

Flexibility within the Lisbon Treaty: Trademark or Empty Promise?



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The concept of flexibility in the European integration process has been discussed in different ways since the 1970s. Some forms may be “upwardly oriented”, representing a driving force rather than a brake on the integration process. Others may weaken integration and have a “downsizing” effect. “Enhanced cooperation”, which was first introduced by the Amsterdam Treaty, aims to provide an attractive alternative to intergovernmental cooperation outside the treaty, and to allow a group of Member States to deepen integration in particular areas without affecting either the interests of others or the overall construction of European integration. The Lisbon Treaty introduces changes at all stages of the cycle: preparatory stage, initiation, authorisation, implementation, accession and termination. The conditions for enhanced cooperation remain restrictive and other forms of flexibility may seem more attractive. Consequently the prospect is for flexibility to be an empty promise rather than a trademark of the new Treaty.

Introduction

The idea of flexibility in the integration process has long been the subject of European debate. The best-known terms have been “Core Europe” (Schäuble and Lamers 1994), “avant-garde” (Chirac 2000), “centre of gravity” (Fischer 2000) and “directoire” (Hill 2006), but these represent only an excerpt from a broad catalogue of such concepts.² The debate dates back to the 1970s (Tindemans 1975) and has put forward different interpretations of flexibility, depending on the approach and on the analyst.

In this contribution, we start from the general definition that it refers to forms of integration in which one group of EU Member States is not subject to the same Union rules as the rest.³ The basic concern is why countries which are objectively able and actually willing to proceed with further integration in a particular area should be prevented from doing so by others which are unable and/or unwilling. Treaty-based flexibility can be identified whenever a group of Member States proceeds in some such way within the treaty framework. This does not necessarily have to be a long-term condition but should ideally provide an incentive for other Member States to join the “avant-garde” in due time. In this sense, flexibility represents a driving force or motor, rather than a brake on European integration.

This article will analyse more specifically whether the provisions for enhanced cooperation in the Lisbon Treaty constitute efficient procedures for flexibility. To this end, the framework of different concepts and forms of differentiated integration is outlined, and the Treaty’s provisions on

flexibility are analysed in the light of the decision-making dilemma in which procedures are revised between a sovereignty-led veto reflex and a functional drive for efficiency (Hofmann and Wessels 2008). Given the restricted length of this article, we will focus on the general procedure of enhanced cooperation, referring to special provisions within Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) whenever this adds to the line of argument. Our essential point is that the Lisbon provisions for enhanced cooperation are hardly offering an opportunity for an upward flexibility. It will therefore remain an empty promise, rather than turning out to be a “trademark” of the Lisbon Treaty.

Concepts of flexibility

There are various approaches aimed at structuring the broad catalogue of concepts of flexibility. The “deepening and widening” graph presented by Faber and Wessels (2006) lays out a framework for visualising different scenarios and strategies for future EU developments. Despite its schematic nature, mirroring the heterogeneity of the inputs to the debate on deepening and widening, it can – in a slightly adapted version – provide a clear framework for defining basic concepts of flexibility, both from a static and dynamic perspective (see Figure 1). The impact on European integration of these different concepts of flexibility depends on whether the overall aims of integration are commonly defined. Thus, concepts of “Core Europe” (concept (a)) and “variable geometries” (concept (b)) can

be defined as upwardly-oriented flexibility. A “Core Europe” merely represents a group of Member States that are already able to attain the commonly-defined aims of integration. Due to its inherent integration-driven dynamic of a “re-invented Union” (Faber and Wessels 2006, pp. 14-15), the remaining Member States will eventually join the core in due time. Even though the concept of “variable geometries” accepts that only some Member States will form a fully-integrated core group, while others may decide to permanently choose lesser integration, flexibility is still upwardly oriented.

