Implementation of the Treaty provisions concerning enhanced cooperation

European Implementation Assessment

STUDY
Implementation of the Treaty provisions concerning enhanced cooperation

Study

The Committee on Constitutional Affairs of the European Parliament requested an implementation report on the 'implementation of the Treaty provisions concerning enhanced cooperation' on 8 March 2018 (rapporteur: Alain Lamassoure, EPP, France). This proposal was approved by the Conference of Committee Chairs at its meeting of 17 April 2018. Implementation reports are routinely accompanied by European implementation assessments.

This European implementation assessment has been drawn up by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament’s Directorate-General for Parliamentary Research Services. It aims at contributing to the Parliament’s discussions on this topic, improving understanding of the subject, and ultimately feeding into the implementation report under preparation by the rapporteur.

Enhanced cooperation is a procedure whereby a minimum of nine Member States agree to establish closer cooperation in a specific area, in cases where an agreement at Union level is not possible, mainly due to a lack of unanimity in the Council. Provisions for enhanced cooperation were introduced the Treaty of Amsterdam and streamlined in the Treaty of Lisbon. However, these provisions are rarely used.

This study examines the existing (and planned) instances of enhanced cooperation, their institutional set up and state of play. The cases examined pertain to: the European Public Prosecutor’s Office, divorce law, property regime rules, European Unitary Patent and (planned) financial transaction tax. The study also examines the similar mechanism of the EU Permanent Structured Cooperation on security and defence. Finally, for the sake of comparison, one case of a joint undertaking is also examined.
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LINGUISTIC VERSIONS
Original: EN

Manuscript completed in December 2018.

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PE 627.152
DOI: 10.2861/814370
CAT: QA-06-18-336-EN-N

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<th>Description</th>
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<tr>
<td>AFSJ</td>
<td>Area of freedom, security and justice</td>
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<tr>
<td>CARD</td>
<td>Coordinated annual review on defence</td>
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<tr>
<td>CDP</td>
<td>Capability development plan</td>
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<tr>
<td>CFSP</td>
<td>Common foreign and security policy</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CMPD</td>
<td>Crisis Management and Planning Directorate</td>
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<td>CSDP</td>
<td>Common security and defence policy</td>
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<td>CWP</td>
<td>Commission work programme</td>
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<tr>
<td>ECA</td>
<td>European Court of Auditors</td>
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<td>EDA</td>
<td>European Defence Agency</td>
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<td>EDF</td>
<td>European Defence Fund</td>
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<tr>
<td>EEAS</td>
<td>European External Action Service</td>
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<td>EnC</td>
<td>Enhanced cooperation</td>
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<td>EPC</td>
<td>European Patent Convention</td>
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<td>EPO</td>
<td>European Patent Office</td>
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<tr>
<td>EPPO</td>
<td>European Public Prosecutor’s Office</td>
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<td>EUMS</td>
<td>European Union military staff</td>
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<tr>
<td>EuroHPC</td>
<td>European joint undertaking on high-performance computing</td>
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<tr>
<td>FAC</td>
<td>Foreign Affairs Council</td>
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<tr>
<td>FTT</td>
<td>Financial transaction tax</td>
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<tr>
<td>HR/VP</td>
<td>High Representative/Vice-President</td>
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<td>JU</td>
<td>Joint undertaking</td>
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<tr>
<td>NIP</td>
<td>National implementation plan</td>
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<td>PESCO</td>
<td>Permanent structured cooperation</td>
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<tr>
<td>PPP</td>
<td>Public private partnership</td>
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<tr>
<td>QMV</td>
<td>Qualified majority voting</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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1. Introduction

1.1. Objectives and scope

The Committee on Constitutional Affairs of the European Parliament requested an implementation report on the ‘implementation of the Treaty provisions concerning enhanced cooperation’ (rapporteur: Alain Lamassoure, EPP, France) on 8 March 2018. This proposal was approved by the Conference of Committee Chairs at its meeting of 17 April 2018. Implementation reports are routinely accompanied by European implementation assessments.

This European implementation assessment has been drawn up by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament’s Directorate-General for Parliamentary Research Services. It aims at providing a contribution to the Parliament’s discussions on this topic, improving understanding of the subject, and ultimately feeding into the implementation report under preparation by the rapporteur.

In general, European implementation assessments look into how specific existing EU laws or policies operate in practice, providing an analysis of the experience to date. Ideally, they are based on sufficient time for observation of the implementation of a given law, set of related laws or policy. This was however not always possible in the examination of the individual cases in this study: some cases of enhanced cooperation were triggered recently and are therefore in the early implementation (or even preparatory) stages. Other cases have not as yet started the implementation stage or are yet to be adopted. Only one case of enhanced cooperation has been implemented for a significant period of time.

Therefore, in lieu of a fully-fledged implementation assessment, this study presents the institutional organisation of the individual cases of enhanced cooperation and their state of play. Furthermore, on the basis of a literature review, it attempts to indicate potentially challenging aspects for future implementation of the cases presented.

Readers might find it useful to read this study in conjunction with an October 2018 study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs. These two studies are complementary, while they examine the same issue of enhanced cooperation, they do so from different perspectives. As noted, this study focuses on the state of play of the existing and planned cases of enhanced cooperation, while the EP Policy Department study examines the legal provisions governing enhanced cooperation against a historical backdrop and attempts to formulate ideas on how to optimise the legal framework for enhanced cooperation in the future.

1.2. Methodology and structure of the study

This study has been carried out through desk research, relying primarily on publicly available institutional sources, as well as on academic literature and relevant think tank publications. While references are included throughout the text in the form of footnotes, a list of main references is presented at the end of the study.

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The study is divided in eight sections: following this introductory section, each section examines a specific case of enhanced cooperation, as well as PESCO. For comparison purposes, a final section, examining the EU joint undertaking on high performance computing, completes the publication.
1.3. Main findings

Since the Amsterdam Treaty entered into force in 1999 (albeit in a form of 'closer cooperation' at the time), enhanced cooperation (EnC) has rarely been used. So far, only four cases of EnC have been adopted, all following the entry into force of the Lisbon Treaty in 2009.

1.3.1. Enhanced cooperation: Facts and figures

The above-mentioned four cases concern: the European Public Prosecutor’s Office (EPPO); divorce law; property regime rules; and unitary patent protection. Only one of these enhanced cooperation (EnC) cases began with EnC implementation (divorce law in 2012).

In addition, permanent structured cooperation (PESCO), often seen as a ‘special’ EnC case in defence cooperation matters, has also been adopted (under separate PESCO-specific Treaty provisions) and began with its implementation in 2017.

Finally, one further instance of EnC, on financial transaction tax (FTT), is awaiting adoption. While the Council authorised a group of Member States to go ahead with the EnC in this case, the legislative act has not as yet been agreed on or adopted.

The analysis below examines the above six cases. For comparison purposes, one joint undertaking example has been included in the analysis, on High Performance Computing.

For ease of reading, this analysis should be read in conjunction with the overview of cases provided on pages 8 to 10.

In five of the above six cases, legislative (or legal) acts have been adopted on the following dates: EnC in divorce law in 2010 (the first EnC to be adopted), EnC on patent matters in 2012, EnC on property regime rules in 2016. Finally, late 2017 saw a breakthrough, with the adoption of EnC on EPPO in October and of PESCO in December.

As mentioned above, only two cases began with the implementation: EnC in divorce law is applicable for over six years (since June 2012), while the implementation of PESCO began in December 2017. This explains why insight into the impact of EnC remains limited. In addition to these two cases, preparatory work aiming at implementation has begun regarding EPPO and the Unified Patent Court.

1.3.2. Period and procedure from proposal to adoption of a legislative act

The time required for an original proposal for a legislative act to come to adoption as an EnC is around four to five years (four plus years for EPPO; four and a half years for divorce law; five plus years for property regime rules). The notable exception is the twelve (12) year period that elapsed from the original Commission proposal on patents in 2000 to the final adoption of the regulation in 2012.

A caveat in the patent case is that the patent package consists of three separate texts. Apart from the Unitary Patent Protection Regulation, two other parts of the package have a different 'life-cycle': the Regulation on Translation Arrangements took two and a half years from the original proposal to its adoption in the EnC format (and only nine months from the original proposal to Council authorisation to proceed by means of EnC). The final part of the package – Council Agreement on a Unified Patent Court – was signed in 2013, but has not as yet been ratified.

Procedurally, enhanced cooperation entails the adoption of two acts: the first is a decision authorising EnC, while the second is the substantive legislative act that binds only participating Member States. It should be noted that the EPPO procedure differs from the other EnC cases, in so far as it does not require authorisation to proceed with the EnC (‘the authorisation is deemed to be
Implementation of the Treaty provisions concerning enhanced cooperation

granted'). Finally, as stated above, PESCO is governed by a special set of Treaty provisions and does not require a 'failed attempt' before launching EU-wide cooperation (there is no 'last resort' provision).

1.3.3. Enhanced cooperation policy areas and type of acts adopted

In terms of policy area, EnC cases in general pertain to the more sensitive policy areas, often those from former pillars II or III, which originally fell outside the scope of 'communitarised' policies. Three EnC cases concern Title V/Area of freedom, security and justice (AFSJ) policies: judicial cooperation in either criminal (EPPO) or in civil matters (divorce, property regime rules). PESCO concerns Common Security and Defence Policy (CSDP), while the remaining two cases concern tax (FTT) and the approximation of laws in the context of internal market (patent).

In terms of the type of act adopted, the most frequent is the Council Regulation (special legislative procedure on: EPPO, divorce law, and property regime rules. PESCO is also a special case, adopted through a Council Decision (legal, not legislative, act in line with Article 24(1), subparagraph 2, TEU). EnC on patents presents the most complex case in this regard, whereby the three parts of the interlocking 'patent package' are: Regulation of the European Parliament and the Council (COD), Council Regulation (SLP), and a Council Agreement. Finally, a proposal on FTT, as yet to be adopted, calls for a Council Directive.

1.3.4. Member States participating in enhanced cooperation

In terms of the number of participating Member States in various cases of EnC, despite the relatively low threshold of nine Member States set in the EnC and EPPO provisions (PESCO does not require a minimum number), the tendency is for much higher numbers of participating Member States.

As can be seen from the overview of Member States' participation in section 1.4., as many as 26 Member States take part in EnC on European Unitary Patent, followed by 25 Member States participating in PESCO, 22 in EPPO, 18 in property regime rules, and 17 in divorce law, with the lowest number of participating Member States in the case of the yet to be adopted EnC on FTT. Several further observations can be made here:

- A core group of eight Member States take part in every case of EnC/PESCO (AT, BE, DE, EL, FR, IT, PT, and SI). This group is closely followed by a group of three Member States that take part in five cases of EnC/PESCO (BG, ES, and LU).
- The biggest group of ten Member States takes part in four cases of EnC/PESCO. These are CY, CZ, EE, FI, MT, NL, LV, LT, RO, and SK, followed by a group of three Member States that take place in three cases (HR, HU, and SE).
- The remaining four Member States take part in only one or two cases of EnC/PESCO. Taking part in two cases each (patent and PESCO) are IE and PL, while DK and UK participate in one case only (patent). Considering that three Member States have standing opt-out arrangements in matters pertaining to AFSJ (DK, IE, UK) and defence (DK), their non-participation in EnC cases in the AFSJ field (EPPO, divorce law, property regime) or in PESCO is not altogether surprising.

Similar numbers (17 and 18) of participating Member States in the EnC cases covering adjacent fields of family law hide an important difference. While 17 Member States participate in the EnC on divorce law and 18 in the EnC on matters of matrimonial property regimes, only 12 of these overlap (i.e. 12 Member States participate in both divorce law EnC and in property regime EnC). A further six Member States participate in property regime EnC only, while another five Member States take part in divorce law EnC only. Finally, five Member States take place in neither divorce law nor property regime EnC. There are warnings that such an 'Olympic circles' use of EnC in closely related fields of family law might result in the legal framework becoming unintelligible.
1.3.5. Unique nature of EnC cases

That the cases of EnC are of a similar nature, having come into existence through the same (or similar) mechanism, would be an erroneous conclusion. Our examination of the above cases of EnC/PESCO leads to conclude the opposite: that these cases are so different from one another that the only common denominator seems to be the mere fact that they are indeed cases of enhanced cooperation.

While each of the cases of EnC/PESCO is presented in some detail as a separate chapter in this study, some of the cases are fairly complex, not least the EnC on unitary patent protection, the EPPO and PESCO. The ‘novel’ regulatory technique in the EnC on patent is a particularly interesting case. With the exception of EnC in divorce law and EnC in property regime rules (which are interrelated and have similar features), the other cases are indeed ‘unique’ cases.

Finally, the more complex cases generally require a secretariat or similar bodies (in the preparatory as well as at the operational stages) as well as complex and detailed provisions on financial (and staffing) provisions.

1.3.6. Too early for the assessment of EnC cases ...

It is too early for an overall or general assessment of the implementation of cases of enhanced cooperation or PESCO. As mentioned above, the reasons for this are simple – only two cases have started implementation: divorce law and PESCO.

Having begun only in December 2017, PESCO is still in the early stages of its implementation. Consequently, any assessment of how it has performed in comparison with expectations would require more time.

On the contrary, EnC in divorce law has been implemented in participating Member States for more than six years (its date of application is 21 June 2012). Given that it is the first case of EnC, it is particularly interesting to see how it has worked in practice. EnC in divorce law (known as the Rome III Regulation) determines the applicable law in cases of divorce or legal separation.

The Regulation envisages a report on its application in 2015 (and another in 2020). However, it appears that the Commission has not presented this report. This is regrettable since, presumably, there should have been a sufficient number of cases of divorce and/or legal separation of international couples in the participating Member States that could feed into a Commission report on the application of the Regulation.

Tentative findings based on a review of the literature on the application of the Rome III Regulation in practice are presented in some detail in a section of this study dedicated to EnC in divorce law. It is to be hoped, however, that the Commission will present its long overdue report on the application of the Rome III Regulation.

1.3.7. ... but future assessment is envisaged via review clauses in adopted EnC acts

On a more general note, while we a comprehensive view as to how these complex EnC set-ups will work in practice in general terms is not possible at this point, it is encouraging to see that all cases include some kind of a review clause (calling for a review/evaluation/report on operation of these EnCs at some point in the future).

Furthermore, while the periods before first reviews are due fluctuate (see the last column of the overview of cases provided in section 1.4.), they generally appear to be sufficient for the legislative (or legal) act to achieve its intended objectives, as well as for the necessary evaluation process to take place. As such, the provisions are in line with the interinstitutional agreement on better law-
making (IIA on BLM) which states that the review clause in legislation should ‘take account of the
time needed for implementation and for gathering evidence on results and impacts’.

1.3.8. Court of Justice of the EU jurisprudence on EnC cases

A search of Court of Justice of the European Union (CJEU) case law reveals several CJEU cases related
to: EnC on patent, divorce law, and FTT.

Before proceeding to a short overview of those cases, two further matters require attention. The first
relates to EnC on EPPO. As mentioned, no cases exist in the CJEU on EPPO. Nonetheless, several
academics have noted that some of the possibly problematic areas in the future work of EPPO
include such matters as the rights of suspects and accused persons, as well as matters related to the
judicial review of acts and decisions by the EPPO. The second point relates to PESCO. Namely, legal
base for PESCO stems from Title V provisions on CFSP and, as such, the Court in general does not
have jurisdiction with respect to these provisions (Article 24(1) TEU).

The CJEU cases related to EnC\(^2\) could be broadly divided into three groups:

1. Cases that relate to the Council Decisions that authorise EnC. There have been three such
cases and, in each, the applicant seeks annulment of the Council Decision authorising EnC:
   - \(\text{Spain v Council}\)\(^3\) and \(\text{Italy v Council}\)\(^4\) (concerns Council Decision 2011/167
     authorising EnC on unitary patent protection);
   - \(\text{United Kingdom v Council}\)\(^5\) (concerns Council Decision 2013/52 authorising EnC in the
     area of financial transaction tax (FTT)).

2. Cases that relate to the legislation on EnC. There have been two such cases and, in each,
   the applicant seeks annulment of the legislative act:
   - \(\text{Spain v European Parliament and Council}\)\(^6\) (concerns Regulation of the European
     Parliament and Council 1257/2012 implementing EnC in the creation of unitary patent
     protection);
   - \(\text{Spain v Council}\)\(^7\) (concerns Council Regulation 1260/2012 implementing EnC in the
     creation of unitary patent protections (translation arrangements)).

3. Cases that pertain to the actual legislation on EnC and pertain to the interpretation
   of provisions of those acts. These are requests for preliminary rulings:
   - \(\text{Soha Sahyouni v Raja Mamisch}\)\(^8\) (concerns Regulation 1259/2010 on divorce law (the
     'Rome III Regulation'). The case involved an application for recognition of a private
     divorce obtained before a religious court in a third country. The Court held that the
     regulation covers only divorces pronounced by a national court or by (or under the
     supervision of) a public authority. A divorce resulting from a unilateral declaration
     made by one of the spouses before a religious court does not fall under the scope of
     regulation. (See also related case C-281/15).

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\(^2\) Two further cases appear in the search (C-493/12 and C-558/16), but do not appear of relevance in this context). Finally,
\(\text{Opinion 1/09}\) is examined in the European Unified Patent section of this study.
\(^3\) Case C-274/11, \(\text{Spain v Council}\).
\(^4\) Case C-295/11, \(\text{Italy v Council}\).
\(^5\) Case C-209/13, \(\text{United Kingdom v Council}\).
\(^6\) Case C-146/13, \(\text{Spain v European Parliament and Council}\).
\(^7\) Case C-147/13, \(\text{Spain v Council}\).
\(^8\) Case C-372/16, \(\text{Soha Sahyouni v Raja Mamisch}\).
The above cases are presented in some detail in the respective sections of this study. However, given that the subject matter of the two first groups of cases (Adjudication 1 and Adjudication 2) covers more general aspects of the enhanced cooperation, it seems pertinent to provide a short outline of the Court’s judgments related to these two groups of cases.

**Adjudication 1: Judgments in the first group of CJEU cases**

In (joined) cases *Spain v Council* and *Italy v Council*, Spain and Italy asked for the annulment of Council Decision 2011/167 authorising EnC on unitary patent protection.

They argued inter alia that the Council had circumvented the unanimity requirement and had not taken the objections to the proposal brought up in the Council into consideration. They noted the short period of time: ‘not even six months [have elapsed] between the [original] proposal […] and the proposal for enhanced cooperation’. They further noted that the ‘possibilities of negotiations among all the Member States on the language arrangements had by no means been exhausted’. They claimed that the enhanced procedure was used in order to ‘keep certain Member States out of difficult negotiations and to circumvent the requirement for unanimity’.

Spain and Italy also claimed that the patent cooperation falls within exclusive EU competence and that the Council therefore has no competence to authorise the enhanced cooperation in question (given that EnC is possible only within the framework of the Union's non-exclusive competences).

The Court dismissed the actions, arguing inter alia that the Council had taken all the necessary steps in the legislative process. The Court gave the Council discretion to decide on the point of last resort stating that ‘[t]he Council […] is best placed to determine whether the Member State have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future’.

On the point of whether the patent cooperation falls within shared or exclusive EU competence, the Court concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences.

What messages can be taken from the Court’s judgement in the above cases? Some academics have noted that the Court in this instance showed ‘a marked friendliness […] to allow the [enhanced] cooperation to go ahead’, not least in terms of its decision on the question of shared-versus-exclusive competence of patent cooperation, as well as in terms of its approach to the ‘last resort’ requirement.

