*

In its initial contribution to the emerging constitutional debate the European Commission assumed a negative standpoint and presented differentiation as an expression of incomplete integration which could not be tolerated in the final stage of European integration: 'The exceptions granted to certain Member States by specific protocols are the result of national options and are still largely compatible with the current legal framework of the Union, that of treaties concluded between sovereign Member States. If the Convention were to come out in favour of a constitutional treaty likely to lead eventually to the approval of a genuine constitution by all the people of Europe, it would be difficult to keep most of these derogations on board. They detract from equality between the citizens of Europe. The ability of the institutions to prepare, decide and implement certain policies could quickly be called into question.'²¹⁴ Our analysis does not confirm this negative assessment: neither the general mechanism for enhanced cooperation nor the specific expressions of supranational differentiations in the Area of Freedom, Security and Justice and the Common Foreign and Security Policy analysed in more detail in this article undermine or threaten the supranational credentials of European law.

On the contrary: all rules described in this article continue the path of integration through law, since they are explicitly laid down in detailed Treaty provisions. One may criticise them for their lack of readability, but they are of no greater or lesser legal value than any other rule of primary law – characteristics which did not apply to the legally dubious 1992 Edinburgh compromise on Denmark following its initial rejection of the Maastricht Treaty and the opaque legal construction of the original Agreement on Social Policy, which were both heavily criticised by Deirdre Curtin in her comment on a Europe of 'bits and pieces.'²¹⁵ Characteristically, the Treaty of Maastricht's most explicit rules on supranational differentiation, the British opt-out from monetary union, did not feature prominently among Curtin's points of criticism.²¹⁶ As an integral part of primary law introduced through successive Treaty amendments and ratified by national parliaments the legal provisions on supranational differentiation share its hierarchical primacy over secondary European law and are insofar part of Europe's formal constitution. Similarly, national constitutions such as the French constitution which mandate European integration to be 'subject to reciprocity' do not require uniform integration involving all Member States in all integration projects as long as reciprocity is guaranteed among the participating Member States.²¹⁷

the State (CUP, 2003).

²¹⁴ Communication: A Project for the European Union, 22 May 2002, COM(2002) 247 final, p. 17.

²¹⁵ Both legal problem areas being 'resolved' by the Treaty of Amsterdam; for the social protocol see and for the Edinburgh compromise on Denmark see notes 29 and 40 above.

²¹⁶ Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', CML Rev. 30 (1993), pp. 17-69 at 51-2 only debates whether the present Art. 10 EC may be invoked to oblige the UK to rejoin the advance group; generally her criticism on the various other protocols is summed up at p. 63 where she asks whether 'all Protocols *de facto* annexed to the (Maastricht Treaty) ... are an "integral part" of Community law ... or violate certain fundamental constitutional principles.' Unfortunately, Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), at p. 449 extends this criticism to later forms of supranational differentiation such as enhanced cooperation without considering their different form and substance.

²¹⁷ See in particular Art. 88-2 of the French constitution on both monetary union and the free movement of third country nationals within the Area of Freedom, Security and Justice which are both subject to wide-spread differentiation. In its decision on the constitutionality of the Treaty of Maastricht the French Conseil constitutionnel, décision no. 92-312 DC of 2 September 1992 does not object to the political opt-outs. Similarly, the principle of reciprocity under public international law does not require international treaties to foresee similar obligations for all parties; differentiated rights and obligations are on the contrary widespread with reciprocity being guaranteed through the equal rights of the high contracting parties; see for more details Bruno Simma,

Long before the present debate on supranational differentiation, Hans Kelsen had recognised the possible need for substantive differentiation within a single legal order: 'When individual rules of one legal order do have a divergent geographic scope of application, different normative regimes apply to different parts of that order. The formal unity of a legal entity does not necessarily entail substantive uniformity... Among the various reasons calling for differentiated geographic treatment ... greater geographic reach and heterogeneity of living conditions usually entail more specificity.'²¹⁸ Indeed, the European Union is not the only federal entity with asymmetric arrangements: At the height of the nation-state historic forms of asymmetry, such as the Austrian-Hungarian Empire, were usually associated with secession and eventual break-up. This led Georg Jellinek to conclude that they were 'elements of an incomplete or disorganised state.'²¹⁹ But modern experiences with asymmetric federalism are more positive. Various degrees of asymmetric federalism and quasi-federalist regionalisation in the United Kingdom, Canada, Spain, Belgium or Finland have arguably contributed to the stabilisation of divisive conflicts and the accommodation of diversity mirroring EU-style supranational differentiation.²²⁰