However, flexibility can develop disintegration or “spill-back” effects whenever “matter” – that is, the very substance of the policy area concerned as compared to the timing or scope of participation – becomes the predominant variable of integration (Stubb 1996), at the expense of commonly-defined overall objectives of integration, resulting in highly differentiated forms of functional cooperation emerging from the EU 27. Hence an intergovernmental cooperation of only a few large Member States (EU3; EU6) forming a “Directoire” (concept (c)) may extend the scope and level of cooperation substantially in specific policy areas, while neglecting other matters and members. The concept of “Europe à la carte” (concept (d)) offers a broad range of subject areas from which each Member State can choose the preferred menu, which suits its ability and willingness.⁴

Without the definition of a common integration framework, “Europe à la carte” neglects deepening, per se, and hence is also referred to as “downsizing flexibility” (Wessels and Jantz 1997, p. 348).

The basic dilemma resulting from flexibility is that modes of differentiated integration need to take account of objectives defined by a smaller group of able and willing Member States (“ins”) while ensuring that the overall construction of European integration and the interests of the Member States not included (“outs”) remain unaffected. The desired effect of flexibility can thus be defined as tackling the threat of dissolution of the current state of European integration and preventing a “downsizing flexibility”.

To that end, three forms of flexibility⁵ have been introduced in the EU’s legal framework (concepts (a) and (e)):

- 1) Predefined flexibility, which makes possible partial integration within a specific subject area by precisely defining the objective and scope, as well as the participating Member States. While the European Monetary Union can be perceived as one of the prime examples, there are various other examples of predefined flexibility established in protocols and declarations, mainly in relation to JHA (e.g. Schengen).
- 2) Case-by-case flexibility, which enables Member States to abstain from a decision without vetoing it, thereby

accepting that the decision is legally binding for the other EU Member States. This constructive abstention is only applicable within the intergovernmental CFSP.⁶

- 3) Enabling clauses, which provide a procedure for a smaller group of interested Member States to proceed within a clearly defined framework of given structures, as in the case of enhanced cooperation complemented by permanent structured cooperation.⁷

Enhanced cooperation – a treaty-based flexibility arrangement

With EMU and Schengen representing cases in which some Member States decided to withdraw from deeper collective action, based on their cost-benefit ratio, flexibility is already a reality within European integration. The latest example of an opt-out is the Charter of Fundamental Rights, which will be introduced into the EU’s legal framework by the Lisbon Treaty, but which will not be fully applicable to Poland and the UK (Protocol No.30). Thus, treaty-based arrangements for predefined flexibility have already been used, and have effectively contributed to preventing stagnation in the integration process in specific EU policies. Other treaty-based arrangements such as case-by-case flexibility and enabling clauses have not yet been used. Moreover, they have been challenged by options for further integration

outside the EU’s legal framework. In May 2005, seven EU Member States signed the Treaty of Prüm on extended data exchange and intensified cooperation against terrorism. Even though the scope and objective of this agreement would have complied with the requirement of the Nice Treaty that “[enhanced cooperation] must remain within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community”, this procedure did not represent an option, because the threshold of eight interested Member States was not reached.⁸ Thus, the Treaty of Prüm can be

regarded as an enhanced cooperation outside the EU Treaty, with the clearly defined aim to be eventually transferred into the EU’s legal framework (Kietz and Maurer 2006).

Whenever EU Member States have the choice between perfect and no communitarisation within the treaty framework, rather than between perfect and imperfect communitarisation, they are tempted to opt for models of intergovernmental cooperation outside the EU. While these forms of flexibility permit further integration within a policy area where otherwise stagnation might have prevailed, compliance with provisions of the EU Treaties has to be ensured. Moreover, the lack of democratic control outside the EU’s legal framework represents a problem, especially

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with regards to a policy area as sensitive as internal security. Thus, even though intergovernmental cooperation structures outside the EU have so far been designed in terms of an upwardly-directed flexibility, as preparatory stages to further integration within the Union's legal framework (e.g. Schengen, Prüm), the possibility of a downsizing flexibility effect cannot be completely ruled out, due to the double structures and lack of control.