In another case, the UK asked for the annulment of Council Decision 2013/52/EU authorising the enhanced cooperation in FTT. The UK argued that the above Decision authorises the adoption of an FTT which would produce extraterritorial effects as well as impose costs for non-participating Member States.

The Court dismissed the action, stating that, since the UK asked for the annulment of a decision authorising enhanced cooperation, the Court could only review whether the granting of the enhanced cooperation was valid or not. Therefore, the Court found that the Decision only authorises the establishment of enhanced cooperation, and not any substantive element of the FTT itself. The Decision also does not include any provision on the issue of expenditure linked to the implementation of enhanced cooperation. The Court therefore concluded that the UK’s arguments

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10 *C-274/11*, Judgment of the Court, 16 April 2013, point 53.
11 Case *C-209/13*, *United Kingdom v Council*. 
were directed at elements of a potential FTT, and not at the Decision authorising enhanced cooperation.

Essentially, this means that, at this stage, the Court can decide on procedural issues leading to the authorisation of the EnC, but not on the substantive issues that have not yet been decided (as the final legislative text is still being negotiated).

**Adjudication 2: Judgments in the second group of CJEU cases**

The two cases, *Spain v European Parliament and Council*¹² and *Spain v Council*,¹³ concerning unitary patent protection, are examined in some detail in the relevant section of this study.

However, in the context of the above-mentioned complex structure created by the 'unitary patent package', it is pertinent to note here that, in its judgment¹⁴, the Court found no fault with this complex 'hybrid' structure. On the contrary, the Court held that 'it is common ground [...] that the [...] regulation [1257/2012] constitutes a special arrangement within the meaning of Article 142 of the [European Patent Convention], with the result that the provisions of Part IX [of the European Patent Convention], which relates to special arrangements [...] are applicable to that regulation'.¹⁵

In summary, it appears that the Court has so far been supportive in the establishment of the early cases of enhanced cooperation. In particular, it seems that the Court has given the Council wide discretion in determining if the conditions for EnC have been met (not least for the 'last resort' condition). Finally, the Court appears to have found no fault in a case of EnC involving 'odd regulatory technique' (the unified patent protection case).

**1.3.9. Summary**

Only practice will tell how the different cases of enhanced cooperation (as well as PESCO) will perform in comparison to expectations. Our implementation assessment of enhanced cooperation is at this point of time limited to the one EnC case with sufficient implementation record (EnC in divorce law, applied for more than six years to date).

The remaining cases either began very recently (PESCO in late 2017); are in the preparatory stages (EPPO); are set to start in the near future (2019 for EnC in property regime rules); have not as yet entered into force (EnC in unitary patent protection awaiting ratification of the UPC Agreement by DE); or are yet to be agreed upon (FTT).

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¹² Case C-146/13, *Spain v European Parliament and Council.*
¹³ Case C-147/13, *Spain v Council.*
¹⁵ C-147/13, Judgment of the Court, 5 May 2015, point 58.
1.4. An overview of cases presented in this study

Figure 1 – Overview of cases of enhanced cooperation and PESCO (and one case of Joint Undertaking/HPC)

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Original proposal date/Legal basis/Policy area</th>
<th>Notification by several MS/‘Last resort’ for EnC only/Decision authorising EnC</th>
<th>Legislative (or legal) act adopted</th>
<th>Number of participating Member States to date</th>
<th>Transitional period</th>
<th>Full implementation started or expected</th>
<th>Review or evaluation clause in legislation</th>
</tr>
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<tr>
<td>EnC/EUROPEAN PUBLIC PROSECUTOR’S OFFICE</td>
<td>July 2013 Art 86(1) subpara. 1 TFEU (AFSJ/Judicial cooperation in criminal matters)</td>
<td>April 2017 Art 86(1) subpara. 3 TFEU No need for authorisation of EnC ‘the authorisation shall be deemed to be granted’</td>
<td>YES October 2017 Council Regulation</td>
<td>22 in 6 out: DK, IE, UK, HU, PL, SE</td>
<td>~ 3 years Started end 2017 To end 2020</td>
<td>NOT YET – November 2020</td>
<td>YES External evaluation in 2025 + every 5 years thereafter</td>
</tr>
<tr>
<td>PERMANENT STRUCTURED COOPERATION</td>
<td>n/a Art 42(6) and Art 46 TFEU Protocol 10 (CFSP/CSDP)</td>
<td>November 2017 PESCO does not have a ‘last resort’ condition</td>
<td>YES December 2017 Council Decision/legal act, not legislative (CFSP)</td>
<td>25 in 3 out: DK, UK, MT</td>
<td>No transitional period Immediate implementation</td>
<td>YES December 2017</td>
<td>NO Caveat: Review clause in the related Council Decision on PESCO governance rules – December 2020</td>
</tr>
</tbody>
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Note: EnC = Enhanced Cooperation

TFEU = Treaty on the Functioning of the European Union

AFSJ = Assistance Fund for Justice

CFSP = Common Foreign and Security Policy

CSDP = Common Security and Defence Policy

EUROPEAN PUBLIC PROSECUTOR’S OFFICE

Permanent Structured Cooperation

EnC/DIVORCE LAW
<table>
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<tr>
<th>EnC/PROPERTY REGIME RULES</th>
<th>March 2011 Art 81(3) TFEU (AFSJ/Judicial cooperation in civil matters)</th>
<th>December 2015 - February 2016 June 2016 Council Decision 2016/954 authorising EnC</th>
<th>YES June 2016 2 Council Regulations (marriage, registered partnership)</th>
<th>18 in 10 out: DK, EE, HU, IE, LV, LT, PL, RO, SK, UK / Application set ~ 2.5 years after Council Regulations</th>
<th>NOT YET January 2019 (some exceptions in Articles 70 of both acts)</th>
<th>YES Review in December 2024 and December 2027 in both acts</th>
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<tr>
<td>EnC / EUROPEAN UNITARY PATENT</td>
<td>August 2000 and June 2010 (for translation) Art 118 (1) and Art 118 (2) TFEU Approximation of Laws (Title VII) (‘in the context of establishment and functioning of internal market’)</td>
<td>December 2010 - early 2011 March 2011 Council Decision 2011/167 authorising EnC for both</td>
<td>YES (see caveat below) December 2012 Regulation (COD) on creation of unitary patent protection Council Regulation related to translation June 2013 Council Agreement on a Unified Patent Court Caveat: signed but not yet ratified by all participating MSs</td>
<td>For two regulations: 26 in 2 out: ES, HR For Agreement on Court: 25 in 3 out: ES, HR, PL</td>
<td>Preparatory work ongoing (Art 18(4) on ‘measures that need to be put in place by date of application of Regulation’) After the Agreement on a Unified Patent Court enters into force, a transitional period of at least 7 years, extendable for another 7 years Transitional measures also in Regulation on translation: 6 years expandable to max 12 years</td>
<td>NOT YET Date of entry into force of the Agreement on a Unified Patent Court i.e. when Germany ratifies the Unified Patent Court Agreement (Art 18 and Art 7 of two regulations respectively, and Art 89 of the Agreement)</td>
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<tr>
<td>JOINT UNDERTAKING /SUPER-COMPUTING</td>
<td>n/a Art 187 and Art 188 TFEU</td>
<td>March 2017 Joint Undertakings do not have a ‘last resort’ condition</td>
<td>NO Procedure ongoing January 2018 Proposal for Council</td>
<td>21 in 7 out: DK, EE, IE, HU, MT, RO, SK, UK Proposal envisages initial period with COM responsible for establishment and</td>
<td>NOT YET Planned for 2019 (YES) Proposal plans interim evaluation by June 2022 and final</td>
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<tr>
<td>Research and technological development and space (Title XIX)</td>
<td>Regulation 2018/0003(NLE) (advanced in the procedure, awaiting publication in the OJ)</td>
<td>initial operations (Art 26(1) of proposal)</td>
<td>evaluation (end of JU in December 2026)</td>
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Figure 2 – Member State participation in enhanced cooperation and PESCO (and one case of Joint Undertaking/HPC)

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</table>
| PARTICIPATING MS (JU not incl.) | 6 | 6 | 6 | 6 | 6 | 6 | 6 | 6 | 5 | 5 | 5 | 5 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 4 | 3 | 3 | 2 | 2* | 1 | 1 | 6

Source: Author’s elaboration based on various institutional sources / X designates Non-participating Member State / * indicates that PL participates in EnC Regulations but not in the Unified Patent Court
1.5. Treaty provisions on enhanced cooperation, permanent structured cooperation and joint undertakings

1.5.1. Enhanced cooperation (EnC)

Provisions on enhanced cooperation are laid down in the Lisbon Treaty in Title IV, Article 20 TEU ‘Provisions on Enhanced Cooperation’ and in Title III, Article 326-334 TFEU ‘Enhanced Cooperation’ (among these are provisions for enhanced cooperation in the Common Foreign and Security Policy (CFSP) – Article 329(2) and Article 331(2)).

In addition to these provisions, there are further provisions on enhanced cooperation specifically for:

**European Public Prosecutor’s Office (EPPO):** Article 86(1) subpara. 3 TFEU;

**Judicial cooperation in criminal matters:** Article 82(3) subpara. 2 TFEU, Art 83(3) subpara. 2 TFEU; and

**Police cooperation in criminal matters:** Article 87(3) subpara. 3 TFEU.

### An overview of the main provisions on enhanced cooperation

**TEU TITLE IV PROVISIONS ON ENHANCED COOPERATION**

Art 20(1) TEU

‘[...] within the framework of the Union’s **non-exclusive competences** [...] Enhanced cooperation shall aim to **further the objectives of the Union, protect its interests and reinforce its integration process**. Such cooperation shall be **open at any time to all Member States** [...]’

Art 20(2) TEU

The decision authorising enhanced cooperation shall be adopted by the Council as a **last resort**, when it has **established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole**, and provided that **at least nine** Member States participate in it. [...]’

Art 20(3) TEU

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. [...]’

Art 20(4) TEU

Acts adopted in the framework of enhanced cooperation shall **bind only participating Member States**. They shall not be regarded as part of the **acquis** [...]’
1.5.2. Permanent structured cooperation (PESCO)

Provisions on permanent structured cooperation (PESCO) are laid down in Article 42(6) TEU, Article 46 TEU and in Protocol 10.

<table>
<thead>
<tr>
<th>An overview of the main provisions on permanent structured cooperation</th>
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</thead>
<tbody>
<tr>
<td>TEU TITLE V SECTION 2 PROVISIONS ON THE COMMON SECURITY AND DEFENCE POLICY</td>
</tr>
<tr>
<td>Article 42(6) TEU</td>
</tr>
<tr>
<td>Those 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. [...]</td>
</tr>
<tr>
<td>Article 46(1) TEU</td>
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<tr>
<td>Those Member States which wish to participate in the permanent structured cooperation [...] shall notify their intention to the Council and to the [HR/VP].</td>
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<tr>
<td>Article 46(2) TEU</td>
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<tr>
<td>Within three months following the notification [...] the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative.</td>
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<td>[...]††</td>
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<tr>
<td>Article 46(6) TEU</td>
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<tr>
<td>The decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only.</td>
</tr>
<tr>
<td>PROTOCOL (No 10) establish criteria that Member States need to meet and the commitments they need to make to each other.††</td>
</tr>
</tbody>
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1.5.3. Joint undertaking

<table>
<thead>
<tr>
<th>An overview of provisions on joint undertaking</th>
</tr>
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<tbody>
<tr>
<td>TFEU TITLE XIX RESEARCH AND TECHNOLOGICAL DEVELOPMENT AND SPACE</td>
</tr>
<tr>
<td>Article 187 TFEU</td>
</tr>
<tr>
<td>The Union may set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes.</td>
</tr>
<tr>
<td>Article 188 TFEU</td>
</tr>
<tr>
<td>The Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions referred to in Article 187.†</td>
</tr>
</tbody>
</table>

† Further PESCO provisions (e.g. those pertaining to Member States joining, being suspended or withdrawing from PESCO) are presented in the PESCO section of this study.

†† Elaborated in some detail in PESCO section of this study.
2. European Public Prosecutor’s Office (EPPO)

2.1. General overview

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’)

European Commission original proposal: proposal of 17 July 2013, special legislative procedure

Procedural file: EUR-Lex, Legislative Observatory

Absence of unanimity in Council noted: 9 March 2017

Notification by a group of Member States on their desire to establish enhanced cooperation: 3 April 2017

16 Original Member States: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain

Plus 6 Member States expressed the desire to participate after 3 April 2017: Latvia (19 April 2017), Estonia (1 June 2017), Austria (9 June 2017) and Italy (22 June 2017), Netherlands (14 May 2018), Malta (14 June 2018)

Adoption of legislative act: Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’)

Entry into force: 20 November 2017 (Article 120(1))

Future timeframe: ‘The EPPO shall assume the investigative and prosecutorial tasks [...] on a date to be determined by a decision of the Commission on a proposal of the European Chief Prosecutor once the EPPO is set up. [...] The date to be set by the Commission shall not be earlier than three years after the date of entry into force of this Regulation [i.e. not earlier than 20 November 2020]’ (Article 120 (2)).

Provisional administrative arrangements: ‘[...] the Commission shall be responsible for the establishment and initial administrative operation of the EPPO until the latter has the capacity to implement its own budget’ (Article 20(1)). ‘[T]he Commission shall exercise its functions [...] in consultation with a group of experts composed of representatives of the Member States’ (Article 20(4)).

2.2. Background

The European Public Prosecutor’s Office will be in charge of investigating, prosecuting and bringing to judgment perpetrators of offences against the Union’s financial interests.18 These are defined in Directive 2017/1371 (PIF Directive)19 and include cross-border VAT fraud involving total damage of at least €10 million and other offences inextricably linked to them.

The legislative act establishing the EPPO through the enhanced cooperation mechanism has been adopted and has entered into force (October 2017 and November 2017 respectively), but the EPPO will assume its tasks no earlier than November 2020. In the interim period, the Commission, assisted by an expert group (Member State representatives), will be responsible for the establishment and the initial administrative operation of the EPPO.

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18 See Council Regulation (EU) 2017/1939 Article 4 “The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of:”

The establishment of the EPPO has been debated for over two decades, culminating in the inclusion of Article 86 in the Lisbon Treaty (granting the EU the competence to set up the EPPO) and the European Commission’s proposal to establish the EPPO in 2013. It has proven to be one of the most controversial files, with points of disagreement on some of the crucial aspects of the file during the negotiations between the European Parliament, the Council and the Commission.\(^{20}\) As many as 14 chambers of 11 national parliaments triggered a ‘yellow card’ procedure in accordance with Protocol No 2.\(^ {21}\) The text was substantially amended during the negotiation process but the necessary unanimity in the Council could nonetheless not be reached.

The final text was therefore adopted under the enhanced cooperation (Article 86(1) subpara. 3), rather than through a Council regulation in accordance with a special legislative procedure (Article 86(1) subpara. 1) as originally envisaged.

At the time of writing this paper, 22 Member States are included: the original 16 Member States, plus 6 Member States that have expressed the desire to join at a later stage (the latter include the Netherlands and Malta).\(^ {22}\) As to the six non-participating Member States, in addition to Denmark, United Kingdom and Ireland,\(^ {23}\) three further Member States do not participate in the EPPO: Hungary, Poland and Sweden.

2.3. Legal basis

Article 86 TFEU\(^ {24}\)

Article 86(1) subpara. 3 TFEU states that ‘within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply’.

2.4. Internal organisation, internal rules and decision-making

The EPPO is set up as ‘an indivisible Union body operating as one single Office with a decentralised structure’ (Article 8(1)), ‘organised at a central level and at a decentralised level’ (Article 8(2)).

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\(^{20}\) For an overview of the controversial issues, see Towards a European Public Prosecutor’s Office (EPPO), Policy Department for Citizen’s Rights and Constitutional Affairs, 2016 (focus on the EPPO’s institutional design, its material scope of competence, its procedural framework and its relationship with partners); Mitsilegas, V. and Giuffrida, F., Raising the Bar? Thoughts on the establishment of the European Public Prosecutor’s Office, CEPS Policy Insights, November 2017 (focus on structure and powers, competence, rights of suspects and accused persons, judicial review, relations with partners); Giuffrida, F., The European Public Prosecutor’s Office: Kind without kingdom?, CEPS research report, February 2017 (focus on material competence, structure and status, investigations, prosecutions, rights of suspects and accused persons, judicial review, relationship with partners).


\(^{22}\) See section 2.1 – General overview.

\(^{23}\) These three Member States do not participate in Title V of Part Three of TFEU (of which Article 86 is a part) by default according to Protocols 21 and 22, with the possibility to opt in, in the case of the United Kingdom and Ireland.

\(^{24}\) The 71-page-long Regulation makes references to all paragraphs of Article 86 (as well as to other articles on enhanced cooperation in general), but it does not specifically refer to Article 86(4) TFEU, although it mentions that a unanimous decision of the European Council is required to extend the EPPO powers to include cross-border serious crime in Recital 11.
The central level consists of a Central Office at the seat of the EPPO. The Central Office consists of: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director (Article 8(3)).

The decentralised level consists of European Delegated Prosecutors located in the Member States (Article 8(4)).

A visual presentation of EPPO structure is given below in this section, whereby the first three layers represent the Central Office in Luxembourg and the bottom layer represents the decentralised level located in the Member States.

Both the central and decentralised levels are assisted by the EPPO staff (Article 8(5)).

The European Chief Prosecutor is the Head of the EPPO. The Chief Prosecutor organises the work of the EPPO, directs its activities, represents the EPPO vis-à-vis the institutions of the Union and of the Member States, and third parties (Article 11(1)(3)).

Two Deputy European Chief Prosecutors assist the European Chief Prosecutor in their duties and act as replacement when necessary (Article 11(2)). They are appointed by the College from among the European Prosecutors and they retain their status as European Prosecutors (Article 15(1)).

The College consists of the European Chief Prosecutor and one European Prosecutor per Member State (Article 9(1)). It is responsible for the general oversight of the EPPO activities, it takes decisions on strategic matters, and on general issues arising from individual cases, with a view to ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the Member States. The College does not take operational decisions in individual cases (Article 9(2)).

The College adopts internal rules of procedure and sets up the Permanent Chambers (both on a proposal by the ECP).

The Permanent Chambers consist of three members: two European Prosecutors and a Chair (ECP or DECP or EP appointed as Chair) (Article 10(1)). The chambers are central level structures entrusted with core operational decisions: monitoring and directing the investigations and prosecutions by the European Delegated Prosecutors and ensuring coordination of investigations and prosecutions in cross-border cases (Article 10(2)). The Permanent Chambers make decisions on a broad spectrum of operational matters: bringing a case to judgment, dismissing a case, applying a simplified prosecution procedure, referring a case to the national authorities, reopening an investigation, instructing the European Delegated Prosecutor to initiate an investigation or to exercise the right of evocation, etc. (Article 10). In addition to the three above members of the Permanent Chambers, the European Prosecutor who supervises an investigation or a prosecution participates in the deliberations of the Permanent Chamber and has a right to vote, except in several defined instances (Article 10(9)). Several important aspects related to the Permanent Chambers (number of chambers, their composition, the division of competences between different chambers) will be determined at a later stage in accordance with the internal rules of procedure (as mentioned above, internal rules of procedure will be adopted by the College on a proposal by the ECP).
The European Prosecutors supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible (Article 12(1)). They do so on behalf of the Permanent Chamber. The European Prosecutor may under certain conditions give instructions to the handling European Delegated Prosecutor (Article 12(3)). The European Prosecutors function as liaisons and information channels between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States.

Source: European Commission.  

