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# **REPORT**

on the implementation of the Treaty provisions concerning enhanced  
cooperation  
(2018/2112(INI))

Committee on Constitutional Affairs

Rapporteur: Alain Lamassoure

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## EXPLANATORY STATEMENT - SUMMARY OF FACTS AND FINDINGS

### Procedure and sources

In preparation of this implementation report, the Rapporteur has collected information and has relied on the following sources, among others:

- a hearing on the ‘Institutional structure and governance of existing forms of enhanced cooperation’, held in the Committee on Constitutional Affairs on 24 September 2018;
- Study on ‘The Implementation of Enhanced Cooperation in the EU’, commissioned by Policy Department for Citizens' Rights and Constitutional Affairs, presented in the Committee on Constitutional Affairs on 10 October 2018;
- an Ex-Post Impact Assessment by the European Parliament Research Service (EPRS) entitled ‘The implementation of the Treaty provisions concerning enhanced cooperation’;
- an In-depth analysis on intergovernmental cooperation in federal states, prepared by Policy Department EXPO;
- a fact-finding mission to Washington D.C., USA;
- a fact-finding mission to Bern, Switzerland.

### Main findings of the research

#### Internal dimension

##### Treaty provisions on enhanced cooperation:

According to the Treaties, enhanced cooperation can be initiated by at least nine Member States under the framework of European policies, except for the areas of exclusive EU competences. It enables participating States to organise greater cooperation than that initially provided for by the Treaties under the policy concerned. Enhanced cooperation is carried out under the auspices of the European Union, through the European institutions and procedures (Article 20 TEU and Article 326 TFEU).

Enhanced cooperation is open to all Member States when it is established. It should remain open to them at any time, provided the Member State that wishes to join complies with the decisions taken within that framework (Article 20 TEU and Articles 327, 328 and 331 TFEU).

The procedure for engagement in enhanced cooperation is depicted in Article 329 TFEU and requires the agreement of the Council by QMV (all Member States, even those not participating in enhanced cooperation), on a proposal by the Commission and after having obtained the consent of the Parliament.

The acts adopted within the framework of enhanced cooperation are not part of the Union acquis. They are applied by the participating Member States only (Article 20 TEU) and cannot be imposed on the non-participating Member States.

The Council and the Commission ensure the consistency of activities undertaken within the framework of enhanced cooperation with the other policies and activities of the Union (Article 334 TFEU).

The Treaty of Lisbon enables *passerelle clauses* to be applied to enhanced cooperation, except in the case of decisions on defence matters or decisions having military implications. The *passerelle clauses* enable switching from voting by unanimity to voting by qualified majority or from the special legislative procedure to the ordinary legislative procedure (Article 333 TFEU).

The Treaty provides specific procedures applicable for enhanced cooperation in CFSP (Articles 22 and 31 TEU), for permanent structured cooperation in the field of defence (Article 42.6 and 46 TEU), for cooperation under the framework of a European mission on defence matters and cooperation within the framework of the European Defence Agency (Article 44 and 45 TEU) and for cooperation in criminal and police matters (Articles 82, 86, 87 TFEU).

Article 332 TFEU deals with the financial aspects of enhanced cooperation and stipulates that costs related to 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 decide otherwise.

According to Article 330 TFEU all Member States may participate in the deliberations but only those participating in the enhanced cooperation can cast a vote.

#### Examples of enhanced cooperation:

Special Treaty provisions for particular Member State or a group of Member had a place in the EU legal framework as early as the Treaty of Rome, which contained special provisions that would not impede the existence of regional unions between the Benelux countries. This trend was maintained with the accession of Sweden, Finland and Denmark, who continued their membership in the Nordic Council.

Enhanced cooperation, in a form similar to the current one, has been available to the Union since the Amsterdam Treaty entered into force in 1999, but was significantly streamlined and rendered more efficient by the Treaty of Lisbon, thereby making it the 'default procedure' for differentiated integration.

So far, only four cases of enhanced cooperation have been adopted: the European Public Prosecutor's Office, Divorce Law, Property Regime Rules, the European Unitary Patent. Of these four cases, only one has started with implementation (Divorce law).

A special case of enhanced cooperation, Permanent Structured Cooperation (PESCO), was agreed and implemented in 2017.

Finally yet importantly, enhanced cooperation on the Financial Transaction Tax is still pending, even though the file has received Council's authorisation for a group of Member States to go ahead with its implementation.

Additionally, it is worthwhile mentioning the other existing forms of differentiated integration in the Union: the Schengen Agreement (UK, Ireland and Denmark have an opt-out, a few other Member States are awaiting to join), the single currency (UK and Denmark have opt outs, Sweden has until now opted-out, while a few other Member States are still expecting to join the Euro once they meet the necessary criteria), opt-outs from the Area of freedom, security and justice (UK, Ireland, Denmark) and CSDP (Denmark's constructive abstention).