The legal unity of European law as a single legal order is primarily of dogmatic interest. In practice, the preservation of the distinctive features of European law is pivotal for the maintenance of its supranational character. It is therefore central to the integration of supranational differentiation into the European constitutional order that its legal regime preserves constitutional principles such as the primacy of European law, its direct effect and uniform interpretation, the fundamental freedoms and the principle of non-discrimination, the principle of mutual respect and the implied external powers of the Union. If supranational differentiation transcended these characteristic, European law might well continue to constitute a single legal order, but its distinguishing supranational features would be lost. In this respect, it has already been demonstrated that the 'ten commandments' of supranational differentiation declaratorily confirm the preservation of these general principles with a view to the general mechanism for enhanced cooperation.²²¹ The same applies to other forms of supranational differentiation. Persisting doctrinal uncertainties can be resolved by general considerations of European law – as the following example illustrates.

At first sight, supranational differentiation is difficult to reconcile with the principle of non-discrimination on grounds of nationality. Some commentators have indeed argued that supranational differentiation within the meaning of this contribution 'turn(s) what the ECJ would normally consider as illegal discrimination into permissible differentiation;'²²² they contend that it is 'the essence of (enhanced cooperation) to treat nationals of participating Member States differently from those of non-participating Member States.'²²³ But at closer inspection the picture is more nuanced: supranational differentiation is characterised by its limited demographic scope and does within the latter apply as any other European rule, including the principle of non-discrimination on grounds of nationality. France is for example

Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (Duncker & Humblot, 1972).

²¹⁸ Hans Kelsen, *Allgemeine Staatslehre* (Springer, 1925), at p. 165 (own translation).

²¹⁹ Georg Jellinek, *Das Recht des modernen Staates. Erster Band*, 2nd edition (O. Häring, 1905), at p. 642 (own translation).

²²⁰ Cf. the overview by Annette Schrauwen (ed.), *Flexibility in Constitutions: Forms of Closer Cooperation in Federal and Non-Federal Settings*, 2nd edition (Amsterdam University Press, 2002).

²²¹ See section V.1 above.

²²² Tuytschaever (note 32), at p. 57.

²²³ Bradley (note 65), at p. 1116.

obliged to treat British or Danish citizens on an equal footing with its own nationals or its German neighbours when it applies rules of monetary union or the Area of Freedom, Security and Justice which do not apply in the United Kingdom or Denmark. Or, as the Court of Justice argued as early as 1969: 'Article 7 of the EEC Treaty (nowadays Article 18 TFEU) prohibits every Member State from applying its law on cartels differently on the ground of the nationality of the parties concerned. However, Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them, in accordance with objective criteria and without regard to their nationality.'²²⁴

The criterion guiding the application of differentiated European rules may not be the nationality of Union citizens, but rather their residence within or without the geographic reach of the asymmetric European rules. If British people residing within the Schengen area are treated like their French neighbours, this treatment might at most be characterised as indirect discrimination on the grounds of nationality which the Treaties' specific rules on supranational differentiation arguably permit.²²⁵ The situation is similar for other general principles of European law which may also be accommodated with the new phenomenon of supranational differentiation on the basis of dogmatic reflections.²²⁶ From a political perspective, the legal restraints flowing from the preservation of Europe's constitutional principles may well prevent immediate groupings of some Member States, thereby tempting them to cooperate outside the legal and institutional framework of the Union on the basis of classic international law. But even if the limitations stemming from the protection of the Union's supranational constitutional characteristics are sometimes annoying at short sight, they do at the long run serve the preservation of the Union's constitutional identity.