For another visual presentation of the EPPO structure, see Mitsilegas, V. and Giuffrida, F., Raising the Bar? Thoughts on the establishment of the European Public Prosecutor’s Office, CEPS Policy Insights, November 2017, p. 3.
of origin, ensuring that all relevant information from the Central Office is provided to European Delegated Prosecutors and vice versa (Article 12(5)).

Finally, at a decentralised level, there are two or more European Delegated Prosecutors in each Member State, responsible for investigations, prosecutions and bringing a case to judgment in their respective Member State. They follow the direction and instructions of the Permanent Chamber in charge of a case, as well as the instructions from the supervising European Prosecutor. They have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in this Regulation (Article 13(1)). The European Delegated Prosecutors have a double role: they act on behalf of the EPPO in their respective Member State (Article 13(1)) but may also exercise functions as national prosecutors (Article 13(3)).

It is pertinent to note that the above structure represents a considerable departure from the structure originally envisaged in the European Commission proposal and that this has been one of the main contentious points during the negotiations. In its 2015 resolution, the European Parliament found it 'regrettable that the option of a collegiate structure is being considered by the Member States, instead of the hierarchical one initially proposed by the Commission'.26 The EPPO structure has been described as a 'multi-level, complex and at first sight rather bureaucratic system of European prosecution with clear and strong intergovernmental elements as regards the structure, composition and decision-making underpinning the activities of [the EPPO]'.27 Others questioned 'how such a complex structure could improve the efficiency of investigations and prosecutions against PIF offences'.28

As to the appointment procedures, the European Parliament and the Council are the decision-makers in the appointment of the Chief European Prosecutor, while the Council is a decision-maker in the appointment of the European Prosecutors. Other appointments (the European Delegated Prosecutors and two Deputy European Chief Prosecutors) are decided by the College. Further details on the appointment procedures are given below.

The European Chief Prosecutor: Following an open call for candidates, the selection panel draws up a shortlist of qualified candidates and submit it to the European Parliament and to the Council, who thereafter appoints the European Chief Prosecutor by common accord (Article 14 and Recital 41). The Council acts by simple majority. The European Chief Prosecutor is appointed for a non-renewable term of seven years (Article 14).

The European Prosecutors: Following the nomination by the Member States of three candidates per Member State, the selection panel will review nominations and send a reasoned opinion to the Council who will thereafter select and appoint one candidates per Member State to be the European Prosecutor of the Member State in question. The Council will act by simple majority. Should the selection panel find that the candidate does not fulfil the conditions required, its opinion shall be binding to the Council (Article 16(2)). The European Prosecutors are appointed for a non-renewable term of six years (with the possibility of a three year extension) (Article 16).

Two Deputy European Chief Prosecutors: The College will appoint two European Prosecutors to serve as Deputy European Chief Prosecutors, while retaining their status as European Prosecutors. They will be appointed for a renewable mandate period of three years (in any case, not exceeding

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Implementation of the Treaty provisions concerning enhanced cooperation

the periods for their mandates as European Prosecutors). The internal rules of procedure will regulate the selection process (Article 15).

The European Delegated Prosecutors are nominated by their respective Member States and thereafter appointed by the College upon a proposal by the European Chief Prosecutor. They are appointed for a renewable term of five years (Article 17).

As seen above, the selection panel has an important role in the selection of the European Chief Prosecutor and of European Prosecutors. For this reason, its role (and the state of play) is examined briefly below.

The selection panel is set up for the selection of the European Chief Prosecutor (ECP) and of European Prosecutors (EPs). Comprising twelve persons chosen from among former members of the Court of Justice and the Court of Auditors, former national members of Eurojust, members of national supreme courts, high level prosecutors and lawyers of recognised competence, one of the persons chosen is proposed by the European Parliament (Article 14(3)). The Parliament appointed Antonio Mura to the selection panel on 31 May 2018.29 As to the remaining eleven panel members, the Council adopts a decision appointing its members on a proposal from the Commission. Such a proposal was made on 31 July 2018.30

As to the selection panel’s operating rules, the Council adopted the Council Implementing Decision on 13 July 2018, in accordance with Article 14(3). The operating rules as proposed by the Commission are included in an annex.31 The final annex as adopted by the Council is not publicly available at the time of writing but reportedly contains only ‘a few minor changes’, compared to the original Commission proposal.

The operating rules inter alia stipulate that:

- the deliberations of the selection panel shall be confidential, held in camera, and will require a quorum of 9 (out of 12);
- the selection process involves both a review of candidates’ files and in-person hearings. For the position of ECP ‘a sufficient number of the highest ranked candidates shall be heard by the panel’. As for the positions of EPs, all nominated candidates will be heard in person;
- on the basis of their qualifications and experience, the selection panel will rank the candidates for the position of ECP as well as those for the position of the EPs, indicating the panel’s order of preferences. This ranking will not be binding to the European Parliament and Council (in the case of ECP) and to the Council (in the case of EPs).

2.5. Internal rules of procedure

The EPPO Regulation stipulates in Article 21 that the organisation of the work of the EPPO shall be governed by its internal rules of procedure. A proposal for the internal rules of procedure will be prepared by the European Chief Prosecutor (without delay, once the EPPO is set up) and thereafter adopted by the College by a two-thirds majority. Furthermore, modifications to the internal rules of procedure

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31 Annex to the Proposal for a Council Implementing Decision on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), Council of the European Union doc. 9361/18, 28 May 2018.
procedure may be proposed by any European Prosecutor and shall be adopted, if the College so decides, by a two-thirds majority (Article 21).

In addition to the more operational aspects of the substantive work of the EPPO, the internal rules of procedure include some of the core aspects of the EPPO, most notably the number of Permanent Chambers, their composition, and the division of competences between the Chambers.

Article 10(1) stipulates that ‘[t]he number of Permanent Chambers, and their composition, as well as the division of competences between the Chambers, shall take due account of the functional needs of the EPPO and be determined in accordance with the internal rules of procedure of the EPPO’.

This means that many decisions, with potentially far-reaching consequences for the future functioning of the EPPO, are yet to be made. As noted in a European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs study, ‘many crucial points are left vague and their clarification is postponed to the adoption of EPPO’s internal rules of procedure’, the study’s authors wonder if ‘it is adequate to leave the fate of these important issues to internal discussions.’

2.6. Budget and staff

**EPPO budget and staff in 2019**: €4 911 000, 35 posts (European Commission proposal)

Treaty provisions stipulate that expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise (Article 332 TFEU).

The EPPO Regulation stipulates financial and staff provisions in Chapter IX (Article 90-98). The EPPO’s revenue comprises of a contribution from the budget of the Union as well as charges for publications and any service provided by the EPPO (Article 91(3)). Further provisions stipulate that the Member States which do not participate in EPPO enhanced cooperation will receive an adjustment (Article 91(7)), and that these adjustments do not apply to the administrative costs entailed for the Union’s institutions resulting from implementation of enhanced cooperation on the establishment of the EPPO (Article 91(8)).

The EPPO’s expenditure includes the remuneration of the European Chief Prosecutor, European Prosecutors, European Delegated Prosecutors, the Administrative Director and the staff of the EPPO; administrative and infrastructure expenses; and operational expenditure (including the setting up of a case management system, training, missions and translations) (Article 91(4) and 91(4) subpara. 3). As to the expenditure incurred by the European Delegated Prosecutors, these are stipulated in Article 91(5) and 91(6)). In principle, operational expenditures will not include costs related to investigation measures carried out by competent national authorities, or the costs of legal aid. The conditions under which these costs can exceptionally be partly met by the EPPO are provided in Article 91(6).

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33 Ibid, p. 15.
35 Provisions related to the status and responsibilities of the Administrative Director are provided separately, in Articles 18 and 19 respectively. See also recitals 111-117.
The European Chief Prosecutor is responsible for preparing decisions on the establishment of the budget and submitting them to the College for adoption, while the Administrative Director is responsible as authorising officer for implementing the budget of the EPPO.

As to the conditions of employment, the European Chief Prosecutor and the European Prosecutors will be engaged as temporary agents and the European Delegated Prosecutors as special advisers (Article 96). The recruitment of temporary and contract agents already working in the institutions, bodies, offices or agencies of the Union should be facilitated by guaranteeing those staff members continuity of their contractual rights if they are recruited by the EPPO in its set-up phase (Article 97, Recital 117).

The Commission’s update of 30 May 2018 notes that the draft EU budget for 2019, adopted by the Commission on 23 May 2018, includes appropriations for the EPPO for the first time, amounting to €4.9 million. In terms of staffing, a total of 35 posts are envisaged for the EPPO in 2019.

Finally, it is pertinent to note that, during the negotiations, and in view of the fact that the final EPPO structure was a considerable departure from that originally proposed by the Commission, the issue of the adequate budget for such an extended structure was one of the contentious issues. For example, the European Parliament’s resolution of 5 October 2016 called on the Commission to 'come up with adjusted estimations of the budgetary implications of the collegiate structure within its cost and benefit analysis, and to provide Parliament with results of the ‘reality check exercise’.

More recently, the Committee on Budgetary Control insisted that the EPPO ‘be adequately financed and staffed’ and ‘deplore[d] that only 35 staff posts are planned [for 2019] which implies that after deduction of the posts of (23) Deputy Prosecutors, only 12 posts are planned for administrative tasks; considers that it is not realistic.'

2.7. Relationship with EU partners and non-participating Member States

The EPPO’s relations with the main EU partners are provided for in Article 100 (Relations with Eurojust), Article 101 (Relations with OLAF) and Article 102 (Relationship with Europol). Its relationship with the non-participating Member States are defined in Article 105.

The common denominator of these provisions is that '[u]nder the principle of sincere cooperation, all national authorities and the relevant bodies of the Union, including Eurojust, Europol and OLAF, should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it' (Recital 69). In order to do so, the EPPO may conclude working arrangements of technical and/or operational nature aiming at facilitating cooperation and the exchange of information (Article 99).

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37 For further details, see Draft General Budget of the European Union for the financial year 2019, including EPPO budget for 2019 (€4 911 000) and EPPO posts (35 posts, 29 Administrators and 6 Assistants in total, all temporary posts), COM(2018) 600, section 3: European Commission, 21 June 2018, pp. 855, 858, 905.


40 Further relationships with other Union entities is covered in Article 103, and with third countries and international organisations in Article 104.
2.7.1. Relationship with main EU partners

Provisions on cooperation with Eurojust\(^\text{41}\) include inter alia sharing information on investigations, Eurojust's support to EPPO related to non-participating Member States and third countries, access to each other's case management system, etc.

Provisions on cooperation with Europol state that the EPPO and Europol will have a close relationship and that they will conclude a working arrangement setting out the modalities of their cooperation. Furthermore, the EPPO will be able to obtain Europol information concerning any offence within its competence and may ask Europol for analytical support related to the EPPO's investigations.

Relationship between the EPPO and OLAF\(^\text{42}\) is particularly important given that both have the same general objective (protecting the EU’s financial interest) and are competent to conduct investigations (criminal and administrative respectively). Provisions on cooperation with OLAF are more detailed and state inter alia that, where the EPPO conducts a criminal investigation, OLAF shall not open any parallel administrative investigation into the same facts (Article 101(2)). Furthermore, when the EPPO decides not to conduct an investigation or dismisses a case, it may provide relevant information to OLAF so that the latter could consider appropriate administrative action (Article 101(4) and Recital 105). Further provisions stipulate that the EPPO may request OLAF support for its activities by providing information, analysis, expertise, operational support, by facilitating coordination, and by conducting administrative investigations (Article 101(2)). Finally, access to each partner's case management system is provided for in Article 101(5).

The EPPO's relationship with its main EU partners and with non-participating Member States has been extensively debated. In relation to the main EU partners, the issue revolves around ensuring complementarity and synergy between the four bodies (EPPO, Eurojust, Europol, OLAF), and avoiding overlaps and loss of efficiency in this complex set-up. After all, ‘[i]t is possible to imagine that the four agencies and bodies intervene in the same case; this might especially be relevant in mixed cases involving both participating and non-participating MSs’.\(^\text{43}\)

It remains to be seen how this complexity will work in practice. At the moment, a positive development is the recently amended Eurojust Regulation, which takes establishment of the EPPO into account.\(^\text{44}\) Furthermore, it is to be hoped that, following the recent Commission proposal, the amended OLAF Regulation will be adopted in time, given that the main driver for the proposal is the need to adapt the operation of OLAF to the establishment of the EPPO.

Ensuring that each entity will have budget and staff commensurate to its task at its disposal is yet another challenge. While the proposed figures for 2019 are available (see table 1), corresponding

\(^{41}\) With regards to EPPO-Eurojust relations, see also the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) of 17 July 2013. A political agreement between the co-legislators on this proposal was reached on 19 June 2018 and the new regulation was adopted on 14 November 2018. It takes the establishment of the EPPO into account. For further info, see EUR-Lex and Legislative Observatory files.

\(^{42}\) With regards to EPPO-OLAF relations, see also the proposal to amend Regulation No 883/2013 on OLAF investigations (the OLAF Regulation) of 23 May 2018. The main driver for the proposal is the need to adapt the operation of OLAF to the establishment of the EPPO. For further information, see EUR-Lex and Legislative Observatory files. See also a comparison of the EPPO and OLAF in The future cooperation between OLAF and the European Public Prosecutor’s Office (EPPO), Policy Department for Citizen's Rights and Constitutional Affairs, European Parliament 2017, p. 14.


estimates for after the EPPO assumes its investigating and prosecutorial tasks (i.e. November 2020 or later) are not available at the time of writing this paper (e.g. relevant MFF 2021-2027 proposals).

Figure 4 – Comparison of budget and staffing levels in 2019 for EPPO, OLAF, Eurojust and Europol

<table>
<thead>
<tr>
<th></th>
<th>2019 budget (€)</th>
<th>2019 staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>EPPO (preparatory phase)</td>
<td>4 911 000</td>
<td>35</td>
</tr>
<tr>
<td>EPPO (fully established, estimates)*</td>
<td>35 000 000</td>
<td>235</td>
</tr>
<tr>
<td>OLAF</td>
<td>59 651 000</td>
<td>341</td>
</tr>
<tr>
<td>Eurojust</td>
<td>37 316 059</td>
<td>203</td>
</tr>
<tr>
<td>Europol</td>
<td>120 789 065</td>
<td>581</td>
</tr>
</tbody>
</table>

* Estimates from the original COM proposal in 2013 for a fully established EPPO in 2023, p. 8. Note that the original proposal envisaged a much leaner EPPO structure than that finally adopted.


2.7.2. Relations with non-participating Member States

Relations with non-participating Member States are provided for in Article 105 (including working arrangements on the exchange of strategic information and the secondment of liaison officers to the EPPO, and designation of EPPO contact points to facilitate cooperation).

The central issue is given in Article 105(3) which states that '[i]n the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.' As noted in a European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs study '[a] literal interpretation [...] would mean that once recognised as a competent authority by the participating [Member States] the EPPO would autonomously rely on EU instruments to cooperate with non-participating [Member States].' 45

Important in this context is Recital 110, which invites the Commission to, 'if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and [non-participating Member States]. [...] This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with Article 4(3) TEU.'

At the time of writing, no such proposal has been published in the Official Journal.

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45 Towards a European Public Prosecutor’s Office (EPPO), Policy Department for Citizen’s Rights and Constitutional Affairs, European Parliament, 2016, p. 47. Although written prior to the adoption of the EPPO Regulation and referring to a proposed paragraph, this nonetheless remains relevant.
2.8. Provisional arrangements

In accordance with Article 20, the Commission ‘shall be responsible for the establishment and initial administrative operation of the EPPO until the latter has the capacity to implement its own budget.’

The EPPO expert group (composed of representatives of the Member States participating in the EPPO), should assist the Commission in the establishment and initial administrative operation of the EPPO until the College of the EPPO takes up its duties.

So far, seven meetings of this expert group were held from March to December 2018.46

An outline of the state of play on the different preparatory steps is given in a non-paper47 by the Council.48

2.9. Looking ahead

It remains to be seen how this complex set-up will work in practice. In this context, there are several positive developments including work on legislation to ensure effective and efficient relations with OLAF (see recent Commission proposal) and Eurojust (see recently adopted Eurojust Regulation). Ensuring effective judicial cooperation between the EPPO and non-participating Member States is yet another crucial matter and could benefit from a Commission proposal concerning the rules, in particular those relating to judicial cooperation in criminal matters and surrender.

As to the future review of the regulation, it should be noted that the EPPO Regulation includes a review clause, calling for an external evaluation by around 202549 and every five years thereafter. At that point, further amendments to the regulation might be considered in view of the evaluation findings, as per Article 119(2). It is pertinent to note that a five year period before the first evaluation appears to allow sufficient time for the legislative act to achieve its intended objectives, as well as for the necessary evaluation process to take place. As such, the provision follows the IIA on BLM, which states that the review clause in legislation should ‘take account of the time needed for implementation and for gathering evidence on results and impacts’.50

Finally, an important issue is a possible extension of the EPPO’s powers to include serious crimes with a cross-border dimension. Article 86(4) allows for such an extension of EPPO powers. The decision must be made by the European Council acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission. This possibility has received support from, among others, Commission President, Jean-Claude Juncker, and French President, Emmanuel Macron.

In his State of the Union address on 13 September 2017,51 President Juncker stated that there was ‘a strong case for tasking the new European Public Prosecutor with prosecuting cross-border terrorist crimes’. Shortly thereafter, the Commission’s Work Programme for 201852 noted that the Commission intended ‘to propose the extension of the tasks of the new European Public

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46 Register of Commission expert groups, EPPO expert group meetings.
48 Council document 8939/18, EPPO – update on the implementation, 30 May 2018. A more recent version of 14 September 2018, is not accessible (but available upon request).
49 Article 119 states that ‘[n]o later than 5 years after [the EPPO assumes the investigative and prosecutorial tasks, which will be at the earliest in November 2020], and every 5 years thereafter, the Commission shall commission an evaluation’.
51 European Commission, State of the Union address, 13 September 2017.
Prosecutor’s Office to include the fight against terrorism ahead of a specific Leaders’ summit in Vienna in September 2018 dedicated to security matters. The Commission’s non-legislative communication to this effect is announced for the third quarter of 2018. Indeed, in September 2018, the Commission published a communication on a possible extension of the tasks of the new EPPO to include the fight against terrorism.

In its 2016 resolution, the European Parliament requested the Commission ‘assess the need to review the mandate of the future EPPO to endow it with powers, once established, to tackle organised crime’. Parliament’s rapporteur on the EPPO file, Barbara Matera (EPP, IT), similarly noted that ‘[h]opefully, the scope of the EPPO’s powers could in the near future also include trans-border crimes, like terrorism and trafficking of human beings’.

French President, Emmanuel Macron expressed his support for an extension of the EPPO’s powers in his September 2017 speech: ‘C’est pourquoi nous devons instituer un Parquet européen contre la criminalité organisée et le terrorisme, au-delà des compétences actuelles qui viennent d’être établies.’

More immediate future developments are presented below.

**Nomination of an interim Administrative Director**

According to an update of 30 May 2018, the Commission is in the process of nominating the EPPO’s interim Administrative Director, in accordance with Article 20(1)(a). Once the Administrative Director is appointed by the EPPO College and has taken up his/her duties, the interim Administrative Director shall cease his/her duties (Article 20(3)).

**Setting up of the Selection Panel**

A 12-member selection panel will be set up to select the European Chief Prosecutor and European Prosecutors. The Council will adopt a decision appointing selection panel members on a proposal from the Commission. The Commission made a proposal on 31 July 2018. Among the members proposed is one member appointed by the European Parliament on 31 May 2018, in accordance with Article 13(3), which states that one of the persons chosen shall be proposed by the European Parliament (Antonio Mura).