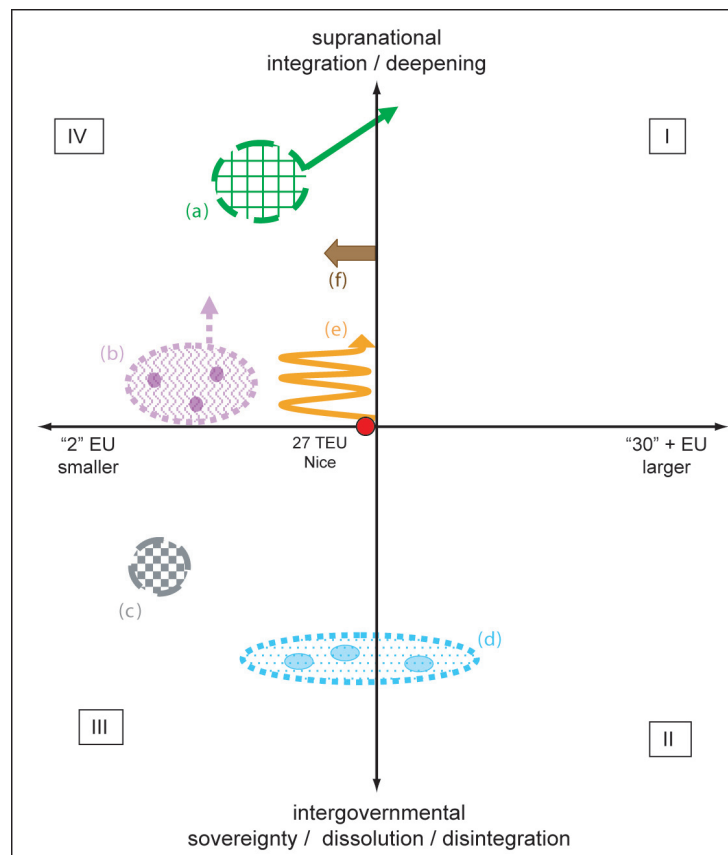
Enhanced cooperation, which was established by the Amsterdam Treaty and reformed by the Nice Treaty, is supposed to represent a treaty-based flexibility arrangement which is sufficiently attractive to provide an alternative within the EU's legal framework. Thereby, it is to be perceived as a tool for effective policy-making, rather than a tool for building a "Core Europe" (see Figure 1 concepts (a) and (e)). The basic aim of enhanced cooperation is to enable a group of

interested Member States to proceed within integrated institutional structures, under rather strict conditions, resulting in a temporary state of imperfect communitarisation with the inherent option for eventually achieving the state of perfect communitarisation, due to its openness to other Member States.

Various reasons for the non-use of enhanced cooperation have been discussed. On the one hand it is argued that the mere existence of this procedure serves its own purpose, because in sensitive policy areas especially (where unanimity prevails) the "threat" of moving forward within a smaller group of Member States might lead to consensus and hence develop an upwardly directed flexibility effect. On the other hand, conditions for triggering enhanced cooperation and provisions regarding the procedure are perceived to be too strict to be applicable. Thus, the respective treaty provisions

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Figure 1: Concepts of Flexibility⁹



- Core Europe ("Avantgarde"):** functional and/or constitutional deepening by a group of „willing“ and „able“ Member States to attract others to follow
- Variable geometry:** sectoral integration of different groups of Member States with opt-outs accepting that not all Member States might join the fully integrated group
- Directoire:** intergovernmental cooperation between a few large Member States (EU3, EU5) excluding smaller states by definition
- L'Europe à la carte:** ad hoc groups of interested states (including more or less than the actual number of EU members) engaged in limited functional or sectoral cooperation outside the TEU framework
- Treaty-based flexibility:** pre-defined flexibility; case-by-case flexibility; enabling clauses; thus enhanced cooperation(!!!)
- Withdrawal by single Member States:** complete opt out of one or more Member States.