As the legal birth certificate of European integration, the preamble of the Treaty establishing the European Coal and Steel Community asserts another crucial and indispensable component of European constitutionalism, when it proclaims the Member States' objective 'to lay the bases of institutions capable of giving direction to their future common destiny.'²²⁷ Indeed, questions of institutional design and procedural arrangements have always been a means of organisational unity building, channelling the different political positions towards agreement. It is therefore essential that the authorisation and participation procedures for enhanced cooperation continue the path of procedural equation, reflecting the positive ex-

²²⁴ ECJ, Case 14/68, [1969] ECR 1, *Walt Wilhelm*, at para. 13; of course, the situation concerned the differentiated national application of common European rules, but the situation is not different in principle, if European law has a limited geographic scope implying different legal rules in the non-participating Member States. The situation is the same as in federal states where the principle of equal treatment does not oblige regions to harmonise the laws adopted within their sphere of competence; cf. for Germany: Bundesverfassungsgericht, Judgment of 30 May 1972, BVerfGE 33, 206 (231), *Waffengesetz*.

²²⁵ Contrary to direct discrimination, indirect discrimination (more French nationals live in France than British nationals) can be justified by objective reasons independent of nationality, which a special Treaty provision allowing for the adoption of differentiated laws for reasons of divergence of political views among the Member States arguably provides. One might also argue that the Treaty regime for supranational differentiation established a *lex specialis* preventing the application of Art. 12 EC to considerations of limited geographic scope in the first place. For more details see Thym (note 12), at pp. 254-8.

²²⁶ Other examples how supranational differentiation can be accommodated with general principles of the Community legal order are discussed in, again, Thym (note 12), at pp. 233-68 (chapter 8).

²²⁷ Recital 5 of the Preamble of the 1951 ECSC Treaty, which expired in July 2002.

periences with the Community method.²²⁸ Moreover, the regular institutional rules do apply when differentiated European rules are debated and eventually adopted.²²⁹ Specific institutional regimes in differentiated policy areas, such as monetary union or the intergovernmental third pillar on cooperation in criminal matters, are not conceptually related to supranational differentiation and would continue, if the non-participating Member States joined the *avant-garde*. Contrary to international law-style cooperation outside the institutional and legal framework of the European Union supranational differentiation is no backdoor that allows an exit from the supranational decision-making procedures.²³⁰

Respect for the single institutional framework is not limited to inter-institutional procedures, but extends to intra-institutional rules on the composition, deliberation and voting of the European institutions. The only exception in this respect concerns the suspension of the voting rights of the non-participating Member States in the Council which appears as the logical consequence of their decision not to participate – while the equal participation of all Member States in the deliberations of the Council (with the exception of the Euro Group²³¹) guarantees a continued dialogue. Arguably, the participation of British ministers and civil servants in the political and technical debate of European immigration and asylum law in the Council and its working groups played an important role in the British decision to participate in many legislative measures.²³² In a similar sense, the unchanged institutional set-up of the supranational institutions Commission and Court of Justice is conceptually not surprising in light of their formal independence as representatives of the Community interest.

One may however question the democratic underpinning of the decision not to suspend the voting rights of MEPs elected by citizens to whom a law under debate will not apply.²³³ The situation corresponds to the British debate whether the voting rights of Scottish MPs should be suspended, whenever the House of Commons decides issues which fall within the substantive reach of the Scotland Act.²³⁴ With a view to enhanced cooperation the European Parliament itself had vehemently opposed the initial proposal to proceed in this direction.²³⁵ The discussion about the (in-)appropriateness of full voting rights would indeed lead us deep into the considerations on the democratic credentials of the European Parliament. Irrespective of its outcome, we eventually have to accept the political decision to retain full voting rights for all MEPs, which was maintained in the Lisbon Treaty. From the point of view of the underlying theme of this article we may positively turn it into a conceptual assertion of supranational differentiation being firmly embedded into Europe's supranational constitutional order, guaranteeing that legal differentiation does not lead to political rupture.

²²⁸ See section V.2 above.

²²⁹ For enhanced cooperation, this is declaratorily confirmed by Art. 44(1) EU-Nice and does otherwise result from the regular institutional provisions of the European Treaties.

²³⁰ Unfortunately, the wording of Art. 43 EU-Nice may be misunderstood in this respect when it refers to enhanced cooperation allowing some Member States to 'make use' of the Union's institutions and procedures.