**Selection and appointment of the European Chief Prosecutor**

According to an update of 30 May 2018, the Commission is in the process of finalising the draft vacancy notice for the position of the European Chief Prosecutor, which will be shared with the Parliament and Council before publication. Following an open call for candidates, the selection panel will draw up a shortlist of qualified candidates for submission to the European Parliament and

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54 Item 18 of Commission work programme 2018 Annex I, Extension of the tasks of the new European Public Prosecutor’s Office (initiative to be launched with a 2025 perspective), Communication on a possible extension of the tasks of the new European Public Prosecutor’s Office to include the fight against terrorism on the basis of Article 86(4)TFEU (non-legislative, third quarter, 2018).
to the Council, who will thereafter appoint the European Chief Prosecutor by common accord (Article 14 and Recital 41). On 19 November 2018, a vacancy for the position of the Chief European Prosecutor was published in the Official Journal.

**Appointments of European Prosecutors**

Following the nomination by the Member States of three candidates per Member State, the selection panel shall review nominations and send a reasoned opinion to the Council, who will thereafter select and appoint one candidate per Member State as the European Prosecutor of the Member State in question.

**Proposal and adoption of the internal rules of procedure**

The organisation of the work of the EPPO will be governed by its internal rules of procedure, which include some of the core aspects of the EPPO, most notably the number of Permanent Chambers, their composition, the division of competences between the Chambers. A proposal on the internal rules of procedure will be prepared by the European Chief Prosecutor (without delay, once the EPPO is set up) and thereafter adopted by the College by a two-thirds majority.
3. Permanent structured cooperation (PESCO)

3.1. General overview

Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

Procedural file: EUR-Lex

Notification by a group of Member States of their intention to participate in permanent structured cooperation: 13 November 2017.

23 Original Member States signed a joint notification in November 2017: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden.

Plus 2 Member States notified their intention to join PESCO on 7 December 2017: Ireland (7 December 2017) and Portugal (7 December 2017).

Adoption of legal act: Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

Entry into force: 11 December 2017 (Article 11 – 'This Decision shall enter into force on the date of its adoption').

3.2. Background

PESCO provides a framework and a process for capable and willing Member States to deepen their defence cooperation through concrete projects and commitments. PESCO aims to strengthen European defence by pooling Member States’ resources, encouraging the joint development of armaments, and increasing the interoperability of European armed forces.

A total of 25 Member States participate in PESCO, with each participating Member State choosing the projects in which it wishes to be involved.

PESCO was established by Council Decision (CFSP) 2017/2315 of 11 December 2017 (full Council, qualified majority vote (QMV)).

In March 2018, the list of PESCO projects was adopted by the Council Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO, 6 March 2018 (Council PESCO format, 25 Member States, unanimous vote) and the Council recommendation concerning a roadmap for the implementation of PESCO.

Finally, Council Decision (CFSP) 2018/909 of 25 June 2018 established a common set of governance rules for PESCO projects (Council PESCO format, 25 Member States, unanimous vote). Adoption of the second wave of projects is expected in November 2018.

Although the Lisbon Treaty contains provisions for the establishment of PESCO, it has taken nearly a decade to activate these provisions, prompting many to refer to PESCO as the ‘sleeping beauty’ of the Treaty. This prolonged lack of political will to activate PESCO provisions can be explained by some Member States’ fears of losing control of their defence and security policies – closely linked to national sovereignty – in favour of the EU institutions, fears that such a move would lead to a ‘two-speed Europe’, or to a possible creation of an European army.

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60 Non participating Member States: Denmark, Malta, the United Kingdom.
61 Council Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO, 6 March 2018.
62 Council Recommendation concerning a roadmap for the implementation of PESCO, 2018/C 88/01, 6 March 2018.
This situation has changed in the recent years, mostly as a result of the deteriorating security and changing political environments, coupled with the increased realisation that maintaining the status quo entails significant costs and inefficiencies.

As early as 2013, a European Parliament cost of non-Europe report found that ‘the ‘go-it-alone’ approach was a source of weakness, and inevitably entail[ed] a needless multiplication in the cost of forming, maintaining and operating military forces in Europe’. Furthermore, the report found that costs also arise due to the lack of a truly integrated market. The existence of twenty-eight compartmentalised national defence markets [...] hinders competition and results in a lack of economies of scale for industry and production.64

These aspects enabled significant strides in defence cooperation in recent years. Following the launch of the EU global strategy (EUGS)65 for the European Union’s Foreign and Security Policy in June 2016, and the subsequent June 2017 implementation plan on security and defence66 in November 2016 (which specifically includes PESCO as one of the concrete actions necessary for credible implementation of EUGS), the European Council agreed on the need to launch an ‘inclusive and ambitious’ PESCO.67

Finally, on 13 November 2017, 23 Member States signed a joint notification of their intention to participate in PESCO. Shortly thereafter, PESCO was established by the Council Decision (CFSP) 2017/2315 of 11 December 2017 (the Foreign Affairs Council acting under qualified majority voting after consulting the High Representative/Vice-President (HR/VP)). This was followed by the formal adoption of the PESCO projects (March 2018) and the adoption of governance rules for those projects (June 2018). These two Council Decisions were made in a PESCO-format Foreign Affairs Council (i.e. by the Defence Ministers of the 25 Member States participating in PESCO).

Figure 5 – PESCO principles

<table>
<thead>
<tr>
<th>PESCO PRINCIPLES</th>
<th>(see Council Decision 2017/2315, pp. 70-71)</th>
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<tbody>
<tr>
<td>Treaty-based</td>
<td></td>
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<tr>
<td>Can only be activated once</td>
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<tr>
<td>Ambitious, binding and inclusive</td>
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<tr>
<td>Enhancing EU Member States’ defence capabilities will also benefit NATO</td>
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<tr>
<td>Participation in PESCO is voluntary and leaves national sovereignty untouched</td>
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<tr>
<td>Output-oriented</td>
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<tr>
<td>Modular nature</td>
<td></td>
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<tr>
<td>Will help strengthen EU strategic autonomy</td>
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<tr>
<td>PESCO ‘could be an element of a possible development towards a common defence should the Council by unanimous vote decide so [...]. A long term vision of PESCO could be to arrive at a coherent full spectrum force package - in complementarity with NATO, which will continue to be the cornerstone of a collective defence for its members.’</td>
<td></td>
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</tbody>
</table>


67 European Council conclusions on security and defence, 22 June 2017.
3.3. Legal basis

Provisions on PESCO are laid down in Article 42(6) TEU, Article 46 TEU and in Protocol No 10 TFEU.

Article 42(6) states that the Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in CSDP with a view to the most demanding missions will establish permanent structured cooperation within the Union framework.

More detailed provisions are provided for in Article 46 TEU and Protocol 10 TFEU:

**Establishing PESCO (Article 46(1)(2) TEU)**

Those Member States which wish to participate in PESCO shall notify their intention to the Council and to the HR/VP. The Council thereafter adopts a decision establishing PESCO and determines the list of participating Member States (the Council acting by QMV after consulting the HR/VP).

**Joining PESCO at a later stage (Article 46(3) TEU)**

A Member State who wishes to join PESCO at a later stage shall notify the Council and the HR/VP. The Council thereafter adopts a decision confirming the participation of that Member State, under condition that it fulfils the criteria and makes the commitments as per Articles 1 and 2 of Protocol 10 on PESCO (the Council acting by QMV – of only PESCO participating Member States – after consulting the HR/VP). A qualified majority is defined in accordance with Article 238(3)(a) TFEU.68

**Suspending a Member State’s participation in PESCO (Article 46(4) TEU)**

If a participating Member State no longer fulfils the criteria or is no longer able to meet the commitments, the Council may adopt a decision suspending the participation of the Member State concerned (the Council acting by QMV – of only PESCO-participating Member States, minus the Member State in question). A qualified majority is defined in accordance with Article 238(3)(a).

**Withdrawal from PESCO (46(5) TEU)**

Any participating Member State which wishes to withdraw from PESCO shall notify the Council, which shall take note that the Member State in question has ceased to participate.

**Council decision making procedure (Article 46(6) TEU)**

The decisions and recommendations of the Council within the PESCO framework shall be adopted by unanimity among the PESCO-participating Member States only.69

Finally, detailed provisions on the criteria that need to be fulfilled and the commitments that need to be made by the Member States who wish to participate in PESCO are set out in Protocol 10.

On the criteria, Member States must intensively develop defence capacities through the development of national contributions and their participation in multinational forces, in the main European defence equipment programmes and in the activities of the European Defence Agency in the field of defence capabilities development, research, acquisition and armaments. They also must have the capacity, by 2010, to supply combat units and support logistics for the tasks referred to in

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68 A qualified majority is defined in accordance with Article 238(3)(a) TFEU (55 % of PESCO-participating Member States and 65 % of the population of the PESCO-participating Member States) (Article 46(3)).

69 With the exception of above mentioned voting procedures in Articles 46(2)(3)(4)(5) TEU.
Article 43 TEU\textsuperscript{70} within a period of 5 to 30 days and, depending on needs, for a period of 30 to 120 days (Protocol 10, Article 1).

The common commitments are defined in Protocol 10, Article 2, which stipulates that Member States shall undertake to establish cooperation in five areas:

- a) Budgetary – setting objectives on the level of defence investment;
- b) Equipment – identifying military needs, pooling and specialising;
- c) Operational – enhancing the availability, interoperability, flexibility and deployability of their forces;
- d) Capabilities – addressing shortfalls as identified through the capability development mechanism; and
- e) Industry – participating in major joint European equipment programmes.

The above cooperation is further developed in the 20 commitments (a full list is presented as an Annex to the Council Decision 2017/2315 of 11 December 2017).

3.4. Internal organisation, internal rules and decision-making

The governance of PESCO is organised at two levels:

- at the Council level;
- at the project level – once the project is adopted, project members (i.e. Member States taking part in a particular PESCO project) are in charge of its management and implementation.

As a general rule, the Council adopts decisions and recommendations by unanimity among the participating Member States, in accordance with Article 46(6) TEU\textsuperscript{71}. The exceptions exist for specific decisions and are presented below.

Unanimity is also a general rule at the project level. This means that, depending on the project, 2 to 24 project members (since the number of project members differs per project) need to make unanimous decisions on the management and implementation of their respective projects. Again, exceptions to the unanimity rule are possible if all the project members so decide.

The Council and project level governance rules are presented in more detail below, followed by the composition and role of the PESCO secretariat.

**COUNCIL LEVEL GOVERNANCE**

**Foreign Affairs Council (28)/QMV/consultation with HR/VP**

- establishes PESCO\textsuperscript{72} (Article 46(1)(2) TEU)

**Foreign Affairs Council/PESCO format (25)/QMV**

- new Member States joining PESCO (plus consultation with HR/VP) (Article 46(3) TEU);

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\textsuperscript{70} These are: joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, combat forces’ tasks in crisis management, including peace-making and post-conflict stabilisation.

\textsuperscript{71} Article 46(6) states that ‘[t]he decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only.’

\textsuperscript{72} Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.
- suspension of participating Member State (minus the Member State in question – 24 Member States) (Article 46(4) TEU)

**Foreign Affairs Council/PESCO format (25)/unanimity** (Article 46(6) TEU)
- providing strategic direction and guidance for PESCO;\(^{73}\)
- sequencing the two consecutive initial phases (2018-2020 and 2021-2025);
- updating and enhancing the Annex when necessary, in particular at the end of the above phases, based on a strategic review process assessing fulfilment of PESCO commitments;
- assessing the contributions of participating Member States;
- establishing the list of projects to be developed under PESCO;\(^{74}\)
- establishing a common set of governance rules for projects;\(^{75}\)
- establishing the general conditions under for the exceptional participation of the third States (non EU states); any other measures required.

**PROJECT LEVEL GOVERNANCE**

**Project Members**\(^{76}\) (2 to 24 since number of members per project differs)/unanimity\(^{77}\)
- agreement on the arrangements for, and the scope of, project members’ cooperation;
- management of that project;
- these arrangements may include: project contributions and requirements, decision-making within the project, conditions for joining and leaving the project, provisions related to observer status;
- these arrangements may also cover: preparation, chairing, coordination of meetings, distribution of roles and responsibilities among the project members, invitation to the Commission to be involved, rules to be applied in case of leaving or joining the project, determination of cases where European External Action Service (EEAS) and European Defence Agency (EDA) support may be requested, specifications, acquisition strategy, choice of a project management support structure, and selection of industrial companies;
- admitting additional project members from the PESCO-participating Member States (requirement to inform the Council);
- decision on applying different voting rules – ‘the project members may agree among themselves by unanimity that certain decisions, such as those relating to administrative matters, will be taken according to different voting rules'.

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\(^{74}\) [Council Decision (CFSP)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0340) of 6 March 2018 establishing the list of projects to be developed under PESCO.


\(^{76}\) Member States taking part in a particular PESCO project (Article 1, Council Decision 2018/909). The number of 2 to 24 Member States refers to the numbers of project members from the first batch of the PESCO projects adopted in March 2018.

\(^{77}\) The role of project coordinators (these would typically be the initiators of the project) is elaborated in Article 5 of [Council Decision 2018/909](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0909).
**PESCO SECRETARIAT**

**EEAS (CMPD + EUMS) and EDA**

The PESCO Secretariat is provided jointly by the European External Action Service (EEAS) (the Crisis Management and Planning Directorate (CMPD) and the European Union Military Staff (EUMS)) and the European Defence Agency (EDA).

It provides a single point of contact within the Union’s framework for all PESCO matters, including for all participating Member States. The Secretariat is a ‘virtual entity’, in the sense that its creation does not entail the physical merger of the respective structures within the EEAS and EDA.

The Secretariat’s role in the **assessment of Member States’ contributions** includes:

In the context of the annual report on PESCO, the EEAS contributes to the HR/VP’s assessment of participating Member States’ contributions with regard to operational aspects, while the EDA does the same with regards to capabilities.

The Secretariat’s role in the **assessment of project proposals** includes:

The EEAS coordinates the assessment of project proposals in the areas of availability, interoperability, flexibility and deployability of forces. The EEAS assesses the project proposals with regards to the operational needs.

The EDA coordinates the assessment of projects proposals in the area of capability development, in particular aiming to ensure that there is no unnecessary duplication with existing initiatives in other institutional contexts.

The Secretariat has a number of other coordination and support roles, elaborated in detail in the Council Decisions on establishing PESCO ([Article 7](#)) and on the governance rules of projects ([Article 3](#)).

### 3.5. Budget and staff

Provisions on financing are given in Article 8 of the Council Decision establishing PESCO. Different rules apply to administrative expenditure at the central level and operational expenditure at the project level.

**Central level (Article 8(1))**

- Administrative expenditure of the Union institutions and the EEAS arising from the implementation of the Council Decision is charged to the Union budget.
- Administrative expenditure of the EDA is subject to the relevant financing rules of the EDA.

It appears that the EEAS and EDA have made appropriate arrangements for carrying out their PESCO secretariat tasks generally within their existing budgets and staffing levels. Discussion as to whether staffing reinforcements are needed within EEAS is ongoing within the context of the general discussions on the EEAS budget. As for EDA, a dedicated PESCO unit of seven full time staff members was formed within the Agency through reallocations of positions within the Agency.78 As noted by the EEAS representative during the 11 July 2018 SEDE committee meeting on PESCO governance.

78 As noted by the EDA representative during the same meeting. Note also that several PESCO related vacancies, including that of the PESCO Head of Unit have been published by the EDA.
Project level (Article 8(2))

- Operating expenditure arising from projects undertaken within the framework of PESCO shall be supported primarily by the participating Member States that take part in an individual project.
- Contributions from the general budget of the Union may be made to such projects in compliance with the Treaties and in accordance with the relevant Union instruments.

Further provisions related to the project costs are provided in Articles 4(1)(2) and (5) of the Council Decision on the governance rules for PESCO. These stipulate that the project members shall agree by unanimity on matters which 'may include the necessary contributions needed to participate in the project'. Article 4(5) further states that 'project members shall contribute to the project with their own resources and expertise. Depending on the scope of the project, each project member shall determine the nature of its contribution, which may include human resources, financial resources, expertise, equipment or contributions in kind. Such contributions shall support the achievement of the project’s objective and shall have an impact on the project.'

As noted above, this project level principle of ‘costs lie where they fall’ is coupled with the possibility to fund projects under the general EU budget for by utilising Union instruments. The most notable example here is the European Defence Fund (EDF), which includes what is known as a ‘PESCO bonus’, whereby PESCO projects, if and when assessed as eligible, receive a higher funding rate. This could potentially result in significant Union funds being allocated to the PESCO projects, bearing in mind that the MFF 2021-2027 proposes €13 billion in EDF funds.

3.6. Procedures for project selection and assessment of Member State contributions

For a quick overview, the Council provides a visual presentation of the procedures for the identification of PESCO projects ('Roadmap of PESCO projects') and the assessment of Member State contributions ('PESCO Assessment process 12/2017-12/2019').

As to the identification of PESCO projects, these procedures will in future entail a call for proposals for new PESCO projects each May, followed by the assessment process, leading to an updated list of PESCO projects (i.e. updated Council Decision) in the following November.

As to the assessment of Member State contributions, this procedure will entail annual reports by the PESCO Member States each January (national implementation plans (NIPs)). On the basis of these NIPs, the HR/VP will present an annual report describing the status of PESCO implementation to the Council, including the fulfilment, by each participating Member State, of its commitments, by the following March/April. Thereafter, and on the basis of the HR/VP’s report, the European Union Military Committee (EUMC) provides the Political and Security Committee (PSC) with military advice and recommendations to enable it to prepare the Council’s review by May each year.

Finally, regarding the annual reporting of project progress to the Council, project members, through project coordinators (i.e. project leaders), report to the PESCO Secretariat on the progress achieved...
within their respective projects. The PESCO Secretariat thereafter transmits consolidated information to the Council. This should, in principle, precede the HR/VP annual report.

3.7. First 17 PESCO projects

The first batch of 17 projects was formally adopted in March 2018 from almost 50 projects proposed by the Member States. The projects cover areas of operational readiness, capability development and training.

A list of these projects, project members (i.e. participating Member States) and the project leaders is presented below. As can be seen, there is a wide difference in the interest shown by Member States for different projects, with the project on military mobility attracting the interest of as many as 24 Member States. On the other end of the spectrum are projects on indirect fire support (EuroArtillery) and an EU training certification centre for European armies, with the participation of two Member States for each project.

Generally, more Member States joined projects in the operational domain (with around 10 Member States per project on average) than in the capability development related projects (with around 5 Member States per project on average). The projects also differ in terms of their level of ambition and the timeframes that would be needed for their completion. Some projects are pre-existing initiatives 'repackaged' in PESCO format.

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84 See Council visual presentation of the 17 projects, divided into three areas: Common training and exercises: 2 projects; operational domains (land, air, maritime, cyber): 6 projects; and joint and enabling capabilities (bridging operational gaps): 9 projects.

85 'In many cases, the states concerned were going to undertake them anyway, PESCO or no PESCO', S. Biscop, European Defence: Give PESCO a Chance, Survival: Global Politics and Strategy, 60(3), p.164.
3.8. PESCO: links with related EU defence initiatives

PESCO needs to be seen within the context of an overall increase in activity in the defence and security field, both within the EU, and within NATO and other EU Member States’ initiatives.

Within the EU context, it is crucial that PESCO activities are coordinated with the coordinated annual review on defence (CARD) and capability development plan (CDP).

The Coordinated annual review on defence (CARD)\(^{86}\), established in 2017, is a process of monitoring Member States’ defence spending plans to help coordinate spending and identify possible collaborative projects. It is a voluntary Member State driven tool with a first trial run of CARD taking place in August 2017.