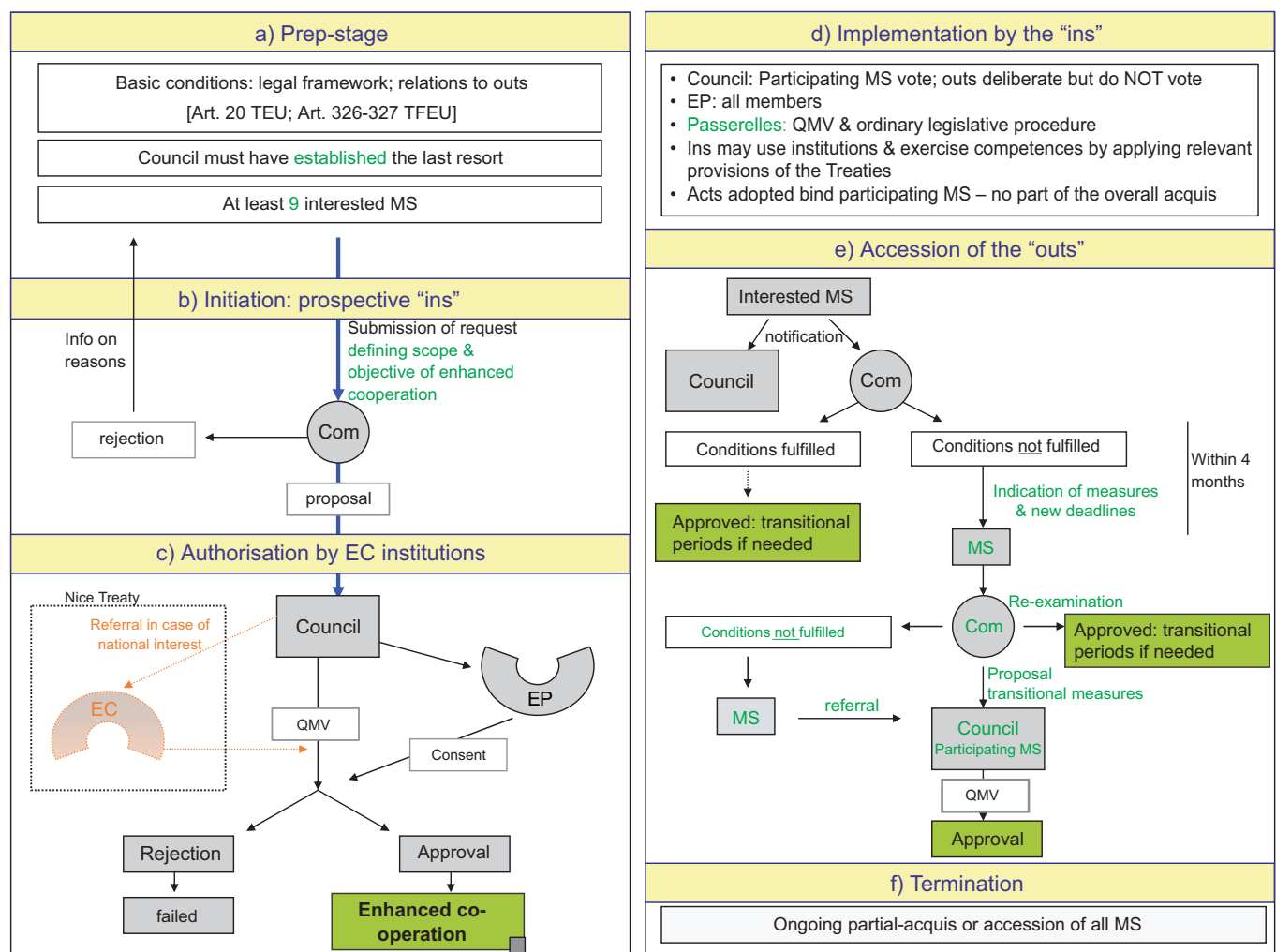
Source: own adaptation of Wessels, 2008.

have been reformed with every treaty revision ever since its introduction into the legal framework by the Amsterdam Treaty. These revisions can only be subject to speculative consideration, since the procedure has yet to be triggered. This also applies to the latest treaty revision in 2007.