²³¹ The Euro Group is, legally speaking, a 'private' meeting of the ministers of the euro countries, which should not be confused with the ECOFIN Council deciding EMU issues with the 'outs' participating in the debate, but not the voting, in accordance with Art. 122(5) EC-Nice; see Erich Vranes, 'The "Internal" External Relations of EMU', *Columbia Journal of European Law* 6 (2000), 361-82.

²³² Generally, see section VI. **Fehler! Verweisquelle konnte nicht gefunden werden.** above.

²³³ See, e.g., the criticism by Ehlermann (note 96), at p. 255; Kortenberg (note 32), at p. 847 and Martin Hedemann-Robinson, 'The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark', in: O'Keefe/Twomey (note 40), pp. 289-302 at 301.

²³⁴ Cf. Robert Hazell, *The English Question* (UCL/The Constitution Unit, January 2006).

²³⁵ See Tuytschaever (note 32), at p. 65.

IX. CONCLUSION

In the past 15 years, integration at multiple speeds has become a European reality. Monetary union, the realisation of the Area of Freedom, Security and Justice including the Schengen law, the Common Foreign and Security Policy and the general mechanism for enhanced cooperation are the most prominent examples of the existing *acquis* of integration at multiple speeds. As pragmatic legal instruments they provide for the asymmetric realisation of specific policy projects among a limited number of Member States within the existing legal and institutional framework of the European Union. In comparison to other instruments of flexible policy-making supranational differentiation within the meaning of this contribution is defined by the limited geographic scope of Community law and the corresponding suspension of the voting rights of the non-participating Member States in the Council. The introduction of supranational differentiation was influenced by the political debate about the suitability of integration at multiple speeds, whose general concepts however transcend the existing expressions of supranational differentiation. Both the establishment of a ‘federal core Europe’ and the *à la carte*-logic of a principled freedom of the Member States to pick and choose the policy areas in which they want to participate have not been translated into Treaty provisions. The existing *acquis* of integration at multiple speeds flows from pragmatic compromises at past IGCs aligning the integrationist inclination of some Member States with the political wish of others to refrain from participation.

The establishment of a supranational legal order requires a continued focus on its uniform application without which the effectiveness of European law is at stake. My intention was not to call into question the underlying rationale of this quest for unity. In the first decades of its existence the political and legal fragility of the integration project mandated an emphasis on unity-building principles. In a common market based on fair competition the different treatment of the Member States was widely considered as a reflection of economic disparities with derogations appearing as temporary exceptions which were expected to be phased out following the approximation of economic realities. This logic does however not extend to the new domains of European integration such as justice and home affairs, social policy or foreign and defence policy which are closely associated with the concept of political union and the *finalité* of the integration project. Here, the call for national opt-outs does not appear as an illegitimate distortion of competition but as a legitimate positioning in the political discourse. Supranational differentiation accepts this plurality of opinions on the range and extent of European rules and accommodates the underlying political diversity within the European legal order. Designed on the basis of the supranational integration method the existing manifestations of supranational differentiation may not resolve fundamental disagreement about the future course of the European project, but contribute nonetheless to the continued dynamism of its existing institutional and legal structure.

If supranational differentiation supports division without fundamental rupture, it requires a high degree of mutual confidence among the Member States, which may be facilitated by the corresponding legal and institutional rules of the respective Treaty provisions governing supranational differentiation. The general mechanism for enhanced cooperation deserves particular attention in this respect, since it is characterised by a geographic and thematic openness. Its substantive constraints and procedural requirements reaffirm its supranational credentials. While the general mechanism for enhanced cooperation has not been used in the first ten years of its existence, the example of the Area of Freedom, Security and Justice

illustrates that differentiated supranational law-making can operate smoothly without the participation of all Member States. Supranational differentiation thus contributes to the continued dynamism of the European project, while acknowledging its limits which are most visible in foreign and defence policy. The theoretical perspective confirms that supranational differentiation does not hinder the constitutional aspirations of the European Treaties as it intentionally maintains the characteristic features of the supranational integration method. It is insofar pragmatic and principled at the same time, combining the case-specific accommodation of disagreement on individual measures with the general maintenance of the underlying characteristics of the supranational constitutional order.

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