



CENTRO STUDI SUL FEDERALISMO

ricerca scientifica
informazione e diffusione
delle conoscenze
documentazione
e didattica

THE ENHANCED COOPERATION PROCEDURE: A STUDY IN MULTISPEED INTEGRATION

Federico Fabbrini

October 2012

Research Paper



ISSN: 2038-0623
ISBN 9788896871386

Copyright © Centro Studi sul Federalismo 2012

Tutti i diritti sono riservati. Parti di questa pubblicazione possono essere citate nei termini previsti dalla legge che tutela il diritto d'autore e con l'indicazione della fonte.

All rights reserved. Quotations from documents in this site can be made according to copyright law, providing information on the source.

ABSTRACT

This paper analyzes the legal regime for enhanced cooperation currently existing in the European Union (EU). The paper, in particular, explores the following four features. First, it addresses the procedural rules, examining the mechanisms that govern the activation and the functioning of the enhanced cooperation and the means by which new states can join an ongoing cooperation. Second, it outlines the limits and the conditions that constrain resort to this mechanism by the states and that should guide review by the EU institutions. Third, it explores the deeper function of enhanced cooperation and, by developing an innovative comparison with the “compact clause” of the Constitution of the United States (US), it argues that the goal of enhanced cooperation is limited to a rather precise purpose: that of ensuring multispeed integration in the EU. Fourth, it surveys the practice, taking into account the first two experiences of enhanced cooperation in the field of divorce and patents. The paper concludes by considering the ongoing reforms of the mechanisms for the economic governance of the Euro-zone and by assessing the potentials of enhanced cooperation to incorporate the provisions of the Fiscal Compact within the framework of EU law and to adopt a financial transaction tax.

Federico Fabbrini is Assistant Professor of European & Comparative Constitutional Law, Tilburg Law School

E-mail: federico.fabbrini@gmail.com

1. Introduction - 2. Procedure - 2.1 The activation of the enhanced cooperation - 2.2 The functioning of the enhanced cooperation - 2.3 The accession of new states to the enhanced cooperation - 3. Limits and conditions - 3.1 *Ex ante* caveats - 3.2 *Ex post* caveats - 4. L Function - 4.1 Interstate adjustments under the “compact clause” of the US Constitution - 4.2 Multispeed integration through the enhanced cooperation procedure - 5. Practice - 5.1 The enhanced cooperation for divorce - 5.2 The enhanced cooperation for patents - 5.3 An enhanced cooperation to incorporate the Fiscal Compact in EU law? - 5.4 An enhanced cooperation to adopt an EU financial transaction tax? - 6. Conclusion

1. Introduction

The purpose of this paper is to examine the enhanced cooperation procedure regulated by the law of the European Union (EU). The enhanced cooperation procedure is the instrument by which a number of EU member states are allowed to embark on a project of differentiated integration, by pooling their forces and coordinating their action in fields which are not yet ripe for common action by all EU member states. Enhanced cooperation was introduced by the Amsterdam Treaty (with the name of “closer cooperation”) and later amended by the Nice and Lisbon Treaties, which expanded it as a useful mechanism to ensure flexibility and accommodate asymmetry among the states in a enlarging EU.¹ This paper focuses on the current legal regime of enhanced cooperation, as it emerges from the provisions of the Treaty on the EU (TEU) and of the Treaty on the Functioning of the EU (TFEU). The paper analyzes the procedures regulating the activation, functioning and expansion of the enhanced cooperation mechanism and the conditions and limits that surround its use by the member states that wish to do so. The paper then explores the goals that are pursued by the enhanced cooperation mechanism and, through a comparison with the “compact clause” of the Constitution of the United States (US), endeavours to explain that the main function of this mechanism is to foster multispeed integration in the EU constitutional order. The paper finally surveys and critically evaluates the first examples of enhanced cooperation adopted by the EU member states, in the field of divorce and patents, and discusses the potentials of the enhanced cooperation procedure in the reform of the governance of the Economic and Monetary Union (EMU), notably through the incorporation in the EU legal framework of the Fiscal Compact and through the adoption of a financial transaction tax.

¹ On the enhanced cooperation procedure, before the Lisbon Treaty see Bruno de Witte, “Future Paths of Flexibility: Enhanced Cooperation, Partial Agreements and Pioneer Groups”, in Jaap de Zwaan et al. eds., *The European Union as an Ongoing Process of Integration* (Asser 2004) 141; Anne Marie Lansdaal, “Differentiation or Enhanced Cooperation: Formalizing Flexibility”, in Annette Schrauwen ed., *Flexibility in Constitutions: Forms of Closer Cooperation in Federal and Non-Federal Settings* (Europa Law 2002) 47. On enhanced cooperation after the Lisbon Treaty, see Carlo Cantore, “We’re One But We’re Not the Same: Enhanced Cooperation and the Tension Between Unity and Asymmetry in the EU”, *Perspectives on Federalism* 3 (2011). See also Hervé Bribosia, “Les coopérations renforcées”, in Giuliano Amato et al. eds., *Genesis and Destiny of the European Constitution* (Buylant 2007) 623

2. Procedure

The procedure regulating the enhanced cooperation mechanism is outlined in general terms by Art. 20 TEU and then detailed in the provisions of Title III of Part VI TFEU.² These procedural rules can be divided in three groups, corresponding to three different “phases” of enhanced cooperation. A first group of provisions regulate how the enhanced cooperation mechanism can be activated. A second group of provisions clarifies how the enhanced cooperation mechanism functions, once it is set up. A third group of provisions, finally, makes clear how states that were not original parties to the enhanced cooperation can join it at a later moment. These three “phases” will be analyzed in some detail in the following sub-sections.³