The flexibility check for the differentiated policy cycle after Lisbon

In the following, the provisions of the Lisbon Treaty are analysed within the framework of the differentiated policy-making cycle of preparatory stage, initiation, authorisation, implementation, accession and termination (see Figure 2 below).

Figure 2: Enhanced cooperation in the Lisbon Treaty



a) Preparatory stage: merely slightly revised conditions

Conditions for triggering enhanced cooperation remain restrictive, according to the provisions of the Lisbon Treaty.¹⁰ Building enhanced cooperation is only possible "within the framework of the Union's non-exclusive competences"¹¹ and it has to "comply with the treaties and the law of the Union".¹² Moreover, the aim shall be to "further the objectives of the Union, protect its interests and reinforce its integration process".¹³ In this way, undermining the internal market or economic, social and territorial cohesion, discrimination in trade and distortion of competition between Member States are to be prevented.¹⁴ While enhanced cooperation can make use of common institutions and exercise competences, by applying the relevant provisions

of the treaties,¹⁵ the competences, rights and obligations of the "outs" are to be respected.¹⁶ Enhanced cooperation shall not become an exclusive club, and hence the provisions of the Lisbon Treaty continue to demand that cooperation remains "open at any time to all Member States".¹⁷ Furthermore, the Commission and the "ins" are asked to promote participation.¹⁸

Only the "last resort" condition and the threshold for the minimum of participating Member States have been reformed by the Lisbon Treaty. Provisions of the Nice Treaty stipulated its use only when the objectives of such cooperation could not be achieved within a reasonable period by applying the relevant provisions of the treaties, without specifying by whom and how this should be measured. This

"last resort" principle has been watered down by the Lisbon Treaty by stating that the "last resort" can be established by the Council¹⁹ (CEPS/Egmont/EPC 2007). Moreover, the minimum number of Member States wishing to engage in enhanced cooperation is set at nine Member States²⁰ instead of eight. In terms of efficiency, there are various interpretations of the most appropriate threshold for building an enhanced cooperation. Nine Member States might currently be considered reasonable, because within an EU-27 this represents one-third of the Member States. Since an enhanced cooperation is authorised to make use of common institutions, the cost-benefit ratio will improve if as many Member States as possible are involved (CEPS/Egmont/EPC 2007, p.101). Thus, in view of an ever-growing Union

it might have been preferable to define the threshold in relation to the overall number of EU Member States, keeping the ratio of Member States necessary for building enhanced cooperation stable. For this reason, even though there is currently no difference between the threshold of nine Member States (Lisbon Treaty) and one-third of the overall number of Member States (Constitutional Treaty), the latter might have been more efficient in the longer-term perspective.

b) Initiation: self-defined scope and objectives via a supranational mediator

According to Article 329(1) TFEU, "Member States wishing to establish enhanced cooperation between themselves [...] shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed." This means that the request is not submitted directly to the Council, but to the European Commission, "which submits the proposal to the Council to that effect"²¹ – preserving supranational review. If the Commission does not submit a proposal to the Council, it is requested to inform the respective Member States of the reasons. Thus, even though interested Member States are able to define the scope and objectives of an enhanced cooperation, the Commission remains the only gateway for launching a concrete legal text.