The Capability Development Plan (CDP)\(^{87}\) provides a full capability picture that supports decision-making processes at EU and national levels regarding military capability development. In this way, it contributes to increased coherence between Member States’ individual defence planning. It addresses security and defence challenges from the perspective of European capability development, looks at the future operational environment, and defines the EU capability development priorities agreed by the Member States.

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\(^{86}\) See Coordinated annual review on defence factsheet, November 2017.

\(^{87}\) See Capability Development Plan factsheet, June 2018. See in particular 2018 EU Capability Defence Priorities on p. 3 of the factsheet.
As noted above, PESCO projects may receive contributions from the general EU budget (if they fulfil the relevant instruments’ conditions), the most notable being the European Defence Fund (EDF) to support collaborative research in innovative defence technologies and the development of defence products jointly agreed by the Member States. The proposed budget allocation for 2021-2027 is considerable – €13 billion (of which €4.1 billion is earmarked for research and €8.9 billion destined for development). The fund is not meant to substitute Member States’ investments in defence, but to be ‘the financial firepower for cross-border investments in state-of-the-art and fully interoperable technology and equipment in areas such as encrypted software and drone technology’. 

3.9. Looking ahead

Second batch of PESCO projects, November 2018

Several experts hold that the majority of the first batch of PESCO projects were not ambitious enough, in particular vis-à-vis addressing the EU’s capability gap. Much attention was therefore paid to the projects due in November 2018.

There is hope that this second batch of projects will be more ambitious and will reflect the priorities identified by the 2018 capability development plan. ‘For PESCO to add real value, it must focus on projects that, because they require a critical mass of participating states and address a common rather than a national shortfall, would not otherwise happen – projects that really are "strategically relevant", such as long-range air and sea transport; intelligence, surveillance, target acquisition and reconnaissance (from drones to satellites); air-to-air refuelling; and deployable networks. These are the strategic enablers that Europeans need to project military force beyond the borders of Europe’. 

Nonetheless, they acknowledge the power of small achievements, namely the fact that some of the projects from the first batch could produce results in the short-term. Demonstrating this added value of PESCO, albeit on a small scale, could serve as an important impetus for further PESCO development.

On 19 November 2018, the Council adopted an updated list of projects to be undertaken under PESCO. The ‘second batch’ of projects includes 17 new projects. The Council issued a complete updated list of all 34 adopted projects (17 from the first batch and 17 adopted in November 2018).

Review clause

The Council Decision establishing PESCO does not include a review or evaluation clause. However, the June 2018 Council Decision establishing a common set of governance rules for PESCO projects includes a review clause in Article 9. It states that the decision shall be reviewed by 31 December 2020 and, if necessary, adapted to take account of the general conditions for participation of third states in individual projects.

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88 European Commission, Press release - EU budget: Stepping up the EU’s role as a security and defence provider, 13 June 2018.
92 Council, Permanent Structured Cooperation (PESCO) updated list of PESCO projects - Overview, 19 November 2018.
4. Divorce Law (Rome III)

4.1. General overview

<table>
<thead>
<tr>
<th>Legislative act</th>
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<tbody>
<tr>
<td>Council Regulation (EU) <a href="#">1259/2010</a> of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.</td>
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<table>
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<tr>
<th>European Commission original proposal: proposal</th>
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<tr>
<td>of 17 July 2006, special legislative procedure</td>
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<th>Procedural file:</th>
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<td>in EUR-Lex, Legislative Observatory</td>
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<th>Absence of unanimity in Council noted:</th>
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<td>5 and 6 June 2008</td>
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<th>Notification by a group of Member States on their wish to establish enhanced cooperation:</th>
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<tr>
<td>see Recital 6 of the Council Regulation (EU) <a href="#">1259/2010</a>.</td>
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<th>15 Original Member States:</th>
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<tr>
<td>Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain (Greece later withdrew its request)</td>
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<th>Plus 3 Member States:</th>
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<td>Lithuania (21 November 2012), Greece (27 January 2014), and Estonia (10 August 2016) later joined, bringing the total of countries participating in the enhanced cooperation to 17 Member States.</td>
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<th>Adoption of legislative act:</th>
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<tr>
<td>Council Regulation (EU) <a href="#">1259/2010</a> of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.</td>
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<th>Application date:</th>
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<tr>
<td>21 June 2012 (Article 21), with the exception of Article 17 which shall apply from 21 June 2011.</td>
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4.2. Background

The adoption of Regulation 1259/2010[93](#) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation marked the first time that the provisions on enhanced cooperation were put to use, despite the fact that the possibility of enhanced cooperation exists since the 1999 Amsterdam Treaty.

This regulation, also known as the Rome III Regulation, applies in situations involving a conflict of laws regarding divorce and legal separation, and sets up rules allowing 'international couples' to select which country's law should apply to their divorce. The term 'international couple' refers to couples where spouses have different nationalities, or live in different Member States, or have the same nationality but are living in another Member State.[94](#)

The need for cooperation in this area was highlighted by the increasing number of divorces in the EU and the high number of divorces that had an 'international element'.[95](#)

The Rome III Regulation is closely related to an earlier regulation, known as Brussels IIa, which includes rules on jurisdiction and recognition in matrimonial matters, but does not include rules on the applicable law.

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As seen above, the Brussels IIa Regulation sets out rules determining which court is responsible for dealing with matrimonial matters.96 International couples who want to divorce can choose between several alternative grounds of jurisdiction (based on spouses’ residence or nationality).

However, when a divorce proceeding has been brought before the court of a Member State, the applicable law was determined based on that State’s national conflict-of-law rules.97 Given significant differences between national conflict-of-law rules, spouses wishing to divorce were faced with a lack of legal certainty and predictability as to which law would be applied to their case.

In view of this situation, in 2005, the European Commission adopted a green paper on the applicable law and jurisdiction in divorce matters, addressing what was considered to be the shortcomings of the situation, and launched a public consultation on possible solutions.98 In July 2006, the Commission proposed a Council regulation amending the Brussels IIa Regulation99. However, in June 2008, a lack of unanimity in the Council was noted.100 Due to the considerable divergence between Member States’ substantive family laws, Member States with more liberal family laws were reluctant to accept that their courts would have to apply more restrictive divorce law of another State, while on the other hand, more traditional Member States were wary of applying what they considered the lenient laws of other Member States.

Instead, 15 Member States101 chose to address a request to the Commission indicating that they wished to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters (Greece later withdrew its request).102

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96 Brussels IIa Regulation has a wider scope than Rome III and includes rules determining which court in responsible for dealing with matters of parental responsibility in disputes involving more than one state, rules on recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.


100 Press release, 2873rd Council meeting, 5-6 June 2008.

101 Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

On 12 July 2010, Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation was adopted in the Council. On 16 June 2010, the European Parliament gave its consent for the enhanced cooperation measure, and on 20 December 2010, after having consulted with the Parliament under the special legislative procedure, the 14 Member States mentioned above adopted Council Regulation (EU) 1259/2010, with the application date set for 21 June 2012. Estonia, Lithuania and Greece later joined, making a total of 17 participant EU Member States. The 17 Member States are bound by the Regulation, but non-participating States are not.

4.3. An overview of main provisions of the Rome III Regulation

The aim of Regulation 1259/2010 was to create a clear legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, and thereby to improve the situation for EU citizens by providing more legal certainty, predictability and flexibility. The regulation does not harmonise domestic divorce and legal separation laws. It rather introduces ‘harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned’. Thus, it enables spouses to easily predict which law will apply.

Article 1 of the Regulation sets out the scope and specifies that the Regulation applies to situations involving a conflict of laws regarding divorce and legal separation, but that it does not apply to several other matters. These include the legal capacity of natural persons; the existence, validity or recognition of a marriage; the annulment of a marriage; the name of the spouses; the property consequences of the marriage; parental responsibility; maintenance obligations; and trusts or successions.

The main provisions are given in Articles 5 and 8. Article 5 stipulates that international couples can choose which law should apply if they were to divorce, as long as it is the law of a country with which they have a close connection. Four choices are given (in no particular order) – the spouses are free to designate any of the four laws as the applicable law:

- either the law of the state where the spouses are habitually resident at the time the agreement is concluded;
- or the law of the state where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded;
- or the law of the state of nationality of either spouse at the time the agreement is concluded;

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103 **Council Decision 2010/405/EU** of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.


105 See **Commission Decision 2012/714/EU** of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation; **Commission Decision 2014/39/EU** of 27 January 2014, confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation; **Commission Decision (EU) 2016/1366** of 10 August 2016, confirming the participation of Estonia in enhanced cooperation in the area applicable to divorce and legal separation.

106 Press release, **A first in EU history: enhanced cooperation to help international couples is in force**, European Commission, 5 August 2010.

107 **Council Regulation (EU) No 1259/2010** of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Recital 21.

or the law of the forum.\textsuperscript{109}

Article 8 provides for situations when the couples cannot reach an agreement on the applicable law in line with Article 5. In such cases, Article 8 introduces harmonised conflict-of-law rules giving national courts a common formula for deciding which country’s law should apply. It states that, if an applicable law is not chosen by the couple, divorce and legal separation shall firstly be subject to the law of the state:

\begin{itemize}
\item where the spouses are habitually resident at the time the court is seized; or, failing that
\item where the spouses were last habitually resident (provided that the period of residence did not end more than one year before the court was seized, in so far as one of the spouses still resides in that state at the time the court is seized); or, failing that
\item of which both spouses are nationals at the time the court is seized; or, failing that,
\item where the court is seized.\textsuperscript{110}
\end{itemize}

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\begin{tabular}{|c|c|}
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\textbf{Universal character of the Rome III Regulation} & \\
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\textbf{Article 4} states that ‘the law designated by this Regulation shall apply whether or not it is the law of a participating Member State’. This means that the law applicable could also be the law of a non-participating Member State or even the law of a third/non-EU state. Indeed, there are indications that, in many Rome III judgements, the applicable law is the law of a third state. & \\
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There are two possible reasons not to apply the applicable law according to the Rome III Regulation. Article 10 stipulates that, if the national law applicable to the case does not include a divorce law or does not grant equal access to divorce or legal separation to one of the spouses on grounds of their sex, then the law of the country in which the case is brought will apply. The other reason is given in Article 12 (public policy clause) and stipulates that the application of a provision of a foreign law will be disregarded where such application would be manifestly incompatible with the public policy of the forum.\textsuperscript{111}

The Rome III Regulation does not affect the application of the Brussels IIa Regulation.\textsuperscript{112} Thus, a divorce or legal separation case will be brought before the court of a Member State following the provisions of the Brussels IIa Regulation (to which all Member States except Denmark are bound). If that particular Member State happens to be one of the 17 Member States that participates in enhanced cooperation under the Rome III Regulation, then the law to be applied to the case will be determined according to the Rome III Regulation. The 11 non-participating Member States are not bound by the Rome III Regulation and the applicable law in these Member States is determined based on that state’s domestic conflict-of-law rules.

\subsection*{4.4. No designated secretariat, specific budget, nor staff provisions}

As noted above, the Rome III Regulation sets out clarifications for international couples and for national courts on which law to apply in cases of divorce and legal separation brought before the courts of the 17 participating Member States. It is an addition to a body of law applied by participating Member States. It does not call for a specific secretariat or budget (no provisions on a secretariat nor on a specific budget exist in the legislation).

\textsuperscript{109} Ibid, Article 5.

\textsuperscript{110} Ibid, Article 8.

\textsuperscript{111} Ibid, Articles 10 and 12, and Recitals 24 and 25.

\textsuperscript{112} Ibid, Article 2.
To ensure that the spouses have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation, the Commission provides and updates an e-Justice portal, a public information system set up by Council Decision 2001/470 (establishing a European judicial network in civil and commercial matters).  

4.5. Relationship with non-participating Member States

As noted earlier, the Rome III Regulation is binding on the 17 participating Member States. The courts of the remaining 11 non-participating Member States continue to apply their own conflict-of-law rules to determine the applicable law in divorce and legal separation cases of international couples.

4.6. Jurisprudence

To date, one case (Soha Sahyouni v Raja Mamisch) has been brought before the Court of Justice of the European Union (CJEU) regarding the interpretation of Regulation 1259/2010. The case involved an application for recognition of a divorce decision delivered by a religious authority in a third country. Both parties in the proceedings held Syrian nationality from birth and later acquired German nationality. Married under the jurisdiction of the Islamic Court of Homs in Syria, the couple were later also declared divorced by the same court. One party applied for a divorce to be recognised in Germany, which was granted by the German court. The other party in the proceedings challenged the decision and applied to have a declaration made that the requirements for recognition of the divorce were not satisfied. The German court rejected this application, stating that the divorce decision was governed by Regulation 1259/2010, and that the Regulation also applies to ‘private divorces’ (divorces not pronounced by a national court or public authority). Due to the absence of a valid choice of applicable law and a common habitual residence of the spouses in the year before the divorce, the decisive factor was therefore determined by the German court to be the spouses' effective nationality at the time of the divorce (Syrian).

The German court elected to stay the proceedings and referred a number of questions to the CJEU for a preliminary ruling, the first being whether the scope of Regulation 1259/2010 also includes cases of private divorce, in this instance one pronounced by the unilateral declaration of a spouse before a religious court in Syria.

The CJEU stated that the recognition of a divorce decision delivered in a third country is not within the scope of EU law, but that the interpretation of a provision of EU law may still be relevant in cases where EU law has been made applicable by national legislation. In this case, Regulation 1259/2010 applies under German law to the recognition in Germany of private divorces pronounced in a third country.

The CJEU found that based on the definition of the concept of ‘divorce’ in Regulation 2201/2003, Regulation 1259/2010 only covers divorces pronounced by a national court or by (or under the supervision of) a public authority. The CJEU therefore judged that Article 1 of Regulation (EU) 1259/2010 (setting out the scope of the Regulation) means that a divorce resulting from a

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113 See relevant parts of the e-Justice portal [here](#).
114 Case C-372/16, Soha Sahyouni v Raja Mamisch.
115 Ibid.
116 Ibid.
117 Ibid.
unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not fall under the scope of Regulation 1259/2010.118

4.7. Implementation of the Rome III Regulation

European Commission report on the application due in 2015 (not issued) and 2020

The Rome III Regulation is the first case of enhanced cooperation and has been applied in the participating Member States for over six years (date of application: 21 June 2012).119 It is therefore particularly interesting to see how it has worked in practice and whether it has performed in comparison with expectations.

The Regulation indeed envisages a report some 3.5 years after application begins (i.e. by the end of 2015), with a second report following by the end of 2020.

The review clause in Article 20 states:

- 'By 31 December 2015, and every 5 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by proposals to adapt this Regulation.

- To that end, the participating Member States shall communicate to the Commission the relevant information on the application of this Regulation by their courts.'

It appears, however, that the Commission has not presented this (long overdue) report.120 This is regrettable since, presumably, there should have been a sufficient number of cases of divorce and/or legal separations of international couples in the participating Member States that could feed into the report on the application of the Regulation. EU-wide, it is estimated that there are around 16 million 'international' families and that the number of international divorces stands at around 140 000 per year.121 An overview of the application of this Regulation would also be welcomed in view of the high numbers of those potentially affected.

Literature review

A review of the literature nonetheless reveals several findings on the application of the Rome III Regulation. These findings are presented below.

It appears that there are sometimes difficulties in discovery and interpretation of foreign laws. 'JJudges have expressed how difficult it can be to find, not only black-letter foreign law, but also the correct interpretation of that law, and moreover to do so in a timely manner.'122 When a European Member State’s law is designated as the applicable law, online information is available through, inter

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118 Ibid.

119 Three Member States joined the enhanced cooperation at a later stage and thus have shorter application periods.

120 At the time of writing this paper, the report was not available in the relevant sections of EUR-Lex, nor the Legislative Observatory, nor on the Commission’s DG JUST webpage. This is in contrast to e.g. the Brussels IIa Regulation, on which ample sources on its implementation exist (see e.g. Report on the application of Brussels IIa Regulation, European Commission, 15 April 2014, 2016 Study for the JURI Committee, as well as the collection of relevant judgments delivered by Member States’ courts.


alia, the civil justice network. However, some have observed that the information available is not always adequate and up-to-date.\textsuperscript{123}

The applicable law is often the law of a third state, which further complicates the process of discovery and interpretation of these laws. Finally, when foreign laws are applied, the procedure involved is in general more costly and lasts longer. \textsuperscript{124} From this perspective, the applicable law issue could be used as a procedural strategy: parties may wish to avoid the application of foreign law (because of the extra costs and slower speed of resolving the case) or to have it applied (to delay the process of to force a settlement).

As noted earlier, the competent court nonetheless has the possibility not to apply foreign law, namely when such application would be manifestly incompatible with the public policy of the forum (Article 12), or if the foreign law applicable to the case does not include a divorce law or does not grant equal access to divorce or legal separation to one of the spouses on grounds of their sex (Article 10). Cases of uneven application have been noted here: case law appears to include similar situations resulting in contrary decisions made by different courts with regards to the same foreign law and its compatibility with the public policy of the forum.\textsuperscript{125} It appears however that public policy is “regarded as an exception which applies only in extreme cases”.\textsuperscript{126}

Research shows that, when spouses choose an applicable law according to Article 5, they generally choose the law that allows for a speedy divorce – that which does not require a period of separation. In addition to this practical concern, it appears that cultural concerns also play a role, especially in migration situations with strong cultural links to the state of origin. In these cases, applying the law of the state of origin has an extra benefit, in that the application of the law of the state of origin of the spouses facilitates the subsequent recognition of the divorce judgment in that state.\textsuperscript{127}

Research from 2018 into Italian case law notes that spouses choose the applicable law according to Article 5 rarely, and that the applicable law is determined more frequently by Article 8 provisions, usually leading to the application of the law of the country where the spouses are habitually resident.\textsuperscript{128}

In general, Rome III Regulation brought about a reversal of criteria for determining the applicable law: prior to Rome III, usually the law of the state of origin would have been applied, according to the national conflict-of-law rules. With the Rome III Regulation, the law of habitual residence has taken the lead.


\textsuperscript{124} Viarengo, I., \textit{Choice of law agreements in property regimes, divorce, and succession: stress-testing the new EU Regulations}, ERA, April 2017, p. 552.

\textsuperscript{125} An example is given of contrary decisions made regarding Moroccan law, whose provisions were deemed to run against public policy by a Spanish court, while an Italian court held the opposite view – that the Moroccan Family Code does not contradict public policy and that its provisions on divorce by mutual consent were similar to the Italian divorce on demand made jointly by the spouses. For further details, see Viarengo, I., \textit{The Rome III Regulation in legal practice: case law and comments}, ERA, January 2015, pp. 549-551.

\textsuperscript{126} Viarengo, I., \textit{The Rome III Regulation in legal practice: case law and comments}, ERA, January 2015, p. 551.

\textsuperscript{127} Ibid, p. 552.

4.8. Looking ahead

It is to be hoped that the Commission will issue a (long overdue) report on the application of the Rome III Regulation, in line with Article 20 provisions. This would enable gaining a full picture of how this regulation has worked in practice.
5. Property regime rules

5.1. General overview

<table>
<thead>
<tr>
<th>Legislative acts</th>
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<tbody>
<tr>
<td>Council Regulation (EU) <a href="#">2016/1103</a> of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes</td>
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<td>Council Regulation (EU) <a href="#">2016/1104</a> of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships</td>
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</table>

**European Commission original proposal:** proposal and proposal of 16 March 2011, special legislative procedure

**Procedural file:** in EUR-Lex and Legislative Observatory (regarding matrimonial property), and in EUR-Lex and Legislative Observatory (regarding property of registered partnerships)

**Absence of unanimity in Council noted:** 3 December 2015

**Notification by a group of Member States on their wish to establish enhanced cooperation:** December 2015 to February 2016 (Recital 11 of 2016/1103)

**18 Member States:** Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden and Cyprus (Recital 11 of both regulations)

**Adoption of legislative act:** Council Regulation (EU) [2016/1103](#) of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and Council Regulation (EU) [2016/1104](#) of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

**Future timeframe:** Both regulations shall apply from 29 January 2019 (Articles 70 of both regulations)

5.2. Background

In a similar way to the case of divorce and legal separation, the need for cooperation in the area of property regimes arose from the difficulties faced by international couples in the European Union, in this case in terms of their common property.