2.1 The activation of the enhanced cooperation

Art. 20 TEU and Art. 329 TFEU draw a four-step procedure for the activation of an enhanced cooperation. This process is designed to involve all the main EU actors on the awareness that these institutional safeguards will be the best guarantee against any abuse or misuse of the enhanced cooperation mechanism. As such, the procedure to activate the enhanced cooperation is as follows:

- 1) First, at least *nine member states* shall call for recourse to enhanced cooperation through a formal request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed;
- 2) Second, the *Commission* shall evaluate the request of the member states and, after assessing the compliance of the request with the conditions and limits regulating the enhanced cooperation,⁴ may submit a proposal to the Council to authorize the enhanced cooperation. Note that the Commission is not obliged to follow up on the request of the member states. In the event where the Commission does not submit a proposal to the Council, however, it shall inform the member states concerned of the reasons for not doing so;
- 3) Third, the *Parliament* shall consent to the enhanced cooperation, in the format proposed by the Commission;
- 4) Fourth, the *Council* shall give its authorisation to proceed with the enhanced cooperation with a formal decision adopted through its ordinary decision-making procedure (hence, through qualified majority voting). The authorizing decision shall dictate the conditions of participation in the enhanced cooperation, which need to be complied with by states willing to join the cooperation at a later stage.

² This paper will not focus on enhanced cooperation in the field of common foreign and defence policy. On this see Marise Cremona, “Enhanced Cooperation and the Common Foreign and Security and Defence Policy”, *EUI Working Paper* No. 21 (2009)

³ This paper will not discuss the question whether states are allowed to withdraw from an enhanced cooperation. On this issue see Editorial Comments, “Enhanced Cooperation: A Union à taille réduite or à porte tournante?”, 48 *Common Market Law Review* (2011) 317

⁴ See *infra* Section 3

- 5) Finally, because of its legal nature, it goes without saying that the Council decision authorizing an enhanced cooperation could be subject to judicial review before the *European Court of Justice* (ECJ).⁵

2.2 The functioning of the enhanced cooperation

The rules on the functioning of the enhanced cooperation mechanism are provided in Art. 20 TEU and Art.s 330, 332 and 333 TFEU. These provisions attempt to strike a balance between, on the one hand, the desire to minimize the difference between the functioning of the enhanced cooperation mechanism and the ordinary EU law-making rules, and on the other hand, the need to accommodate the diversity of this peculiar form of differentiated integration. As such, is possible to identify the following core rules on the functioning of the enhanced cooperation mechanism:

- a) the member states that take part in an enhanced cooperation make regular use of the institutions of the EU. This implies, in particular, that supranational bodies such as the Parliament and the Commission exercise their normal powers and work in their standard composition. Moreover, member states participating to an enhanced cooperation procedure do not have to bear additional administrative costs for the use of the EU institutions.
- b) in the working of the Council, however, an exceptional rule applies: All members of the Council may participate in its deliberations, but only members of the Council representing the states participating in enhanced cooperation shall take part in the vote. As such, unanimity shall be constituted by the votes of the representatives of the participating member states only and the qualified majority shall be recalculated accordingly.
- c) in the working of the Council, in addition, member states which are parties to the enhanced cooperation may resort to a “*passerelle clause*” which modifies the internal voting rules or the law-making procedure to be followed by the Council. In particular:
 - where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting with the unanimous vote of the states which are parties to the enhanced cooperation, may adopt a decision stipulating that it will act by a qualified majority;
 - where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting with the unanimous vote of the states which are parties to the enhanced cooperation, may adopt a decision stipulating that it will act under the ordinary legislative procedure. In this case, the Council shall act after consulting the EU Parliament.

⁵ Editorial Comments, 320

In the framework of the enhanced cooperation, participating states are allowed to adopt all legislative and non-legislative acts permitted by EU law (e.g. regulations and directives). As it emerges from the previous analysis, while the Council participates in this law-making process in a special composition (with only the states participating in the cooperation), the Parliament and the Commission operate under standard rule – a feature that should be positively appreciated, bearing in mind that the members of these last two bodies do not represent their states of origin, but rather the EU citizens, and can therefore defend the interests of the EU as a whole.⁶

2.3 The accession of new states to the enhanced cooperation

On the basis of Art. 20 TEU and Art.s 328 and 331 TFEU it is clear that the participation in an enhanced cooperation mechanism remains always open to other member states. In fact, the Commission and the member states participating in an enhanced cooperation have an obligation to ensure that they promote participation of as many states as possible. The procedure that governs the accession of new member states to the enhanced cooperation mechanism appears therefore to be easier than the procedure regulating the activation of the mechanism. In addition, among the EU institutions, only the Commission is involved in the procedure, while the Council is called to act exclusively if problems emerge during the process. The procedure is as follows:

- 1) First, the *member state* that wishes to participate in an ongoing enhanced cooperation shall notify its intention to the Council and the Commission
- 2) Second, the *Commission* shall, within four months of the date of receipt of the notification, evaluate the request of the member state, taking into account the conditions specified by the Council in its decision authorizing the cooperation as well as the subsequent acts adopted in the framework of the enhanced cooperation. At the end of its assessment the Commission may:
 - a) confirm the participation of the member state concerned. It shall note, where necessary, that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.
 - b) consider that the conditions of participation have not been fulfilled. In this case, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. On the expiry of that deadline, it shall re-examine the request. If the Commission considers that the conditions of participation have still not been met, then the member state concerned may refer the matter to the *Council*, which shall decide on the request through a vote of the

⁶ In the literature it has occasionally been argued *de jure condendo* that, in the framework of an enhanced cooperation, the Parliament should operate only in the composition of the representatives of those member states which are parties to the enhanced cooperation. In my opinion, this normative position is not convincing and the current logic of the treaties should be preserved. In fact, by involving the Parliament – the body representing the EU citizens – a voice is ensured to those individuals who do not have a direct influence on the decisions of the government of those states that participate to an enhanced cooperation and who may still be affected by the externalities produced by the cooperation.

states which are parties to the enhanced cooperation. The Council may also adopt the transitional measures proposed by the Commission.