c) Authorisation: emergency brake and accelerator

Revisions of the procedure to authorise enhanced cooperation have been remarkable. The Nice Treaty established an "emergency brake" in case enhanced cooperation is vetoed in the Council and special national interest exists, providing Member States the possibility of referring the matter to the European Council for consensus-driven deliberations. The Lisbon Treaty communitarised the procedure to authorise enhanced cooperation by abolishing this opportunity and introducing qualified-majority voting (QMV) to all areas except CFSP, where decisions are now to be taken by unanimity.²²

Within specific policy areas of the Lisbon Treaty, special options are provided. If one Member State vetoes a decision on police and judicial cooperation in criminal matters, and at least nine Member States wish to proceed, "enhanced cooperation [...] shall be deemed to be granted and the provisions on enhanced cooperation shall apply".²³ In this case, the functional drive for efficiency transforms an emergency-brake veto by one or more Member States into an accelerator for smaller groups of "ins".

Moreover, the Lisbon Treaty increased the European Parliament's (EP) rights of participation in the authorisation procedure. While according to the provisions of the Nice Treaty the EP was asked for consent only in areas where "co-decision" applied, its consent with simple majority will

additionally be required under the Lisbon provisions in areas where special legislative procedures apply.²⁴ Thus in general, the procedure to authorise enhanced cooperation has been communitarised in terms of an increase in participation rights of the EP, closely linking the emergency brake to an accelerator and the application of QMV. Nevertheless, the efficiency of the latter remains subject to the suspensive sovereignty-led veto reflex provided by the so-called "Ioannina" clause. That is, a group representing at least three-quarters of the share of population necessary for building a blocking minority can ask the Council to do everything in its power, within a reasonable period of time, to reach a satisfactory solution. This opens up the possibility of pulling a "hidden emergency brake" at least for a limited period.

d) Implementation: enhanced cooperation a moving target?

Decisions taken in the Council within enhanced cooperation are to be taken only by the "ins", while the "outs" are granted the right to participate in deliberation on the decisions but not to vote. This implies that some sort of "mini-acquis" – legally binding only for the Member States engaged in enhanced cooperation²⁵ – is being created within the overall *acquis communautaire*. This is especially interesting with regard to Art. 333 TFEU which offers two *passerelle* clauses: Member States engaged in enhanced cooperation are enabled to transform unanimity into QMV and to introduce the ordinary legislative procedure in cases where special legislative procedures are foreseen. This

might render enhanced cooperation a moving target for those Member States wishing to accede to it at a later stage – having to apply the mini-acquis in its entirety, without any direct influence on its scope. Indirect influence is possible via the European Parliament, where all members are entitled to vote in cases in which the ordinary legislative procedure is applied or consent is requested. However, the EP's influence is rather limited with regards to the *passerelle* clauses, being only consulted when the ordinary legislative procedure is to be introduced. Nevertheless, in view of the Commission's right to propose legal acts,

the EP's (limited) right to participate and the judicial control by the European Court of Justice, Community control is granted to a certain extent.

e) Accession: Commission and Council of the "ins" as door openers

In general, the procedure for accession of former "outs" to enhanced cooperation in the Lisbon Treaty has remained unchanged. The Commission is responsible for evaluating and deciding on any accession request "within four months of the date of receipt of the notification".²⁶ This supranational control ensures that the interests of the EU as a whole are

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preserved and that coherence with the legal framework is provided. However, “outs” are explicitly requested to comply “with any conditions of participation laid down by the authorising decision”.²⁷ The provisions lack specification as to whether these conditions were initially defined by the Member States submitting the request for establishing an enhanced cooperation or by the Council deciding on its authorisation. Thus, if the former applied, the “ins” would have an influence on the accession of the “outs” by predefining the conditions. Furthermore, the procedure for accession in the Lisbon Treaty is extended in the event that a request for accession is rejected twice by the Commission: Member States then have the right to refer the request to the Council comprising only the “ins”.²⁸ Therefore, the decision of the Commission can be overruled by the small group of participating Member States by QMV²⁹ and the “ins” become a second door-opener.

f) Termination: enduring “mini acquis” or *acquis communautaire*?