In the 2004 Hague programme, the European Council asked the Commission to present a green paper on the conflict of laws regarding matrimonial property regimes and highlighted the need for cooperation in this area.\(^{129}\) In 2006, a green paper was adopted by the Commission, launching consultations on the difficulties European couples encounter regarding liquidation of their common property and the legal remedies available to them.\(^{130}\) The 2009 Stockholm programme further argued that mutual recognition should be extended to all fields essential to everyday life (such as the property consequences of forming a couple).\(^{131}\)


\(^{130}\) Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, European Commission, July 2006.

\(^{131}\) The Stockholm programme - An open and secure Europe serving and protecting citizens, European Council, May 2010.
In March 2011, the Commission proposed two Council regulations, one for matrimonial property and one covering the property of registered partnerships. In December 2015, the Council concluded that it would not be able to reach unanimity in the near future regarding the proposals. Following this, 17 Member States chose to address requests to the Commission indicating that they intended to establish enhanced cooperation between themselves in this area. In March 2016, Cyprus indicated that it wished to participate in the enhanced cooperation.

On 9 June 2016, Council Decision 2016/954 authorising enhanced cooperation on matters of matrimonial property regimes and the property consequences of registered partnerships was adopted. The issue of property regimes, as for divorce law, falls under Article 81(3) of the TFEU, which prescribes a special legislative procedure for family law with cross-border implications. On 23 June 2016, the European Parliament approved the Commission proposals without amendment.

On 24 June 2016, the Council adopted both regulations: Regulation 2016/1103 on matrimonial property and Regulation 2016/1104 on property for registered partnerships.

Both regulations will apply from 29 January 2019.

5.3. Overview of main provisions of Council Regulations 2016/1103 and 2016/1104

The aim of Regulation 2016/1103 and Regulation 2016/1104 is to provide international couples with greater legal certainty and to improve predictability, thereby avoiding the risk of parallel and/or conflicting procedures in different Member States. The regulations attempt to achieve this by introducing harmonised conflict-of-law rules regarding a couple’s common property, and by acting as a complement to Regulation 2201/2003 (on matrimonial matters and the matter of parental responsibility), Regulation 1259/2010 (on enhanced cooperation in divorce and legal separation), and Regulation 650/2012 (on matters of succession).

Both regulations specify two situations, as set out in Articles 4 and 5, in which jurisdiction is predetermined. The first case, set out in Article 4, refers to the death of one of the spouses/partners and states that the court of the Member State that was seized regarding the succession of a spouse or registered partner under Regulation 650/2012 will also have jurisdiction to rule on the property.
Implementation of the Treaty provisions concerning enhanced cooperation

consequences in connection with the succession case.\textsuperscript{141} In the second case, Article 5 of Regulation 2016/1103 states that if a married couple apply for divorce, the court ruling on the application of divorce will also have jurisdiction as regards to the matrimonial property, as long as the couple agree.\textsuperscript{142} Likewise, in case of dissolution or annulment of a registered partnership, Article 5 of Regulation 2016/1104 states that the court that will have jurisdiction over the property consequences will be the same court that has jurisdiction over the dissolution or annulment of the registered partnership.\textsuperscript{143} Importantly, Articles 4 and 5(1) only apply when a court has already been seized.

Under both regulations (when Article 4 or 5 do not apply) the couples can choose which law should apply to their property, regardless of the nature or location of that property. Married couples can choose the law of their nationality or habitual residence, while registered partners also have the possibility to choose the law of the Member State where they registered their partnership. Considering that not all Member States provide for registered partnerships, the courts of a Member State whose law does not provide for this may decline jurisdiction.\textsuperscript{144}

If the spouses cannot agree on which law to apply, or if no applicable law is chosen, the Regulation on matrimonial property introduces harmonised conflict-of-law rules that give the national courts of the participating Member States a common formula to determine which law should apply to the spouses' property. The first criteria is the first common habitual residence of the spouses after marriage or, if this does not apply, the spouses' common nationality. If both of these criteria do not apply, the law of the state to which the spouses have the closest links should apply. When determining with which state the couple has the closest links, the court shall consider all relevant factors as they were at the time the marriage was entered into.\textsuperscript{145} For the Regulation on property of registered partnerships, if no applicable law is chosen, the law of the state that registered the partnership will apply to the property consequences.\textsuperscript{146}

While both regulations provide for automatic recognition of judgments, enforcement requires a declaration of enforceability in the Member State of enforcement (which can be refused in exceptional cases, such as if the decision would, for example, violate the public policy of the state).\textsuperscript{147}

5.4. No secretariat, specific budget, nor staff provisions

Both Regulations 2016/1103 and 2016/1104 set out clarifications for international couples and national courts on which law should apply in matters of the couples' property. Enhanced cooperation in this area has no specific secretariat.

As such, the regulations are an addition to a body of law that participating Member States apply. They do not call for a specific secretariat, or a specific budget (no provisions for a secretariat nor on the specific budget exist in the legislation).

The Regulations, under Article 67, do however set up a committee, referring to Regulation 182/2011. Based on the advisory procedure set out in Article 4 of Regulation 182/2011, the Commission shall

\textsuperscript{142} Council Regulation (EU) No 2016/1103, Article 5.
\textsuperscript{143} Council Regulation (EU) No 2016/1104, Article 5.
decide on implementing acts to be adopted. A first meeting of the committees was held on
20 November 2017, where the proposed draft attestation forms were discussed.

5.5. Relationship with non-participating Member States
The regulations are binding on the 18 participating Member States only.

5.6. Looking ahead
The regulations will begin to apply in 2019. At this point in time, we cannot know how they will work
in practice.

On the future interaction between the Regulation on matrimonial property and the related Rome III
Regulation (divorce law), it is pertinent to mention that, while 17 Member States participate in
enhanced cooperation on divorce law and 18 on matters of matrimonial property regimes, only 12
of these overlap (i.e. 12 Member States participate both in divorce law EnC and in property regime
EnC). A further 6 Member States participate in the property regime EnC only, while another 5
Member States take part in divorce law EnC only. Finally, 5 Member States take part in neither
divorce law nor property regime EnC.

It is warned that such an 'Olympic circles' use of EnC in closely related fields of family law might
result in the legal framework becoming unintelligible.

In this context, it is encouraging to see that both regulations, on matrimonial property and on
property consequences of registered partnerships (as well as Rome III Regulation) include review
clauses among their provisions.

These review clauses oblige the Commission to present a report on the application of Articles 9
(alternative jurisdiction) and 38 (fundamental rights) in 2024.

As for the reports on the regulations as a whole, the Regulation on matrimonial property states that
the Commission shall present a report on the application of the Regulation in 2027. The review
clause for the Regulation on property of registered partnerships also requires a report on the
application of the Regulation in 2027, and further states that such a report shall be presented every
five years thereafter.

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149 See Dossier CMTD(2017)0700, Comitology register, European Commission, and Dossier CMTD(2017)0701, Comitology
register, European Commission
152 Council Regulation (EU) No 2016/1104, Article 68(1).
6. European Unitary Patent

6.1. General overview

**Legislative act**
- Regulation 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection
- Council Regulation 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements
- Council Agreement on a Unified Patent Court 2013/C 175/01, 19 February 2013

**Procedural file:** Legislative Observatory (regarding the creation of unitary patent protection, OLP) and Legislative Observatory (regarding the applicable translation arrangements, SLP)

**European Commission original proposal:** proposal on Community patent of 1 August 2000; proposal of 30 June 2010 on translation arrangements

**Absence of unanimity in Council noted:** 10 December 2010

**Notification by a group of Member States on their desire to establish enhanced cooperation:** December 2010 for 12 Member States followed by another 13 Member States (Council Decision 2011/167, Recital 5)

**25 Member States:** Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden and the United Kingdom

**Plus 1 Member State** expressed its desire to participate after the two Regulations and the Agreement had been adopted: Italy (30 September 2015), totalling 26 Member States

**Caveat:** Poland participates in the two regulations, but is not a signatory of the Unified Patent Court Agreement. The total number is therefore 26 participating Member States for two Regulations (all Member States except Croatia and Spain), and 25 for the Agreement on a Unified Patent Court (all except Croatia, Poland, Spain)

**Adoption of legislative act:**
- 17 December 2012 for Regulation 1257/2012 and Regulation 1260/2012; and
- 19 February 2013 for Council Agreement on a Unified Patent Court 2013/C 175/01

**Future timeframe:** The two regulations and the agreement will enter into force when Germany ratifies the Unified Patent Court Agreement

6.2. Background

The idea of creating a 'community patent', applicable in all Member States, has been discussed for decades. The importance of improving the patent system in the European Union has continuously increased as patents have become ever more important for innovation and economic growth. Prohibitive costs and the complexity of obtaining patent protection across the European Union has created an untenable situation.

By way of example, obtaining patent protection in the EU Member States was estimated at about €36 000 in 2012, while the same figure for other major markets was significantly lower (around €2 000 in the United States and €600 in China). Unsurprisingly, numbers of patents granted in those
two states has been significantly higher: in 2011, 224,000 and 172,000 patents were granted in the United States and China respectively, while only around 62,000 patents were granted in Europe.\(^{153}\)

Nonetheless, due to various challenges, not least those relating to translation arrangements and setting-up a litigation system, efforts to create a common patent were unsuccessful for some time.\(^{154}\)

The first limited form of patent cooperation was established in 1973, outside the EU (then EEC) framework, by the six EEC Member States and Switzerland. In that year, the European Patent Convention (EPC) was signed, which simplified the patent system somewhat by creating the possibility for applicants to apply for a European patent by a single, harmonised procedure before the European Patent Office (EPO). The system later expanded and today includes all EU Member States, as well as ten other states.\(^{155}\)

Figure 8 – European patent organisation overview

<table>
<thead>
<tr>
<th>EUROPEAN PATENT ORGANISATION</th>
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<tbody>
<tr>
<td>Not part of the EU legal order, but an intergovernmental organisation comprising 38 members (all EU Member States + 10 other states)</td>
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<tr>
<td>Established in 1977 on the basis of the European Patent Convention (EPC)(^{156})</td>
</tr>
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<td>European Patent Office (EPO)</td>
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<td>‘Executive arm’ of the European Patent Organisation</td>
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</table>


6.3. Current situation: National patents and European patents, plus no unified 'patent court'

Today, technical inventions can be protected in the European Union by following two tracks:

1st track: National patents

National patents granted by the competent national authorities. Technical inventions protected through national patents, however, is limited to the territory of the Member States concerned.

2nd track: European patents

European patents are granted by the European Patent Office and involve a single patent application processed in one of the three official languages of the EPO (English, French or German). This standardised application phase is however followed by a more complicated post-grant procedure.


\(^{155}\) 28 EU Member States plus Albania, Iceland, Liechtenstein, FYROM, Monaco, Norway, San Marino, Serbia, Switzerland, Turkey.

\(^{156}\) Revised in 1991 and 2000.
The European patent does not take effect automatically in most contracting states, but must be validated in those states in which the patent owner/proprietor desires protection. The European patent also has to be ‘converted’ into a national patent. These post-grant procedures vary, and are often complex and costly, between the different Member States. They may include payment of a fee, compliance with various formal requirements, and translation of the patent to the official language of that Member State. Once the patent is validated in e.g. several Member States, the patent owner has to pay renewal fees in each of these Member States.

No unified ‘patent court’

This form of patent cooperation was deemed a partial success given that ‘it established but an incomplete system’: while it did bring about some improvements in the patent granting phase (albeit limited, due to the needed validation process at national level as presented below), ‘it did not establish any unity post-grant’ – there was no unified patent litigation system.\(^{157}\)

6.4. Future plans: addition of a 'unitary patent' and a creation of a Unified Patent Court

In the future, once the Agreement on a Unified Patent Court enters into force, a third track will become available – granting of a European patent with a unitary effect (‘unitary patent’). This will not replace the European patent (nor national patents), but will offer an additional track to patent protection in Europe in the future.\(^{158}\)

3rd track: European patents with unitary effect (‘unitary patent’)

European patents with unitary effect will make it possible for an owner/proprietor of a European patent to obtain patent protection in all participating Member States through a single request. The pre-grant phase does not change: the applicant applies for a European patent at the European Patent Office. The EPO handles the application in accordance with the EPC and, if all criteria are met, grants a European patent. The post-grant procedure is different: the owner/proprietor of a European patent will now have the opportunity to file a request for unitary effect. If all requirements are fulfilled, the owner/proprietor of a European patent will get patent protection in all participating Member States.\(^{159}\) Complex validation requirements for different Member States will end. Finally, the owner/proprietor of the European patent with unitary effect will only have to pay a single annual renewal fee (to the European Patent Office).

Creation of a Unified Patent Court

The Agreement on the Unified Patent Court creates a court for the settlement of disputes relating to European patents and European patents with unitary effect, with membership open to all EU Member States.\(^{160}\)

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158 The owner of the European patent will still have the choice of whether or not to request unitary effect for their European patents. ‘Inventors may therefore choose between unitary patents, the ‘classical’ European patents (to be validated in the Member States) or national patents (to be filed in all the Member States). The new […] package just provides an additional tool in the toolbox.’ Patent reform package - frequently asked questions, European Commission, 11 December 2012, p. 6.

159 For the non-participating EU Member States (Croatia, Spain), the European patent will need to be separately validated in these two Member States.

160 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 84.
6.5. An overview of the main provisions of the patent package

The 'Unified Patent package' consists of 'three pillars':

- Regulation 1257/2012 establishing unitary patent protection (all Member States except Croatia and Spain participate);
- Regulation 1260/2012 on translation arrangements (all Member States except Croatia and Spain participate);
- an intergovernmental agreement setting up the Unified Patent Court (UPC) for the settlement of disputes relating to European patents and European patents with unitary effect (all Member States except Croatia, Spain and Poland).

The 'patent package' shall apply once 13 participating Member States (including France, Germany and the UK) have ratified the Unitary Patent Court Agreement.

While so far, 16 Member States (including France and the UK) have ratified the Agreement, the patent package still requires Germany's ratification of the Agreement.

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161 Croatia was not an EU Member State at the time, and has not as yet joined following its accession in 2013. At that time, a total of 25 Member States, with the exception of Italy and Spain, had chosen to participate in the two Regulations. In September 2015, Italy chose to join the enhanced cooperation, making a total of 26 participating Member States. See Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of unitary patent protection; Daily news, Italy joins the Unitary Patent, European Commission, 30 September 2015. Finally, following the adoption of the two regulations, all participating Member States, with the exception of Poland, signed the Agreement on the creation of a Unified Patent Court.

162 See Regulation 1257/2012, Article 18; Regulation 1260/2012, Article 7, and Council Agreement on a Unified Patent Court (2013/C 175/01), Article 89.

163 Unified Patent Court/Preparatory Committee, Summing up and Looking Forward to 2018, December 2017 and Ratification update, April 2018.

However, even when a European patent has been granted, the patent holder still needs to validate the patent in each of the Member States where protection is required, creating three main issues for the owner/proprietor of a European patent. These are: different validation requirements in Member States; obligation to pay renewal fees in every Member State where the patent is valid; and a lack of a harmonised system for settling potential disputes or infringements. Overall, this can be a very complex and costly process, especially for applicants with limited resources, such as SMEs.\textsuperscript{165}

Regulation 1257/2012 creating unitary patent protection

Regulation 1257/2012 introduces a unitary patent protection that builds on the European Patent Convention. This means that the applicant still has to apply through the European Patent Office that first grants a European patent (in accordance with the EPC). Once the EPO has granted a European patent, the patent holder can, under Regulation 1257/2012, request unitary effect for that patent. This request should be filed within one month of the date of the grant in the European Patent Bulletin. The owner/proprietor of a European patent with unitary effect can still validate that patent as a ‘classical’ European patent in the states that are not party to the enhanced cooperation, as well as the participating Member States that have not yet ratified the UPC Agreement. With a European patent with unitary effect, the patent holder only pays a single annual renewal fee to the EPO.\textsuperscript{166}

Article 9 of Regulation 1257/2012 specifies tasks that the participating Member States shall give to the EPO\textsuperscript{167} and further states that the participating Member States shall ensure governance and supervision of the EPO’s activities related to the tasks entrusted to it in the context of unitary patent protection (in their capacity as Contracting States to the EPC). The Regulation further states that the participating Member States shall decide the level of the renewal fees.\textsuperscript{168}

To facilitate the work of the participating Member States, the Regulation sets up a Select Committee which is embedded within the Administrative Council of the European Patent Organisation. It consists of the representatives of the participating Member States and a representative of the Commission (observer status), as well as their alternates.\textsuperscript{169}

The Select Committee, which held its first meeting in March 2013,\textsuperscript{170} has since then, inter alia, taken decisions on:

- the rules relating to unitary patent protection,\textsuperscript{171} establishing inter alia a Unitary Patent Protection Division;
- the rules relating to the fees for the unified patent protection (such as, inter alia, the size of the renewal fees and rules on compensation for translation costs);\textsuperscript{172} and

\textsuperscript{165}See Unitary Patent, EPO, 2017; An Enhanced European Patent System, Unified Patent Court/The Select Committee and the Preparatory Committee, 2014; Press release, Commission proposes unitary patent protection to boost research and innovation, European Commission, 13 April 2011.

\textsuperscript{166}Regulation 1257/2012, Article 11.

\textsuperscript{167}Regulation 1257/2012, Art 9(1) subpara. a-h.

\textsuperscript{168}Regulation (EU) 1257/2012, Art 9.

\textsuperscript{169}Regulation 1257/2012, Art 9(2) subpara. 3. For the actual composition, see European Patent Office (representatives from the participating Member States, EPO President, the Board of Auditors, EPO Staff Committee; plus observers: European Commission, epi, BusinessEurope and 10 non-participating states (including Croatia and Spain).

\textsuperscript{170}EPO, Select Committee, 2017.

\textsuperscript{171}Decision SC/D 1/15 of the Select Committee of the Administrative Council of 15 December 2015 adopting the rules relating to unitary patent protection.