3. Limits and conditions

The possibility for a group of member states to resort to the instrument of enhanced cooperation is subject to a number of limitations and conditions. These qualifications emerge from scattered provisions of Art. 20 TEU and of Title III of Part VI TFEU. The caveats that surround resort to the enhanced cooperation mechanism can be classified into two main groups. A first group of provisions operate *ex ante*, either to exclude *tout court* resort to enhanced cooperation in specific sectors or to prevent enhanced cooperation from interfering with specific interests of the EU. A second group of provisions, instead, comes into play *ex post* (after the activation of the enhanced cooperation mechanism) and serves the purpose to ensure the consistency of the enhanced cooperation with the general policies of the EU and avoid spill-over effects on the non-participating states. These two groups of provisions will be analyzed in detail in the following subsections.

3.1 Ex ante caveats

Member states which are willing to begin an enhanced cooperation encounter a number of *ex ante* limitations and conditions. These are provided in Art. 20 TEU and Art. 326 TFEU and can be summarized as follows:

- i) First, enhanced cooperation is *tout court* excluded in the framework of the EU's exclusive competences. Hence, in the policy areas listed in Art. 3 TFEU, action by a group of member states through the instrument of enhanced cooperation is always prohibited.
- ii) Second, a proposal to begin an enhanced cooperation is brought forward by the Commission, and authorized by the Council through the procedure outlined above,⁷ only when it is established that the objectives of such cooperation cannot be attained within a reasonable period by the EU as a whole. Hence, resort to enhanced cooperation is permitted only as an *ultima ratio* when it appears to the Commission and the Council that action by all member states of the EU on a specific issue is politically unfeasible.
- iii) Third, any enhanced cooperation shall comply with the Treaties and the law of the EU. Whereas this may state the obvious (since an enhanced cooperation can not bring about a change in the constitutional law of the EU), the meaning of this requirement is further qualified by Art. 326 TFEU which affirms that, in particular, an enhanced cooperation shall not undermine the internal market or the economic, social and territorial cohesion, it shall not constitute a barrier to or discrimination in trade between member states, nor shall it distort competition between them.

⁷ See *supra* Section 2.1

The enforcement of these *ex ante* limits and conditions is allegedly ensured through the procedure for the activation of the enhanced cooperation mechanism described supra in Section 2.1.

3.2 *Ex post caveats*

Member states which began an enhanced cooperation are subject to a number of limitations and conditions in the exercise of their powers in the framework of the enhanced cooperation. These are provided in Art. 20 TEU and Art.s 326, 327, 328 and 334 TFEU and can be summarized as follows:

- i) First, enhanced cooperation shall respect the competences, rights and obligations of those member states which do not participate in it. This implies, that acts adopted in the framework of enhanced cooperation shall neither bind non-participating member states, nor be regarded as part of the *acquis* which has to be accepted by candidate states for accession to the EU. Conversely however, as could be inferred from the duty of loyal cooperation of Art. 4 TEU, and as is expressly codified in Art. 327 TFEU, the states that are not parties to the enhanced cooperation commit not to interfere in its implementation by the participating member states.
- ii) Second, the activities undertaken and the measures adopted in the framework of the enhanced cooperation shall be consistent with the *acquis communautaire*. This, once again, implies that the cooperation shall comply with the Treaties and the law of the EU, without undermining the internal market or the economic, social and territorial cohesion, without constituting a barrier to or discrimination in trade between member states and without distorting competition within them.

The enforcement of these *ex post* limits and conditions is ensured by the monitoring of the Commission and the Council. In particular it is a duty of the Council and of the Commission to ensure the consistency of the activities undertaken within the framework of the enhanced cooperation with the policies of the EU, and to cooperate to that end. Moreover, the Commission shall keep the EU Parliament and the Council regularly informed regarding developments in enhanced cooperation, presumably to assure that action in the framework of enhanced cooperation does not undermine the overall policies of the EU institutions.

4. Function

Whereas the TEU and the TFEU offer a detailed description of the procedural arrangements governing the activation, functioning and expansion of the enhanced cooperation mechanism, as well as of the limits and conditions that surround its use by the member states, EU law gives only a very sketchy explanation of the goal that enhanced cooperation should pursue. According to Art. 20 TEU “enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process.” But what does this precisely mean?⁸ What is the

⁸ The function of the enhanced cooperation mechanism is not always explored in the literature on the topic, perhaps because it is considered self-evident. Yet, it is important to assess what precisely is the goal which

underlying purpose of the enhanced cooperation mechanism and how does it relate to the overall project of EU integration? To address this central question this section develops a comparison with the US experience. As the comparative analysis makes clear, also the US Constitution is endowed with an instrument – the “compact clause” – which allows states to pursue flexible and differentiated action within the American Union. Yet, the comparison reveals that this instrument is not subject to a specific finality and has consequently been utilized in the US for a wide variety of purposes having to do generally with interstate adjustments. In the EU context, instead, it emerges that the function of the enhanced cooperation is essentially circumscribed to ensuring multispeed integration in the EU. The identification of a clear pro-integrationist *ratio* in the structure of the enhanced cooperation mechanism, however, has important implications, both for the kind of cooperation that can be launched by the states and for the role of the EU institutions in policing the constraints that surround its use.