Even though the accession of all EU Member States is not the explicit objective of enhanced cooperation, it is not excluded in a long-term perspective. In the meantime, the mini-acquis can provide an efficient tool for differentiated policy-making in the respective policy area in terms of a “multi-speed Europe”. Once it has been triggered, it represents a state of imperfect communitarisation, preventing a stagnation of integration. In line with the argument that flexibility represents a motor rather than a brake to European integration, this state will only be of temporary nature. However, even if the “mini-acquis” was of an enduring nature, in terms of “variable geometries”, this form of flexibility would not develop a disintegration impact, because the general *acquis communautaire* persisted.

Conclusions

The reforms put forward by the Lisbon Treaty will not necessarily make enhanced cooperation less complex, and the sovereignty-led veto reflex has not been outweighed by the functional efficiency drive. In particular the remaining strict conditions for triggering enhanced cooperation will not make the procedure more applicable. Thus, it will continue to be challenged by other treaty-based arrangements for flexibility, such as opting-out or predefined forms of cooperation. Furthermore, the choice between imperfect and no communitarisation will remain prominent, thus maintaining the attractiveness of intergovernmental cooperation outside the treaty framework. For reasons of complexity, and given the existence of other, more attractive, flexibility options, it will be difficult for this kind of treaty-based flexibility arrangement to develop an upward flexibility effect, despite the revisions of the treaty provisions on enhanced cooperation at all stages of the differentiated policy-making cycle. It is more likely to remain an empty promise than to become a trademark of the Lisbon Treaty.

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NOTES

- ¹ The University of Cologne leads the EU-CONSENT Network of Excellence. Funda Tekin is Project Manager, and Professor Wolfgang Wessels is the Coordinator.
- ² For an overview on the complexity of terminology see Stubb 1996.
- ³ In line with this general definition, the terms “flexibility” and “differentiated integration” will be used synonymously.
- ⁴ This definition of the pick-and-choose character of “Europe à la carte” is based on Dahrendorf 1979.
- ⁵ For a more detailed description of these three modes see Deubner 2000, Missiroli 2000.
- ⁶ Art. 31 TEU.
- ⁷ Arts. 20 and 46 TEU; Arts. 326-333 TFEU.
- ⁸ Former Art. 43(d) and (g) TEU.
- ⁹ While the horizontal x-axis denotes the number of Member States, the vertical y-axis indicates the dichotomy between sovereignty of Member States and the autonomy/supremacy of the EU-level. What can be seen as ‘integrationist’ should be seen as an upward movement along the y-axis and vice versa.
- ¹⁰ Conditions in the Lisbon Treaty for building enhanced cooperation within CFSP have been simplified by abolishing the definition of specific aims and the restriction to specific actions. Thus, enhanced cooperation is extended to the entire field of CFSP and CSDP – permanent structured cooperation being introduced to the latter (Art. 20 TEU; Art. 326-334 TFEU; Art. 46 TEU).
- ¹¹ Art. 20(1) TEU.
- ¹² Art. 326 TFEU.
- ¹³ Art. 20(1) TEU.
- ¹⁴ Art. 326 TFEU.
- ¹⁵ Art. 20(1) TEU.
- ¹⁶ Art. 327 TFEU.
- ¹⁷ Art. 20(1) TEU.
- ¹⁸ Art. 328(2) TFEU.
- ¹⁹ Art. 20(2) TEU.
- ²⁰ Art. 20(2) TEU.
- ²¹ Art. 329(1) TFEU.
- ²² Art. 329(2) TFEU.
- ²³ Arts. 82, 83, 86 and 87 TEU.
- ²⁴ Art. 329(1) TFEU.
- ²⁵ Art. 330 TFEU.
- ²⁶ Art. 332(1) TFEU.
- ²⁷ Art. 328(1) TFEU.
- ²⁸ Art. 331(1) TFEU.
- ²⁹ Art. 330 TFEU.