\textsuperscript{172}Decision SC/D 2/15 of the Select Committee of the Administrative Council of 15 December 2015 adopting the rules relating to fees for unitary patent protection.
the budgetary and financial rules for the Committee.173

Figure 10 – European patent organisation +

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<td>Established by the Select Committee as a special department within the EPO</td>
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</tr>
</tbody>
</table>

Source: European Patent Office, 2018 and author’s own elaboration based on Regulation 1257/2012 and rules adopted by the Select Committee

Finally, the Regulation states that all expenses incurred by the EPO in carrying out the additional tasks given to it by this regulation shall be covered by the fees generated by the European patents with unitary effect.174

Regulation 1260/2012

Regulation 1260/2012 sets out the translation arrangements of the enhanced cooperation in unitary patent protection. The Regulation states that the request for unitary effect shall be submitted, according to Article 14(3) of the EPC, in one of the official languages of the EPO (English, French or German). No additional translations shall be required where the specification of a European patent with unitary effect has been published in one of the official languages of the EPO together with a translation of the claims in the other two official languages of the EPO (in accordance with Article 14(6) of the EPC).175

In the event of a dispute and at the request of the alleged infringer, the patent holder is required to provide a translation of the patent to an official language of the participating Member State where the infringement took place or where the alleged infringer is domiciled. The patent holder is also required to provide a translation of the patent in the language used in the proceedings of that court, if the court in question so requests.176

175 Council Regulation 1260/2012, Article 3.
To support SMEs, natural persons, non-profit organisations, universities and public research organisations, a compensation scheme will be available making it possible to receive reimbursement for the translation costs for patent applications filed at the EPO in one of the official languages of the Union that is not an official language of the EPO (that is, not English, French or German).177

During a transitional period of a minimum of six years and a maximum of twelve years, the proprietor of a European patent requesting unitary effect, if the language of the proceedings is French or German, also needs to provide a translation of the specification of the European patent in English. If the language of the proceedings is English, the proprietor shall instead provide a translation of the specification into any other official language of the Union. These translations are required for information only and will not have any legal effect. After the transitional period, no post-grant translation will be required.178

Regulation 1260/2012 further states that after six years have passed since the entry into force and every two years thereafter, an evaluation of the availability of high quality machine translations of patent applications and specifications into all the official languages of the Union as developed by the EPO shall be carried out by an independent expert committee, and a report on the results shall be presented by the Commission to the Council.179 The aim is to be able to provide translations in all the official languages of the EU in the future.

The Agreement on the Unified Patent Court

The Agreement on the Unified Patent Court is the final part of the patent package and creates a court for the settlement of disputes relating to European patents and European patents with unitary effect,180 open to all EU Member States to join.181

**Court structure**: The UPC consists of a Court of First Instance, a Court of Appeal, and a Registry.182 The Court of First Instance includes a central division, with its seat in Paris (and sections in London and Munich), as well as local and regional divisions.183

The Agreement also creates a Presidium, comprising of the President of the Court of Appeal, the President of the Court of First Instance, two judges of the Court of Appeal, three judges of the Court of First Instance and the Registrar (the latter having no vote). The Presidium is responsible for the management of the UPC.184

Lastly, the Agreement creates three committees: an Administrative Committee, a Budget Committee and an Advisory Committee to ensure the effective implementation and operation of the Agreement,185 as well as a patent and arbitration centre with seats in Ljubljana and Lisbon.186

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179 Ibid.
180 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 84.
181 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 84. Article 5, see also Annex II of the Agreement.
183 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 15 of the Statute.
184 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 11.
185 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 11.
186 *Council Agreement on a Unified Patent Court (2013/C 175/01)*, Article 35.
To facilitate the work of the UPC, the Agreement creates a number of committees:

**Administrative Committee**

Responsible, inter alia, for the appointment of judges of the UPC, determining and reviewing court fees, conducting consultations and making suggestions for possible changes to the Agreement during the transitional period.

**The Advisory Committee**

Consisting of patent judges and practitioners in patent law and patent litigation, assists the Administrative Committee in the appointment of judges and delivers opinions concerning the requirements for qualifications, and makes proposals regarding the training framework for judges.

**Budget Committee**

Inter alia, adopts the budget and approves the annual accounts and the auditors' report.

**Preparatory Committee**

Prepares for the Agreement to enter into force, after which will cease to exist.

The UPC is subject to the same obligations under EU law as any national court in the participating Member States and is thus bound to apply EU law and to respect its primacy. The Agreement also states that the Court shall cooperate with the CJEU to ensure the correct application and uniform interpretation of Union law.

When a case is brought before the UPC, the Court shall base its decision on Union law, including Regulation 1257/2012 on unified patent protection and Regulation 1260/2012 on the translation arrangements; the Agreement; the EPC; other international agreements to patents that are binding for all participating Member States; and national law. Article 32 of the Agreement specifies in which areas the UPC has exclusive competence. These are:

- actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences;
- actions for declarations of non-infringement of patents and supplementary protection certificates;
- actions for provisional and protective measures and injunctions;
- actions for revocation of patents and for declaration of invalidity of supplementary protection certificates;
- counterclaims for revocation of patents and for declaration of invalidity of supplementary protection certificates;
- actions for damages or compensation derived from the provisional protection conferred by a published European patent application;
- actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the invention;
- actions for compensation for licences (see Article 8 of Regulation No 1257/2012); and
- actions concerning decisions of the European Patent Office in carrying out the additional tasks as set out by Article 9 of Regulation No 1257/2012.

The decisions made by the Court cover the participating Member States for which the European patent has effect.

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188 Council Agreement on a Unified Patent Court (2013/C 175/01), Article 24.
189 Council Agreement on a Unified Patent Court (2013/C 175/01), Article 32.
190 Council Agreement on a Unified Patent Court (2013/C 175/01), Article 34.
Finally, the participating Member States' national courts remain competent for all actions relating to patents and supplementary protection certificates that are not covered by the exclusive competence of the UPC mentioned above.191

6.6. Budget

Regulation 1257/2012: Chapter V (Articles 10-13) of Regulation 1257/2012 sets out financial provisions related to the implementation of the regulation.

Article 10 states that ‘the expenses incurred by the [European Patent Organisation] in carrying out the additional tasks given to it [...] by the participating Member States shall be covered by the fees generated by the European patents with unitary effect’. These fees are paid by the patent owner/proprietor to the European Patent Organisation.

Article 13 states that the European Patent Organisation shall retain 50% of the renewal fees while the remaining amount shall be distributed to the participating Member States (according to the distribution criteria set in the same article).

The Unified Patent Court: Financial provisions on the Unified Patent Court are given in Articles 36 to 39 of the Agreement.

The budget of the UPC will be financed by the Court’s own financial revenues (such as court fees, for example) and, if necessary, at least under the transitional period, by contributions from the participating Member States.

Should the UPC be unable to balance its budget based on its own financial revenues and resources, the participating Member States shall provide special financial contributions.192 Article 37 provides details on the financing of the Court, including its local and regional divisions. The article stipulates formula for the calculation of the contributions of the participating Member States (based on the number of European patents having effect in the territory of that state).

6.7. Transitional period – seven years

Once the Agreement has entered into force, a transitional period begins that will last for at least seven years and that can be extended for a maximum of seven years.

During the transitional period, a case relating to, for example, an infringement of a European patent, may still be brought before a national court and any ongoing cases remaining at the end of the transitional period will not be affected. Furthermore, during the transitional period, unless an action has already been brought before the Court, the possibility to opt-out from the exclusive competence of the UPC exists. Withdrawal of an opt-out at any moment is also possible, unless a specific action has already been brought before a national court.193

During the transitional period, the Administrative Committee has two significant responsibilities in terms of the evaluation of the UPC. After five years, the Administrative Committee shall consult with the users of the patent system and carry out a survey to determine how many cases regarding European patents and supplementary protection certificates are still brought before national courts instead of the UPC and the reasons for this. The Administrative Committee may thereafter, based on

191 Ibid.

192 Council Agreement on a Unified Patent Court (2013/C 175/01). Article 36 states that ‘If the Court is unable to balance its budget out of its own resources, the Contracting Member States shall remit to it special financial contributions.’

193 Council Agreement on a Unified Patent Court (2013/C 175/01), Article 83.
the results of the consultation and the UPC’s opinion, choose to prolong the transitional period by a maximum of seven years.194

The Administrative Committee shall also be required to carry out a consultation regarding the functioning, efficiency and cost-effectiveness of the UPC, as well as the level of trust and confidence in the patent system and the quality of the Court's decisions. This consultation shall take place seven years after the Agreement has entered into force, or when 2 000 infringement cases have been decided by the UPC (whichever is earliest).

Based on the results regarding the consultation, the Committee may decide to amend the Agreement to ensure its compatibility with an international treaty relating to patents or EU law. If a participating Member State declares that it does not wish to be bound by the decision made by the Administrative Committee, a Review Conference of the participating Member States will be held regarding the Committee's amendment to the Agreement.195

6.8. Jurisprudence

Parts of the 'patent package' led to several CJEU cases:

- cases that relate to the Council Decisions that authorise EnC: Joined cases C-274/11 Spain v Council196, and C-295/11 Italy v Council197, and
- cases that relate to the actual legislation on EnC: C-146/13 Spain v European Parliament and Council198 (concerns Regulation 1257/2012), and C-147/13 Spain v Council199 (concerns Council Regulation 1260/2012).

C-274/11 and C-295/11

In (joined) cases C-274/11 (Spain v Council) and C-295/11 (Italy v Council), Spain and Italy asked for the annulment of Council Decision 2011/167 authorising EnC on unitary patent protection.

They argued inter alia that the Council had circumvented the unanimity requirement and not taken the objections to the proposal brought up in the Council into consideration. They noted the short period of time: 'not even six months [have elapsed] between the [original] proposal [...] and the proposal for enhanced cooperation'. They further noted that the 'possibilities of negotiations among all the Member States on the language arrangements had by no means been exhausted'. They claimed that the enhanced procedure was used in order to 'keep certain Member States out of difficult negotiations and to circumvent the requirement for unanimity'.

Spain and Italy also claimed that the patent cooperation falls within exclusive EU competence and that the Council thus has no competence to authorise the enhanced cooperation in question (given that EnC is possible only within the framework of the Union’s non-exclusive competences).

The Court dismissed the actions,200 arguing inter alia that the Council had taken all the necessary steps in the legislative process. The Court gave the Council discretion to decide on the point of last resort stating that '[t]he Council [...] is best placed to determine whether the Member States have

194 Ibid.
195 Council Agreement on a Unified Patent Court (2013/C 175/01), Article 87.
196 Case C-274/11, Spain v Council.
197 Case C-295/11 Italy v Council.
198 Case C-146/13 Spain v European Parliament and Council.
199 Case C-147/13 Spain v Council.
200 Court of Justice of the European Union, Press release No 47/13, Luxembourg, 16 April 2013.
demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future.  

Whether the patent cooperation falls within shared or exclusive EU competence, the Court concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences.

C-146/13 and C-147/13

Although the patent package has not as yet entered into force, two other cases (C-146/13 and C-147/13), concerning regulations 1257/2012 and 1260/2012 (on unitary patent protection, and related translation arrangements), have already been brought in front of the Court. In 2015, the Court gave its judgments in these two cases.

In Case C-146/13 Spain requested the annulment of Regulation 1257/2012. Spain questioned the legality of the administrative process preceding the grant of a European patent under EU law and argued that the procedure is not subject to judicial review to ensure the correct and uniform application of EU law and the protection of fundamental rights. The CJEU found that the Regulation does not intend to delimit the conditions for the granting of European patents, which are governed under the EPC, and that it does not incorporate this procedure into EU law.

Spain also argued that paragraph 1 of Article 118 TFEU regarding the uniform protection of intellectual property is not an adequate legal basis for the Regulation. However, the CJEU responded that the unitary patent protection does provide uniform protection of intellectual property in the participating Member States. Furthermore, Spain questioned the situation that participating Member States, in the Select Committee, would set the level of renewal fees and determine the distribution of those fees. The CJEU stated that, according to the TFEU, it is the responsibility of the Member States to adopt measures of national law necessary to implement legally binding Union acts, and that it, in the case of Regulation 1257/2012, falls on the participating Member States to do so (since the EU is not a party to the EPC).

In Case C-147/13, Spain requested the annulment of Regulation 1260/2012, arguing that the Regulation on the applicable translation arrangements discriminates on the basis of language and that an economic motivation is not enough by itself to validate any exception to the principle of the equal status of the EU’s official languages. The CJEU found that the Regulation does differentiate between the official languages of the EU, but argued that the Regulation has a legitimate objective (to facilitate patent protection, in particular for SMEs). Overall, the Regulation simplifies the patent system, lowers costs related to patent protection and increases legal security, while also balancing the interests of the applicants. The CJEU concluded that the legal basis for the Regulation is covered under paragraph 2 of Article 118 TFEU, since the Regulation establishes the language arrangements for a European intellectual property right defined by reference to the EPC.

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201 Case C-274/11, Judgment of the Court, 16 April 2013, point 53.
202 Case C-146/13 Spain v European Parliament and Council.
203 Case C-147/13 Spain v Council.
204 Judgment of the Court in Case C-146/13, Action for annulment under Article 263 TFEU, brought on 22 March 2013, Spain v European Parliament and the Council; Judgment of the Court in Case C-147/13, Action for annulment under Article 263 TFEU, brought on 22 March 2013, Spain v the Council of the European Union.
205 Judgment of the Court in Case C-146/13, Action for annulment under Article 263 TFEU, brought on 22 March 2013, Spain v European Parliament and the Council.
206 Ibid.
207 Ibid.
208 Judgment of the Court in Case C-147/13, Action for annulment under Article 263 TFEU, brought on 22 March 2013, Spain v the Council of the European Union.
Finally, it should also be noted that in 2011, the CJEU delivered an Opinion on the draft agreement on the creation of a ‘European and Community Patent Court’ and its compatibility with the Treaties. The Council had requested this Opinion from the CJEU in July 2009, and the Opinion found that the draft agreement establishing the Patent Court would be incompatible with the EU Treaties. The Opinion stated that the agreement would deprive national courts of the possibility to refer a question of EU law to the CJEU for a preliminary ruling under Article 267 TFEU. The Opinion also concluded that under the draft agreement, infringement proceedings by the Commission, regarding a breach of EU law by the Patent Court’s decision, would not be possible.209

The Commission welcomed the CJEU opinion, but declared that it should not have any impact on the decision regarding authorising enhanced cooperation, since the Commission determined that the unitary patent protection is legally distinct from the creation of the Patent Court.210 Thus, a few days after the Court’s opinion, the Council chose to adopt Decision 2011/167/EU authorising enhanced cooperation.211

6.9. Looking ahead

To oversee the work of establishing the UPC, a Preparatory Committee composed of all the signatory states to the Unified Patent Court Agreement, was set up. The Preparatory Committee has identified five major work streams to be completed, relating to the legal framework; financial aspects; information technology; facilities; and human resources and training.212 The latest draft for the Rules of Procedure was updated at the Preparatory Committee meeting on 15 March 2017. Before the Rules of Procedure can be formally adopted, the draft shall be inspected by the Commission regarding its compatibility with Union law once the period of provisional application of the Agreement has begun.213

The Preparatory Committee also noted that more work needs to be done before the Agreement (and therefore also the two Regulations) can enter into force, with one major obstacle being the current complaint brought before the German Constitutional Court (Bundesverfassungsgericht) against the ratification of the Agreement in Germany. As already noted, the Regulations and the Agreement cannot enter into force until Germany has ratified the Agreement on the Unified Patent Court.214 The complaint reportedly argues that the UPC is not compatible with the Basic Law for the Federal Republic of Germany. There are currently also four other constitutional complaints pending which argue that there are infringements of the Basic Law due to inadequate legal protection of the EPO against decisions by its Boards of Appeal. All five cases are on the Constitutional Court’s preview for 2018.215

Finally, in view of the withdrawal of the United Kingdom from the EU, it should be noted that the EnC on the unified patent court is the only EnC case in which the UK participates. At the March 2017 hearing on the state of play of unitary patent protection in the European Parliament’s Legal Affairs

209 Opinion 1/09 of the CJEU, 8 March 2011.
210 Press release, Patent Court: the Commission welcomes the delivery of the Court of Justice’s opinion, European Commission, 8 March 2011.
211 Council Decision (2011/167/EU) of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.
215 Bundesverfassungsgericht, Preview for 2018 (in German), 2018.
Committee, the question was also raised regarding the possible effects of the UK’s exit from the EU on the unified patent system, considering that one of the UPC’s Court of First Instance’s central division shall have its seat in London.216 On 12 July 2018, the UK Department for Exiting the European Union published a white paper setting out the government’s proposals for the future relationship between the UK and the EU. The white paper expressed the government’s desire to continue European cooperation regarding patent protection and its intention to explore the options to stay in the UPC and the unitary patent system after the UK leaves the EU. It further stated that the UK would work with the participating States to ensure that the UPC Agreement would be able to continue on a firm legal basis.217

Finally, in April 2018, the UK ratified the Agreement on a Unified Patent Court.218

7. Financial transaction tax (FTT)

7.1. General overview

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<th>Notification by a group of Member States on their desire to establish enhanced cooperation:</th>
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<td>Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain. Estonia later withdrew from the enhanced cooperation, making a total of 10 participating Member States</td>
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7.2. Background

In the aftermath of the 2008 economic and financial crisis, the political and economic debate in many countries focused on how to stabilise the economy with the help of policy responses in areas such as financial regulation and macroeconomic policies. One aspect of this debate analysed the role of tax policy in the build-up of the crisis and how tax policy might be used to decrease the risk of future crises. On the EU level, financial transaction taxes, bank levies, and financial activity taxes, and whether these might be used to prevent future crises as well as create tax revenue, have been the main focus.\(^{219}\)

In October 2010, the Commission published a communication and a staff working document on taxation of the financial sector which discussed the possible benefits of a financial transaction tax (FTT) and a financial activities tax (FAT).\(^{220}\) In February 2011, the Commission launched a consultation regarding taxation of the financial sector,\(^{221}\) followed by publication of an impact assessment\(^{222}\) as well as a legislative proposal for an FTT (which was the preferred option out of the two) in September 2011.\(^{223}\)

Following discussions on the proposal, it was concluded at the June 2012 Council meeting that it would soon be difficult to achieve a unanimous agreement on the FTT file.\(^{224}\) Instead, 11 Member States\(^{225}\) addressed requests to the Commission expressing their wish to continue under enhanced cooperation.

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<td>(^{221}) Consultation paper, European Commission, 22 February 2011.</td>
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<td>(^{224}) Press release, 3178th Council meeting, Luxembourg, 22 June 2012.</td>
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<tr>
<td>(^{225}) Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.</td>
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cooperation, and on 22 January 2013, the Council adopted Decision 2013/52/EU authorising enhanced cooperation.\textsuperscript{226}

Once Decision 2013/52/EU was adopted, the Commission presented an updated proposal on the FTT, as well as a new impact assessment, on 14 February 2013.\textsuperscript{227} At that time, 11 EU Member States already had some form of FTT in place, including Belgium, France, Greece and Italy.\textsuperscript{228}

In December 2015, 10 Member States\textsuperscript{229} issued a statement regarding some of the features of the FTT on which they had managed to reach an agreement, regarding the taxation of shares and derivatives for example, while highlighting that further analysis was needed regarding the real economy (that produces goods and services) and pension schemes. Estonia no longer wished to participate in the enhanced cooperation, leaving a total of 10 participating Member States.\textsuperscript{230}

However, even though some progress has been made, no agreement has yet been reached, and a regulation on enhanced cooperation on a financial transaction tax has therefore still to be adopted.

7.3. Scope of the proposed financial transaction tax

The aim of introducing a financial transaction tax is to strengthen the single market by harmonising national approaches to financial transaction taxation. The Commission argues that this would ensure that the financial sector makes a fair and substantial contribution to public revenues, and that introducing a FTT would introduce another incentive for the financial sector to engage in more responsible activities.\textsuperscript{231} This is linked to the position that the financial sector played a major role in causing the economic crisis, while governments and citizens bore most of the costs.\textsuperscript{232}

The 2013 proposal for the FTT under enhanced cooperation mirrors the original proposal of 2011 to a large degree. One of the main differences compared to the original proposal is the changes in FTT jurisdiction; instead of covering all Member States, the enhanced cooperation would only be binding for participating Member States. Furthermore, the original 2011 proposal would have amended Council Directive 2008/7/EC regarding indirect taxes of the raising of capital, but under the 2013 proposal, the Directive would remain unaffected. The 2013 proposal also introduces stronger provisions regarding counteracting tax avoidance.\textsuperscript{233}

The proposed scope of the FTT is wide, allowing it to cover transactions relating to all types of financial instruments. The tax focuses on financial transactions carried out by financial institutions (such as, for example, investment firms, credit institutions, pension funds, and any other

\textsuperscript{226} Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax.