4.1 Interstate adjustments under the “compact clause” of the US Constitution

Art. 1, § 10, cl. 3 of the US Constitution, generally referred to as the “compact clause”, allows a state of the US, “with the consent of Congress” to “enter into an[] agreement or compact with another State.” This clause is the instrument by which the US Constitution permits flexible and coordinated action by some states of the US, subject to authorization by the federal Congress, and shall be distinguished from Art. 1, § 10, cl. 1 of the US Constitution, which instead *tout court* prohibits states from entering into a “treaty, alliance or confederation”. As was clarified by Felix Frankfurter and James Landis in an article for the *Yale Law Journal*, written in 1925 and still illuminating today, the “compact clause” serves the goal to arbitrate the contests between the Union and its constituent member states which are “inherent in the very conception of federalism.”⁹ When a problem affects more than one state and, at the same time, action by the federal government would be impossible, the “compact clause” allows states that are willing to pool their forces to do so within the framework of the Constitution. Through the “compact clause” the framers of the US Constitution “astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded national interest.”¹⁰

Art. 1, § 10, cl. 3 of the US Constitution only briefly describes the procedure to be followed in the adoption of a state compact. States willing to enter into a compact among themselves must ask to, and obtain authorization from, Congress (i.e. the US House of Representatives and the US Senate)¹¹. Despite the brevity of the provision, however it is clear that the US Constitution sought to design a mechanism which accommodates, on the one hand, the desire of the states to enter into agreements among themselves, with, on the other hand, the need to ensure the unity

enhanced cooperation should pursue in order to evaluate the legitimacy of the practical initiatives taken in this field. See *infra* Section 5

⁹ Felix Frankfurter & James Landis, “The Compact Clause of the Constitution – A Study in Interstate Adjustments”, 34 *Yale Law Journal* (1925) 685, 686

¹⁰ Frankfurter & Landis, 695

¹¹ It may be worth remembering that until the adoption of the 17th Amendment to the US Constitution in 1913 the US Senate represented the legislatures of the member states, being composed of member elected by the state legislatures.

and the interests of the federal compound. As explained by Frankfurter and Landis, indeed “the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon the consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of ‘treaty, alliance, or confederations’, and what arrangements come within the permissive class of ‘agreement or compact’. But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions.”¹²

The criteria conditioning resort to state compact have been worked out over time by the US Supreme Court (USSCt). In the 1893 case of *Virginia v. Tennessee*,¹³ in particular, the USSCt “introduced the idea that the Constitution would not require Congressional consent for all interstate agreements”¹⁴, but only for those that involved “the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the US.”¹⁵ In more recent decisions, otherwise, the USSCt spelled out several indicia of an interstate compact, whose existence would make the compact subject to congressional authorization. Hence, in *Bancorp Inc. v. Board of Governors of the Federal Reserve*,¹⁶ the USSCt affirmed that a compact requires: “(i) the establishment of a joint organization or body; (ii) the conditions linking a state’s action to the actions of other participating states; (iii) the restrictions on the ability of member states to modify or repeal their laws unilaterally; and (iv) the reciprocal constraints on each state’s regulations.”¹⁷ In addition, in *US Steel Corp. v. Multistate Tax Commission*,¹⁸ the USSCt elaborated on the functional requirements of a state compact and clarified that a compact requiring congressional consent had to impose some legal obligations on the participating states (e.g. the impossibility to withdraw unilaterally), while empowering them to carry out action that they would not be able to achieve autonomously.¹⁹

As a matter of fact, the jurisprudence of the USSCt has introduced a narrow reading of the procedural constraints of the “compact clause”, allowing for the adoption of interstate compacts without congressional consent in the majority of circumstances. Although Art. 1, § 10, cl. 3 of the US Constitution textually requires the consent of Congress for any compact or agreement between the states, the USSCt has interpreted the provision “according to its purpose, not its plain text.”²⁰ The USSCt has therefore argued that states are free to enter into compact among themselves, even without congressional consent, except in those (limited) cases in which the compact would threaten the unity and supremacy of the federal government. As such, regardless of what the original goals of the “compact clause” might have been, the USSCt has opened up

¹² Frankfurter & Landis, 694-5

¹³ 148 U.S. 503 (1893)

¹⁴ Duncan Hollis, “Unpacking the Compact Clause”, 88 *Texas Law Review* (2010) 741, 762

¹⁵ *Virginia v. Tennessee* at 519

¹⁶ 472 U.S. 159 (1985)

¹⁷ Hollis 766

¹⁸ 434 U.S. 452 (1978)

¹⁹ Hollis 765

²⁰ Hollis 763. For a criticism of the Court’s jurisprudence see however Allan Erbsen, “Horizontal Federalism”, 93 *Minnesota Law Review* (2009), 493, 536

the possibility to adopt interstate compacts for a wide variety of functions. As indicated by Frankfurter and Landis in the 1920s, it appears that compacts were used by the states in at least the following eight fields of legislation: 1) boundaries and cessions of territory; 2) improvement of navigation; 3) penal jurisdiction; 4) uniformity of legislation; 5) interstate accounting; 6) control of natural resources; 7) utility regulation; 8) taxation.²¹ Since the New Deal, states have used interstate compacts even with greater frequency “to share information and to jointly study, and even regulate, various collective action or coordination problems.”²²

4.2 Multispeed integration through the EU enhanced cooperation procedure

The previous analysis brings to light a number of interesting similarities between the US and the EU. As the comparison reveals, indeed, also the US Constitution is endowed, since its foundation, with a mechanism – the “compact clause” – that allows member states to pursue a path of coordination and adjustments among themselves, without the involvement of the whole American Union. The need to ensure flexibility and differentiation in the operation of a compound constitutional arrangement appears therefore to be a recurrent feature of federal, multilevel architectures like the US and the EU in which states of asymmetrical size and powers, with diverging economic and political interests, coexist within a Union of wide geographical scope. The possibility for the states of the Union to establish special pacts or agreements between themselves, otherwise, is subject to analogous procedural and substantive constraints both in the US and in the EU to safeguard the general interests of the Union. As we have seen, indeed, the activation of the enhanced cooperation mechanism in the EU requires the support and the approval of all the main institutional actors of the EU (the Commission, the Parliament, the Council and, if the case may be, the ECJ), while in the US interstate compacts must obtain the consent of Congress, albeit at the loose conditions specified overtime by the USSCt.

The comparison with the US experience, however, brings to light also a point of difference between the EU mechanism of enhanced cooperation and the US regime for interstate compacts. Whereas EU law attempts to identify a specific goal that the enhanced cooperation procedure should pursue in the EU – notably the furthering of the objectives of the EU, the protection of its interests and the reinforcement of its integration process – the US Constitution leaves undefined the function of interstate compacts. As a consequence, the “compact clause” of the US Constitution has been utilized by states for a wide variety of functions, which broadly speaking have concerned the adjustment and the solution of interstate problems.²³ The “compact clause”, therefore, has not been finalized exclusively to the achievement of greater integration among a core group of US states. In fact, arguably, the creation of a too close combination among the states represents the external limit of what is permitted under the “compact clause”. As was previously mentioned, indeed, the US Constitution prohibits the states from creating a

²¹ Frankfurter & Landis, 696

²² Hollis 763

²³ See also generally Robert Cooter & Niel Siegel, “Collective Action Federalism”, 63 *Stanford Law Review* (2010) 115

special “alliance or confederation” among themselves²⁴ and the USSCt has consistently affirmed the need for congressional scrutiny on compacts that “encroach upon or impair the supremacy of the US, or interfere with the rightful management of particular subjects placed under their entire control.”²⁵

A comparative analysis hence would suggest that the scope of the enhanced cooperation procedure, as defined in Art. 20 TEU, is more limited than that of the interstate compacts in the US constitutional system. The closer cooperation among EU member states in the framework of the enhanced cooperation procedure cannot simply be directed toward the solution of a basic interstate problem, but needs to be finalized toward closer integration. The requirement set in Art. 20 TEU that at least nine states must participate in the enhanced cooperation confirms that the function of this instrument is to create a “vanguard group” of states, willing to move ahead toward the achievement of an “ever closer union.”²⁶ As a matter of fact, therefore, it would appear that the goal of the enhanced cooperation mechanism is to offer to EU member states the possibility to pursue, within the framework of EU law, those initiatives aimed at greater integration which, so far, have traditionally taken place outside the EU legal architecture. Initiatives such as the Social Policy Protocol or the Schengen Treaty, which were initially devised outside the EU and only subsequently integrated in the *acquis communautaire*, are the kind of agreements that, according to the *ratio* of Art. 20 TEU, should be in the future channelled through the enhanced cooperation procedure.²⁷

From the “pro-integration” goal of the enhanced cooperation procedure,²⁸ it also emerges that several substantive constraints should bind resort to this instrument. In particular, the previously mentioned requirement of Art. 20 TEU that enhanced cooperation be a last resort, to be activated only when the objectives of such cooperation cannot be attained within a reasonable period by the EU as a whole, acquires now a new meaning. This criterion seems to indicate that enhanced cooperation can only be used when member states disagree on *whether* to act, and not on *how* to act. If a group of states is willing to move ahead in integrating and coordinating its action in a new field (as, e.g. social policy, border management, or – recently – economic governance) while other states are not ready to pool their sovereignty in this field, *then* enhanced cooperation can be used. Enhanced cooperation, instead, is not an option when states largely agree on the need for joint EU action, but disagree on the policy choices – i.e. advance

²⁴ Needless to say, the experience of the Civil War, which was legally triggered by the decision of a group of states to secede from the Union and coalesce within a new Confederation, confirms to the dangers of allowing a political combination between states within the framework of the American Union.

²⁵ *Virginia v. Tennessee* at 518

²⁶ Hence, to make a very practical example, it would be impossible for the five EU states which have jurisdiction on the Alpine Region (France, Italy, Austria, Germany & Slovenia) to adopt a compact through enhanced cooperation to address the common environmental problems of the Region.

²⁷ Yet, as the example of the recently adopted Fiscal Compact highlights, it is anything but clear that states aiming at reinforcing the EU integration process are willing to resort to the enhanced cooperation procedure rather than to *ad hoc* international treaties. See *infra* Section 5.3

²⁸ On the notion of integration through law see notably Mauro Cappelletti et al., “General Introduction”, in Mauro Cappelletti et al. eds., *Integration Through Law. Europe and the American Federal Experience. Volume I. Book 1* (de Gruyter 1986), 3. For a recent reassessment of the capacity of law to ensure integration in the EU see also Daniel Augenstein & Mark Dawson, “Introduction: What Law for What Polity? ‘Integration Through Law’ in the European Union Revisited”, in Daniel Augenstein ed., *‘Integration Through Law’ Revisited. The Making of the European Polity* (Ashgate 2012), 1

conflicting or alternative substantive proposals on how to regulate a specific field or sector. In this case, in fact, the enhanced cooperation would not serve the goal of furthering the process of EU integration, but would rather allow a majority of the states to unilaterally impose its position in circumvention of the EU law making procedure. Because the function of enhanced cooperation is to ensure multispeed integration in the EU, the EU political and judicial branches should oversee that the instrument is not hijacked for other, unacceptable goals.

5. Practice

As the previous section has clarified, the function of enhanced cooperation is to allow a group of “vanguard states” to go ahead in the process of EU integration. Through a comparison with the “compact clause” of the US Constitution, the previous section has explained that Art. 20 TEU designs a specific, and rather circumscribed, goal for the enhanced cooperation, finalizing them to the establishment of a multispeed Union in which some states are willing to pool their action in specific fields while others are not. With the benefit of the previous theoretical assessment, this section will move to analyze the practice and examine the early EU experiences with enhanced cooperation in the field of divorce and unitary patents. As it will emerge – troublingly – the appropriateness of the enhanced cooperation mechanism in these two cases appears rather doubtful in light of the function of the instrument identified above. On the contrary – ironically – the mechanism of enhanced cooperation would have been well fitting for the enactment of the reforms of the EU economic governance: but as is well-known these reforms were recently adopted through the Fiscal Compact, an ad hoc international treaty, technically outside the EU legal framework. With a proactive approach, nevertheless, it will be explained that the instrument of enhanced cooperation can be successfully employed in order to reincorporate, during the next five years, the provisions of the Fiscal Compact within EU law. In addition, it will be maintained that the enhanced cooperation mechanism could be a useful tool for the adoption of a financial transaction tax among those member states of the EMU which are willing to proceed in this direction.