\textsuperscript{229} Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.

\textsuperscript{230} Press release, 3435th Council meeting, Brussels, 8 December 2015.

\textsuperscript{231} Press release, Financial Transaction Tax under Enhanced Cooperation: Commission sets out the details, European Commission, 14 February 2013.


\textsuperscript{233} Ibid.
undertaking carrying out one or more of those kinds of activities) as a party to a financial transaction (on their own account or for other persons) or acting in the name of a party to the transaction.\(^{234}\)

The proposed FTT would not include primary markets, and it would not affect most day-to-day financial activities (such as the conclusion of insurance contracts, mortgage lending, consumer credits, enterprise loans, payment services, etc.) for citizens and businesses. Currency transactions on spot markets also fall outside the scope of the proposed tax, while derivatives contracts that are based on currency transactions would still be covered. Furthermore, the proposed FTT does not apply to Central Counter Parties, Central Securities Depositories, International Central Securities Depositories and Member States and public bodies entrusted with the function of managing the public debt, when they are exercising that function.\(^ {235}\)

Article 3 of the proposal sets out that the FTT would apply to all financial transactions, as long as at least one of the parties is established in the territory of a participating Member State and that a financial institution, established in a participating Member State, is party to the transaction (either on its own account or for the account of another person or acting in the name of a party to the transaction).\(^ {236}\) If the tax has not been paid within the set time limit, each party to a transaction, even though they are not a financial institution, shall be jointly liable for the payment of the FTT.\(^ {237}\)

The participating Member States should not maintain or introduce any other taxes on financial transaction or any value-added tax (as provided for in Council Directive 2006/112/EC).\(^ {238}\) Member States must, according to Article 11, contribute to ensuring that the FTT is paid to the tax authorities by, for example, laying down registration, accounting and reporting obligations. The proposal also states that the Commission may adopt delegated acts specifying related measures to be taken by the participating Member States.

Furthermore, the proposal sets out that the participating Member States would need to adopt measures to ensure that every person liable for payment of FTT submits all the information needed to calculate the FTT to the tax authorities. They would also need to ensure that financial institutions keep all relevant data regarding their financial transactions for at least five years, so that this information is available to the tax authorities if needed.\(^ {240}\)

The proposal further states that the participating Member States shall adopt measures aimed at preventing tax fraud and tax evasion, and it includes a general anti-abuse rule. The anti-abuse rule specifies that an artificial arrangement (i.e. an arrangement that lacks commercial substance) which has been put in place with the purpose of avoiding taxation shall be ignored. Under the proposal, the participating Member States should treat such an arrangement for tax purposes by reference to its economic substance. To determine whether an arrangement has resulted in a tax benefit, the proposal states that the Member State should compare the amount of tax due by a taxpayer (with regard to the arrangement) with the amount the taxpayer would have been liable to pay in the absence of such an arrangement.\(^ {241}\)

\(^{234}\) Ibid.

\(^{235}\) Ibid.

\(^{236}\) Proposal COM(2013) 71 final, Article 3.

\(^{237}\) Proposal COM(2013) 71 final, Article 10.

\(^{238}\) Proposal COM(2013) 71 final, Article 15.

\(^{239}\) Proposal COM(2013) 71 final, Article 11.

\(^{240}\) Ibid.

As regards the possible tax revenues of the FTT, the proposal estimate that the annual revenues of the FTT would be around €30 to 35 billion, or 0.4 to 0.5% of the GDP of the participating Member States.\(^{242}\)

The proposal states that a committee, referring to Regulation 182/2011, should be set up to assist the Commission.\(^{243}\)

Lastly, the proposal includes a review clause, which sets out that the Commission shall present a report to the Council every five years, in which it examines the effects of the FTT on the functioning of the internal market, the financial markets and the real economy, taking into account any progress on taxation of the financial sector internationally.\(^{244}\)

However, as negotiations are still ongoing, the exact scope of the FTT, as well as the time frame for implementation, remain unclear.

### 7.4. Jurisprudence

In 2013, the UK asked for the annulment of Council Decision 2013/52/EU authorising enhanced cooperation in FTT. In this case (C-209/13\(^{245}\)), The UK argued that the above Decision authorises the adoption of an FTT which would produce extraterritorial effects as well as impose costs for non-participating Member States.

The Court dismissed the action\(^{246}\) in 2014, stating that, since the UK asked for the annulment of a decision authorising enhanced cooperation, the Court could only review whether the granting of the enhanced cooperation was valid or not. Therefore, the Court found that the Decision only authorises the establishment of enhanced cooperation, and not any substantive element of the FTT itself. The Decision also does not include any provision on the issue of expenditure linked to the implementation of enhanced cooperation. The Court therefore concluded that the UK’s arguments were directed at elements of a potential FTT, and not at the Decision authorising enhanced cooperation.

### 7.5. Looking ahead

As noted above, the enhanced cooperation on financial transaction tax has not yet been agreed, nor adopted at the time of writing this paper.

Procedurally, the enhanced cooperation entails the adoption of two acts: the first is a decision authorising EnC; while the second is the substantive legislative act that is binding on participating Member States only.

While the Council Decision authorising enhanced cooperation in the area of FTT was adopted in 2013, the negotiations on the possible future Council Directive are still ongoing.\(^{247}\)


\(^{244}\) Proposal COM(2013) 71 final, Article 19.

\(^{245}\) Case C-209/13, United Kingdom v Council.

\(^{246}\) Judgment of the Court in Case C-209/13, action for annulment in respect of infringement of Articles 327 TFEU and 332 TFEU and of customary international law, action brought on 18 April 2013, United Kingdom v Council.

\(^{247}\) The progress of the negotiations can be followed in EUR-Lex and in the European Parliament’s Legislative Observatory.
8. Joint Undertaking - Supercomputing

8.1. General overview

**Legislative act:** at the time of writing, the text of the Council regulation has not as yet been published in the Official Journal of the European Union, although the procedure is completed.

**Notification by a group of Member States** on their desire to establish enhanced cooperation was expressed in the [EuroHPC declaration](https://www.eurohpc.eu) signed on 23 March 2017.

**European Commission original proposal:** proposal of 11 January 2018 on establishing the European High Performance Computing Joint Undertaking (EuroHPC JU).

**Council:** endorsed the proposal on 25 June 2018.

**European Parliament:** adopted the text with amendments on 3 July 2018.

**Procedural file:** EUR-Lex, Legislative Observatory

**21 Member States** committed to join in July 2018

**Entry into force:** on the twentieth day following that of publication in the Official Journal of the EU

**Set-up and start of operations:** planned for 2019

**Proposed time framework of the EuroHPC JU:** until 31 December 2026

**Proposed budget:** around €1 billion from the EU and participating countries. Contribution is also expected from private members.

**Provisional administrative arrangements:** 'The Commission shall be responsible for the establishment and initial operation of the Joint Undertaking until it has the operational capacity to implement its own budget (...).'

8.2. Background

High performance computers (HPC), or supercomputers, are systems which process large amounts of data and carry out complex computations. The supercomputers now available in Europe do not satisfy current demands, obliging the EU to use foreign, competitor systems. The EU does not invest sufficiently in supercomputing, with the result that, in June 2017, not a single EU HPC appeared among the top 10 HPC in the world.251

The Joint Undertaking (JU) is a public-private partnership (PPP), aiming 'to implement research and innovation activities to enhance competitiveness and to tackle the grand societal challenges with the active engagement of Europe's industry'.253

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248 Article 27 of the proposal.
249 Article 1.1 of the proposal (for a Council Regulation).
250 Article 26.1 of the proposal.
251 In June 2017, there were 5 HPC from EU Member States in the top 20 world ranking: 11th place was occupied by the HPC in the United Kingdom, 13th in Spain, 14th in Italy, 17th in Germany and 19th in France. A year later, in June 2018, there were four HPC from the EU among the world top 20, 13th and 18th in Italy, 14th in France and 20th in the United Kingdom.
252 Joint undertakings, Glossary, Eur-Lex.
253 Commission staff working document, Executive summary of the interim evaluation of the joint undertakings operating under Horizon 2020, SWD(2017) 339 final. See also section 8.8 on the lessons learned from existing JUs.
The main objective of the EuroHPC JU is to procure and deploy a world-class pre-exascale high performance computing and data infrastructure in Europe, based on competitive European technology. This will be achieved by the joint efforts of the EU, participating countries (Member States and countries associated with the H2020 programme, who signed the EuroHPC declaration) and private sector representatives.

The EuroHPC JU should support the development of exascale performance systems by 2022-2023, and procure two HPC systems with pre-exascale performance by 2019-2020. It is expected that by 2022-2023, the European HPC infrastructure will be ranked among the world’s top three.

The new European HPC should help to address scientific, industrial and societal challenges. Among other things, it should help in forecasting climate developments, preventing and managing large-scale natural disasters, observing space, fostering research on the functioning of the human brain or on new forms of medicine (more personalised and precise). The EuroHPC is also important for security (including cybersecurity) and defence.

Access to the supercomputers will be primarily for research and innovation purposes falling under public funding programmes and will be open to users from the public and private sectors. The European Investment Bank study underlines that 'European supercomputing infrastructure represents a strategic resource for the future of EU industry, SMEs and the creation of new jobs'.

The proposal to establish the European High Performance Computing Joint Undertaking was published by the European Commission on 11 January 2018, under Article 187 of the TFEU. The European Economic and Social Committee expressed its opinion on the proposal in May 2018. The Industry, Research and Energy (ITRE) Committee of the European Parliament adopted its report on 19 June 2018. The Council endorsed the proposal on 25 June 2018. The proposal was adopted (with amendments) by the European Parliament on 3 July 2018. At the time of writing, the procedure is completed and the final text is expected to be published in the Official Journal shortly.

The proposal forms part of, inter alia, the digital single market strategy for Europe adopted by the Commission in 2015, and was announced in the mid-term review of the strategy in 2017.

8.3. Legal basis

The legal basis for Joint Undertakings is provided in Articles 187 and 188 TFEU.

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254 **Exascale** performance allows $10^{18}$ or 1 billion billion or 1 trillion calculations (floating point operations or 1 Exaflop) per second. The exascale computers are 1 000 times faster than today’s computers. **Pre-exascale** performance is close to exascale – $10^{17}$ (or more than 100 Petaflops and less than 1 Exaflop). **Petascale** performance allows $10^{15}$ calculations per second (or 1 Petaflop), based on Article 2 of the proposal and other data of the European Commission.


256 Article 9.1 of the proposal.


258 European Commission, Proposal for a Council Regulation on establishing the European High Performance Computing Joint Undertaking, COM(2018)8, 11 January 2018. Article 187 TFEU states that ‘The Union may set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes’.

259 European Economic and Social Committee, Opinion TEN/659, 24 May 2018.


Article 187 states that the Union may set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes. Article 188 states that the Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions referred to in Article 187.

8.4. Internal organisation, internal rules and decision making

Public members
These are the EU, represented by the Commission, and participating countries that signed the EuroHPC declaration262 in support of the next generation computing and data infrastructures. The declaration was signed on 23 March 2017 by 7 Member States: France, Germany, Italy, Luxembourg, the Netherlands, Portugal and Spain. This was followed by additional signatures, bringing the number of participating EU Member States to 21.263

Other members
Two contractual public-private partnerships, the European Technology Platform for High Performance Computing (ETP4HPC) Association registered under Dutch law with its office in Amsterdam (The Netherlands), the Big Data Value Association (BDVA) registered under Belgian law with its office in Brussels (Belgium).264 The participation of representatives from the supercomputing and big data stakeholders, including academia and industry, is expected.

Ownership
The Joint Undertaking will be the owner of the pre-exascale supercomputers and associated infrastructure. Four years after the successful acceptance test by the JU, is the earliest the ownership of the pre-exascale supercomputers can be transferred to the hosting entity.265

Seat and locations
The seat of the EuroHPC JU will be in Luxembourg.266 The (petascale or)267 pre-exascale supercomputers will be located in the hosting entities in the participating EU Member States (no more than pre-exascale supercomputer per country) upon signing the hosting agreement.268

8.4.1. Governance:

Governing Board
The Governing Board will be mainly responsible for strategic orientation and operations of the JU as well as for the coordination between the JU and the funding programmes. The Board will be composed of the representatives of the Commission and the participating countries (each delegating one representative). The EU will hold 50 % of voting rights. The voting power of each participating country representative will depend on the task. The Board will select a chair269 for a

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262 EuroHPC Declaration, 23 March 2017.
263 Belgium, Slovenia, Bulgaria, Greece, Croatia, Czech Republic, Cyprus, Poland, Lithuania, Austria, Finland, Sweden, Estonia, and Latvia. Switzerland is also participating.
264 Upon acceptance of the statutes of the EuroHPC JU by means of a letter of endorsement, Article 2.1. lit. c), Statutes of the EuroHPC JU, Annex I to the proposal.
265 Article 8 of the proposal.
266 Article 1.5 of the proposal.
267 The European Parliament added 'petascale computers' to Article 6.2 of the proposal.
268 Articles 4 and 6-7 of the proposal.
269 The European Parliament added that the chair would be elected from among the members of the Board.
period of two years, with possibility of one extension. The Board will also hold ordinary meetings at least twice a year and will take decision by consensus or by majority of at least 75 % of all votes.270

Executive Director
The Executive Director will be responsible, inter alia, for the day-to-day management of the JU in accordance with the Board decisions, will be legally responsible for the JU, and will implement the budget of the JU. The Executive Director will set up (and supervise) a Programme Office for the execution of all tasks.271

Industrial and Scientific Advisory Board
The Industrial and Scientific Advisory Board will be composed of a Research and Innovation Advisory Group and an Infrastructure Advisory Group. The first will consist of no more than twelve members (no more than six appointed by the private members and no more than six appointed by the Governing Board). The second will consist of up to twelve members, appointed by the Governing Body.272

8.5. Budget and staff

Budget
The Commission proposed a budget of almost €1 billion, with 50 % coming from the EU and 50 % from participating states: up to €486 million of the EU contribution, comes from the Horizon 2020 (€368 million, including €10 for administrative costs) and Connecting Europe Facility (€100 million) programmes;273 and at least €486 million (including €10 for administrative costs) of the participating states’ contribution.274 Additional contributions, of at least €422 million (including €2 million for administrative costs), is expected to come from private entities,275 as part of their current commitment to the contractual public-private-partnerships ETP4HPC and BDVA, for the remaining duration of H2020.

Staff
The staff of the JU will fall under Regulation 259/68 (‘Staff Regulation’ and ‘Condition of Employment’). The staff of the JU will consist of temporary staff and contract staff. All costs of the staff will be borne to the JU. The JU can make use of secondary national experts and trainees. Protocol No 7 on the privileges and immunities of the EU applies to the JU staff. The privileges and immunities can be also granted by the country of the seat.276

8.6. Provisional arrangements

Article 26(1) of the proposal stipulates that the Commission shall be responsible for the establishment and initial operation of the Joint Undertaking until it has the operational capacity to implement its own budget. The Commission shall carry out, in accordance with Union law, all necessary actions in collaboration with the other members and with the involvement of the competent bodies of the Joint Undertaking.

270 Articles 4-7 of the statutes of the EuroHPC JU, Annex I to the proposal.
271 Articles 4 and 9 of the statutes of the EuroHPC JU, Annex I to the proposal.
272 Articles 4 and 10-14 of the statutes of the EuroHPC JU, Annex I to the proposal.
273 Article 4.1 of the proposal.
274 Article 5.1 of the proposal.
275 Article 5.2 of the proposal.
276 Articles 13-15 and article 25 of the proposal.
8.7. Jurisdiction of the CJEU

The Court of Justice of the European Union will have jurisdiction in the JU, concerning, inter alia, arbitration clauses contained in agreements or contracts, in disputes relating to compensation for damage caused by the staff of the JU and in disputes between the JU and its staff (with the limits and under the conditions laid down in the Staff Regulations and the Conditions of Employment). Moreover, the CJEU will have jurisdiction in the hosting agreements concerning the hosting of the pre-exascale supercomputers in selected Member States. Regarding any matter not covered by the Regulation or by other EU legal acts, the law of Luxembourg (where the seat of the JU will be located) will apply.

8.8. Lessons learned from the operating JUs

European Commission

The Commission’s interim evaluation of the seven JUs details the performance of all seven JUs, with the conclusion that ‘while it is still early for most of them to demonstrate tangible project outputs, [they] have demonstrated efficiency improvements in comparison to FP7’.

The Commission also pointed out that the JUs ‘managed to engage the major actors in research and innovation in the respective industrial sectors and have shown their potential as important drivers for strengthening Europe’s competitiveness and helping to respond to major socio-economic challenges’. The Commission underlined that the JUs achieved more than 90% stakeholder satisfaction for their services and that ‘the private funding leveraged by the JUs is shown to be well on track against the targets defined in the respective legal frameworks’.

Among the challenges for the JUs, the Commission underlined the uneven participation rates among EU-13 Member States and SMEs, as well as the need for better interaction between the governing board and advisory groups. The choices of the key performance indicators used to measure JU-specific impact was also criticised.

According to the Commission’s data, for the duration of the H2020 programme, the JUs will manage around 10% of the global programme budget and, through the leverage effect, will mobilise additional resources from the private side of each JU.

The European Court of Auditors (ECA)

The ECA’s 2016 audit of eight JUs showed that their accounts were reliable. The Member of the ECA responsible for the audit of the JUs said that ‘as auditors, we are pleased to see that, overall, their accounts are clean and that the only qualification on their transactions refers to an issue which
is being phased out’. In the same time, the ECA ‘drew attention to issues related to budgetary implementation and management, internal control systems and procurement procedures, which do not affect their opinions’.285

According to the ECA’s data, the total budget of the JUs in 2016 was €1.8 billion (€1.4 billion in 2015) or 1.3% (1% in 2015) of the EU general budget and ‘the total in-kind and cash contributions from industry and research partners were expected to be of a similar amount’. The JUs employed 633 staff members at the end of 2016 (562 in 2015).286

8.9. Looking ahead

Evaluation clause

Before 30 June 2022, the Commission should carry out the interim evaluation of the JU, with the assistance of the independent experts, and send it to the European Parliament and the Council by 21 December 2022. The final evaluation should be conducted by the Commission within six months after winding-up of the JU, but not later than two years after triggering the winding-up procedure.287

285 The EU’s research Joint Undertakings: “Clean accounts, and transactions mostly compliant with the rules”, say Auditors, Press Release, the European Court of Auditors, 13 November 2017.
286 Summary of results from the ECA’s 2016 annual audit of the European research Joint Undertakings, op.cit.
287 Article 17 of the proposal.
9. Main references

on enhanced cooperation in general


on European Public Prosecutor's Office


on permanent structured cooperation


on divorce Law


on property regime rules

- institutional sources

on a European unitary patent


on the financial transaction tax (FTT)

- institutional sources

on supercomputing/joint undertakings

Enhanced cooperation is a procedure whereby a minimum of nine Member States agree to establish closer cooperation in a specific area, in cases where an agreement at Union level is not possible, mainly due to a lack of unanimity in the Council. Provisions for enhanced cooperation were introduced the Treaty of Amsterdam and streamlined in the Treaty of Lisbon. However, these provisions are rarely used.

This study examines the existing (and planned) instances of enhanced cooperation, their institutional set up and state of play. The cases examined pertain to: the European Public Prosecutor's Office, divorce law, property regime rules, European Unitary Patent and (planned) financial transaction tax. The study also examines the similar mechanism of the EU Permanent Structured Cooperation on security and defence. Finally, for the sake of comparison, one case of a joint undertaking is also examined.