5.1 The enhanced cooperation for divorce

Within the EU, the need to establish uniform conflict of law rules in the field of transnational divorce has increasingly obtained support among the EU member states, especially to avoid phenomena of forum shopping and rushes to court that adversely affect the parties of a divorce claim. Nevertheless, no agreement has been possible among the 27 EU member states because state legislation widely diverge, not only on the motives that justify the dissolution of marriage, but also on the criteria that ground state jurisdiction in divorce cases. In particular, while a group of states strictly apply the *lex fori* rule (empowering state courts to hear divorce cases on the basis of the petition) others demand a scale of connecting factors that let state courts rule on divorce cases only when the parties are somehow connected to the state in which proceedings are brought. In this context of stasis, a number of member states opted to resort to the instrument of enhanced cooperation and made a request to the Commission to this end already in 2008. In March 2010, the Commission proposed the framework of the cooperation. The

Parliament gave its consent in June 2010 and in July 2010 the Council reached consensus to authorize it.²⁹ Eventually, in December 2010 the states participating in the enhanced cooperation approved Council Regulation No. 1259/2010,³⁰ implementing enhanced cooperation in the area of law applicable to divorce and legal separation, which will enter into force, for the participating states, in July 2012.

The enhanced cooperation among 14 EU member states in the field of divorce represents a test case for the use of enhanced cooperation in EU law.³¹ Yet, it is not at all certain that the use of the instrument of enhanced cooperation was appropriate in this context, where the main issue concerned the choice of the conflict of law rule to be applied in divorce cases. As Jan-Jaap Kuipers has well explained, indeed, “the risk of enhanced cooperation when applied to an area where the substance of the rules is the main controversy, rather than the question whether the Union should accede the policy area as such, is that the group of minority Member States may try to establish common rules among themselves.”³² In the case at hand, the instrument of enhanced cooperation allowed a group of states (characterized by a common conflict of law rules – based on the use of connecting factors) to draw for themselves a common regulation of divorce claims consistent with their legal tradition. Nevertheless, nothing would prevent another group of states to use enhanced cooperation to foster *their* substantive policy choices in the field of conflict of law (e.g., the *lex fori* rule). As it is clear, however, this scenario is clearly inconsistent with the function of the enhanced cooperation, which is to create a “two-speed Europe, [...] rather [than] push Europe in two directions.”³³ The first experience of the use of enhanced cooperation, therefore, raise serious questions about the adequacy of this mechanism in the regulation of the law applicable to divorce and warns us against the distorted, and potentially counter-productive, use that states may make of the enhanced cooperation procedure.

5.2 The enhanced cooperation for patents

Analogous concerns are raised by the second example of enhanced cooperation authorized in the EU: the enhanced cooperation for the establishment of a unitary patent. It is widely acknowledged that the creation in the EU of a single system for the registration and the protection of patents is a necessary step to protect invention and stimulate research and development. Indeed, in the field of protection of intellectual property states face a clear collective action problem which can only be overcome through concerted action. Yet, whereas the opportunity of EU action in the field of patents is extensively recognized by member states, national governments fundamentally disagree on a central issue in the design of the EU patent system, namely the languages to be used for registering a patent. In particular, while a majority of the EU states supports a trilingual regime (in which patents can be equally registered in English, French or German), Italy and Spain required that the languages be either reduced to one (English)

²⁹ OJ [2010] L 189/12

³⁰ OJ [2010] L 343/10

³¹ Steve Peers, “Divorce European Style: the First Authorization of Enhanced Cooperation”, 6 *European Constitutional Law Review* (2010) 339

³² Jan Jap Kuipers, “The Law Applicable to Divorce as a Test Ground for Enhanced Cooperation”, 18 *European Law Journal* (2012) 201, 213

³³ Kuipers 213

or extended to five (to include Italian and Spanish).³⁴ Because of the stasis in the decision-making process, in December 2010, a group of member states tabled a proposal for an enhanced cooperation in the field of patents. By February 2011, when the Commission proposed a framework for cooperation, 25 states were backing the proposal. Hence, in March 2011, the Parliament gave its consent and the Council authorized the cooperation.³⁵ The only two states that were not parties to the cooperation (Italy and Spain), however, have challenged the authorization before the ECJ, which should soon rule on the matter.³⁶

The experience of the use of enhanced cooperation in the field of patents shows, once again, the promise and the perils of this instrument. As it was mentioned, it can hardly be denied that the EU should endow itself with a unitary patent system.³⁷ Art. 1, § 8, cl. 8 of the US Constitution – the so-called “patent clause” – already granted in 1787 the power to Congress to adopt legislation “to promote the progress of science and useful arts, by securing for limited times [...] inventors the exclusive right to their respective [...] discoveries.” Yet, it is quite doubtful that the enhanced cooperation will do the trick in Europe. The only two states that did not take part in the enhanced cooperation did not disagree on *whether* common EU action was needed. Rather, they disagreed on *how* the system should have been designed (notably, what languages ought to be used in the patent system). In this circumstance, it seems unavoidable to notice that the decision of the Council to authorize the enhanced cooperation is incompatible with the requirement of Art. 20 TEU. Whereas the function of enhanced cooperation would be to allow a group of vanguard states to advance the cause of EU integration, in the current situation the instrument of enhanced cooperation has been distorted by a majority of states to circumvent the voting rules applying in the Council and enact its preferred policy choice against the wish of the two only dissenting states. In this context, one can only hope that the ECJ will exercise a strict scrutiny on the measures activating the cooperation and enforce the clear requirements of Art. 20 TEU.

5.3 An enhanced cooperation to incorporate the Fiscal Compact in EU law?

Taking into account the inappropriate – and, most likely, unlawful – use of the enhanced cooperation procedure which was done in the first two above-mentioned cases, it is ironic to notice that, in the field of economic governance, where the instrument of enhanced cooperation would have been a perfect fit, member states have rather opted to enact an *ad hoc* international treaty, the so-called Fiscal Compact.³⁸ As made clear in the Preamble and in Art. 1, in fact, the goal

³⁴ The position of the states on the issue of the linguistic regime of the EU patent system is obviously connected to the desire of protecting the national industries. The cost of translating patents can be very high and states are either interested in assuring that state industries can register patents *without* translation costs or, at worse, in preventing industries from other states from registering *at lower* costs. See Enrico Bonadio, “The EU Embraces Enhanced Cooperation in Patent Matters: Towards a Unitary Patent Protection System”, 3 *European Journal of Risk Regulation* (2011) 416

³⁵ OJ [2011] L 76/53

³⁶ Case C-274/11 *Spain v. Council* pending and C-295/11 *Italy v. Council* pending

³⁷ Steve Peers, “The Constitutional Implications of the EU Patent”, 7 *European Constitutional Law Review* (2011) 229

³⁸ On the Fiscal Compact see Federico Fabbrini, “The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism”, 36 *Boston College International & Comparative Law Review* (forthcoming 2013)

of the Fiscal Compact is to develop an “ever closer coordination of economic policies within the Euro-area”³⁹ and to “strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline [...] and to improve the governance of the Euro area.”⁴⁰ Clearly, this goal is perfectly consistent with the requirement of Art. 20 TEU that enhanced cooperation furthers the objectives of the Union, protects its interests and reinforces its integration process. In addition, the opposition of two member states (the United Kingdom and the Czech Republic) against these reform of the architecture of the EMU was motivated by a substantive disagreement on whether the EU should act at all, and not on how the EU should act. As such, this situation perfectly fits in the scenario foreseen by Art. 20 TEU, in which a group of vanguard states wants to move ahead in the process of EU integration (by coordinating action in a new area) while others are unwilling or unable to take part in this venture. Yet, it is well-known that member states willing to reinforce the architecture of the EMU, have not resorted to the enhanced cooperation procedure, but have rather adopted a new international treaty.

I will not dwell here on the political factors that pushed in the direction of the enactment of an *ad hoc* treaty (nor will I consider whether the Fiscal Compact was actually needed at all, given the previous adoption of EU legislation on the same issue through the so-called “six pack”).⁴¹ Instead, what I want to emphasize is that the instrument of enhanced cooperation can provide an adequate framework to incorporate the provision of the Fiscal Compact into EU law. Art. 16 of the Fiscal Compact, in fact, states that “[w]ithin five years, at most, of the date of entry into force of this Treaty [...] the necessary steps shall be taken, in accordance with the [TEU] and the [TFEU], with the aim of incorporating the substance of this Treaty into the legal framework of the [EU].” Taking into account the function and the content of the Fiscal Compact, it is submitted that its provisions can be incorporated into EU law through an enhanced cooperation.⁴² On the one hand, the Fiscal Compact pursues a goal which falls within the scope of Art. 20 TEU: greater economic coordination and tighter fiscal coordination among the states. On the other hand, no provision of the Fiscal Compact runs afoul of the conditions and limitations for the adoption of an enhanced cooperation: the Fiscal Compact does not interfere with an exclusive competence of the EU; does not violate EU law; does not undermine the internal market or discriminate between states; and is certainly an *ultima ratio*, as its goal cannot be achieved by the EU as a whole. In light of this, the states (possibly all the 25 signatories to the Fiscal Compact) should soon request to the Commission to bring forward a proposal for an enhanced cooperation with the goal to incorporate all the innovations of the Fiscal Compact in EU law. In light of the arguments developed above, there is no reason why the Council should not authorize the cooperation and why the ECJ should not back it.

³⁹ FC, 1st recital

⁴⁰ FC, Art. 1

⁴¹ On these issues see Gianni Bonvicini & Flavio Brugnoli (eds.), *Il Fiscal Compact*, Quaderni IAI n. 5, September 2012

⁴² Incidentally, it may be noticed that the other instrument adopted by the EU member states to tackle the ongoing financial crisis – i.e. the European Stability Mechanism (ESM) – will not require instead further action to be re-inserted in the EU legal frame work. The ESM Treaty, in fact, has been adopted pursuant to the new Art. 136 TFEU which, as modified by the European Council on 25 March 2011 with Decision 2011/199/EU, OJ [2011] L 91/1, authorizes the member states of the Euro-zone to establish a permanent mechanism to safeguard the financial stability of the Euro-area.

5.4 An enhanced cooperation to adopt an EU financial transaction tax?

Beside being an appropriate tool to incorporate fiscal instruments enacted so far outside the EU legal framework into EU law, the enhanced cooperation can also serve as a useful mechanism to make further steps in the federal integration of the EMU and to adopt additional measures to respond to the financial crisis of the Euro-zone. The enhanced cooperation, in particular, seems to be an apt procedure for the enactment of a financial transaction tax (FTT) among those EU member states (possibly, all the 17 countries of the Euro-zone) which are willing to participate. The option of adopting an EU FTT has been on the table of the EU institutions since September 2011, when the Commission proposed a Council Directive on a common system of FTT,⁴³ based on Art. 113 TFEU, with the goals to avoid fragmentation in the internal market, ensure that financial institutions contribute to the cost of the crisis and create a new revenue stream for the EU budget. The EU Parliament (whose role in this field is however only consultative) endorsed the proposal.⁴⁴ Yet, it has become clear that not all 27 EU member states are willing to follow suit on the Commission's initiative, as countries such as the United Kingdom oppose any measure that could affect their florid financial markets. On 22 June 2012, therefore, the Presidency of the ECOFIN Council concluded that the Commission's proposal was not unanimously supported by the member states and this paved the way for the consideration of a FTT through the mechanism of an enhanced cooperation.⁴⁵

An enhanced cooperation for the adoption of a FTT would be certainly legitimate in light of Art. 20 TEU. The tax indeed furthers the objectives of the EU, protects its interests and reinforces its integration process.⁴⁶ Moreover, the field of fiscal policy is an area of concurrent competence of the EU and the member states, and action by a group of states would not contrast with existing EU laws or interfere with the functioning of the EU internal market.⁴⁷ Within the framework of the enhanced cooperation, at the same time, participating states could resort to the “*passerelle clause*” of Art. 333, shifting from the special legislative procedure (with unanimity rule) set by Art. 113 TFEU to the ordinary legislative procedure (with qualified majority and the involvement of the Parliament as co-legislator). Nevertheless one should not underplay a relevant practical difficulty on the way to the adoption of FTT through enhanced cooperation, connected to the difference regulation of “taxing” and “spending” powers in the EU. While in fact member states can use an enhanced cooperation to *raise* new EU revenues through the FTT,⁴⁸ it appears that they do not enjoy the same autonomy to *spend* the resources obtained with a FTT through another enhanced cooperation. The expenditures of the EU, in fact, are regulated through the

⁴³ COM(2011) 594 final, 28 September 2011

⁴⁴ EU Parliament Resolution P7_TA(2012)0217, 23 May 2012

⁴⁵ Council of the EU Doc. 11682/12, 22 June 2012, 11

⁴⁶ See the Impact Assessment of the Commission, COM(2011) 594 final, 4

⁴⁷ In fact, several EU member states such as France have autonomously decided to adopt a FTT. See Art. 5, *Loi n° 2012-354*, J.O.R.F. n° 64 du 15 mars 2012, 4690. It is submitted that if a member state can *singulatim* decide to adopt a FTT, it can also do so jointly with other member states through an enhanced cooperation.

⁴⁸ It is submitted, in fact, that while the states are in charge of collecting the FTT, the revenues will be assigned to the EU and become part of its own resources pursuant to Art. 311 TFEU. See also Pier Virgilio Dastoli, “Le risorse proprie”, in Maria Teresa Salvemini & Franco Bassanini, *Il finanziamento dell'Europa* (Passigli 2010) 279

budgetary process of Art. 314 TFEU which vests in the EU institutions, *qua* Union, the exclusive power to decide how to allocate the available EU resources.⁴⁹ In this context, it would be up to the states which are parties to the enhanced cooperation to devise, during the negotiation of the EU budget, the appropriate political means in order to ensure that the revenues collected through a FTT in only some member states are effectively spent to the benefits of the citizens of those states.⁵⁰ Provided this practical difficulty could be solved through a political agreement, it seems that a FTT would be a significant improvement in the ways in which the EU could address the current financial crisis.

6. Conclusion

The paper has analyzed the enhanced cooperation mechanism as it is currently regulated in the law of the EU. The paper has examined the procedure that needs to be followed to activate the mechanism, the rules that govern its functioning and the means by which new member states can join an ongoing cooperation. It has assessed the conditions and the limits that surround the use of this mechanism and the interests that these *ex ante* and *ex post* constraints secure. The paper has then explored the function of the enhanced cooperation system and, on the basis of a comparison with the US experience, argued that the goal of the enhanced cooperation is to create a multispeed Europe, by favouring the pro-integration initiatives of groups of vanguard states in the framework of EU law. Having identified the more limited scope of the enhanced cooperation procedure *vis-à-vis* the interstate compacts of the US Constitution, the paper has surveyed the first two examples of enhanced cooperation in EU law. As it has been remarked, significant concerns are raised by the use of enhanced cooperation in the field of divorce and unitary patents: both initiatives appear incompatible with the requirements of Art. 20 and it cannot be excluded that the ECJ will declare (at least) one of them unlawful. On the contrary, as the paper has made clear, the instrument of enhanced cooperation would have been very appropriate for the reform of the EMU governance. Although the states have so far decided to improve the governance of the EMU through a special treaty, it appears that the provisions of the Fiscal Compact could be incorporated in EU law through the enhanced cooperation procedure. The EU's "compact clause", seems indeed the most appropriate way to bring the Fiscal Compact back within the framework of EU law. In addition, the instrument of enhanced cooperation could be usefully employed to enact a financial transaction tax among the states of the EU which are willing to follow suit on the 2011 Commission's proposal. In conclusion, the enhanced cooperation mechanism continues to remain a potentially valuable solution for differentiated and asymmetric integration in the EU. Yet, as with most legal instruments, member states and EU institutions should handle it with care, to avoid a distorted and dangerous use.

⁴⁹ The EU budgetary process is so protective of the sovereign equality of all the 27 member states that, according to Art. 353 TFEU, the application of the normal "*passerelle* clause" of Art. 48(7) TEU (which allows member states to unanimously change a special law-making procedure into an ordinary one) is prohibited in the decisions relating to the determination of the EU's own resources and to the adoption of the EU multiannual financial framework.

⁵⁰ Alternatively, the states that are parties to the enhanced cooperation on the FTT could agree with the other EU member states that, for them, the revenues raised through the FTT will replace the direct contribution based on the national GDP, which currently represent the main funding of the EU budget.

CENTRO STUDI SUL FEDERALISMO

**Via Real Collegio 30
10024 Moncalieri (TO)
Tel. +39 011 670 5024
Fax. +39 011 670 5081
www.csfederalismo.it
info@csfederalismo.it**