### Key findings of the research on the implementation of the existing cases of enhanced cooperation

- the existing cases of enhanced cooperation are very divergent - there is a great variety in the number of participating Member States, in the regulatory technique used, in the type of secretariat or other administrative body chosen for the operational stage, as well as in the financing and staffing provisions;
- all existing case of enhanced cooperation have arisen following the impossibility to obtain unanimity in the Council;
- except for the case of PESCO, enhanced cooperation is used as a ‘last resort’ measure, resulting from a failed attempt in the Council to find an agreement on a draft legislative proposal by the Commission;
- even if it is a ‘last resort’ measure, enhanced cooperation is a tool that allows to overcome legislative paralysis due to the unanimity requirement, except in the case of the Financial Transaction Tax, which is still under negotiations;
- the legal base in most cases is a Council regulation, except for PESCO, where it is a Council decision;
- the number of participating Member States is usually far beyond the necessary threshold of 9, and varies between 17 and 26. In terms of participation it is also interesting to note that Austria, Belgium, France, Germany, Greece, Italy, Portugal and Slovenia participate in all cases of enhanced cooperation since their inception, that Eurozone member states are usually at the core of enhanced cooperation and that Eastern and Northern Member States and those that already have an opt out are less likely to engage in enhanced cooperation;
- even though only the participating Member States vote, generally all Member States are allowed to participate in the discussions on enhanced cooperation;
- all cases of enhanced cooperation include some kind of review clause;
- EPPO has by far the most complicated operational structure, which involves enhanced cooperation for the Unitary Patent but also a satellite intergovernmental agreement outside the Treaties for the Unified Patent Court;
- even though the FTT enhanced cooperation process is still pending, works on it have not stopped, as those Member States interested are continuing their exchanges on the topic, while the Commission is trying to keep involved the non-participating Member States as well;
- even though some cases of enhanced cooperation could provoke free riding by non-participating Member States (like EPPO) in practice these cases have the highest number of participating Member States (26);

### Obstacles and challenges to enhanced cooperation

- the timeframe for engagement in enhanced cooperation for the existing cases has been quite long (4-5 years on average, and even 12 years for the European Unitary Patent), except for the case of PESCO, which unfolded much quicker over a period of about a year. The lengthiness of the procedure is partially explained by the requirement to use enhanced cooperation as a last resort, when it is clear that unanimity cannot be achieved in the Council, but it could also be attributed to the lack of political will to move forward faster in the very sensitive subjects covered by enhanced cooperation. A prime example is PESCO, where the political will was strongly present, which made its adoption and implementation much faster than the other cases of enhanced cooperation;

- enhanced cooperation cannot arise from scratch, it has to follow a Commission proposal, which has not succeeded to reach agreement through the usual legislative cycle;
- some of the main obstacles to enhanced cooperation are the unanimity requirement and the different sovereignty issues in the different Member States;
- it is limited to areas of shared competence and should not undermine the internal market, which is a substantial but subjective criterion and the Commission has the full discretion to decide whether or not it has been met; this also could be potentially discouraging for Member States to pursue enhanced cooperation in areas linked to the internal market, as they would have to come up with justifications how their cooperation will not undermine the internal market;
- the QMV requirement with the participation of all Member States in the authorisation phase of enhanced cooperation makes it rather difficult to launch enhanced cooperation with just the minimum required number of Member States, and even more unlikely if enhanced cooperation is launched in an area where a previous QMV vote failed;
- it is difficult to determine what is the reasonable period required by Article 20 (2) TEU to agree that the unanimity deadlock cannot be solved and that enhanced cooperation should therefore be pursued;
- Parliament's involvement is quite marginal, even though its consent is required before the Council authorises the willing Member States to proceed with enhanced cooperation;
- there is no provision in the Treaties on how to deal with a Member State that wants to exit an existing case of enhanced cooperation or does not fulfil the requirements anymore, except for the special case of PESCO (Article 46 (4) and (5) TEU);
- there is a potential loophole in the organisation of enhanced cooperation linked to the requirement to continue with the unanimity requirement within the enhanced cooperation, unless the passerelle clause contained in Article 333 TFEU is used to switch over to QMV. There is a risk that a non-interested Member State could enter the enhanced cooperation only to sabotage its advancement due to the unanimity requirement and to prevent the switch over to QMV through the passerelle clause;
- even though enhanced cooperation offers solutions to common problems with the convenience of using the Union institutional and administrative support, it has not eliminated the pursuit of Member States for solutions outside the EU Treaties;

### **External dimension**

#### *Flexible forms of sub-federal level cooperation in the EU Member States:*

Among the EU Member States, Germany and Italy have legal provisions allowing different forms of flexible cooperation between the sub-federal levels, somehow comparable to enhanced cooperation. Article 117, second last paragraph of the Italian Constitution reads as follows: 'Agreements between a Region and other Regions that aim at improving the performance of regional functions and that may also envisage the establishment of joint bodies shall be ratified by regional law'. These agreements are often adopted to carry out common projects, particularly for those having a cross-border dimension (health, transport, digitalisation of public services etc...). They are adopted in sectors, which do not fall within the exclusive competence of the State. They get different names, such as conventions, protocols, agreements.

The German Länder are engaged in vertical and horizontal coordination with the purpose to resolve practical problems, usually requiring temporary or permanent cross-regional cooperation. Horizontal cooperation between and among the Länder is said to take place at a

kind of extra-constitutional ‘third level’ between the federation and the Länder. The conferences of Land prime ministers take place about every three months to consider common demands on the federation, and subject ministers in the Länder meet regularly to consider a wide variety of themes, including draft legislation. The conference of Land prime ministers, serves a variety of functions, including guarantor of continuity for Land government actions in spite of changing majorities in the Bundesrat, control instrument vis-à-vis the federation and watchdog over EU developments, clearing house for various compacts among the Länder and arbitrator for Land ministerial meetings. The rule of unanimity and rotating leadership of the prime ministers’ conferences discourage a strong partisan approach.

The most common and best-known legal instrument of cooperation among the Länder is the interstate compact. It is based neither on federal law nor on Land law but rather on ‘cooperative customary law’ (Kooperationsgewohnheitsrecht) that exists between the federation and the Länder at the ‘third level.’ There are two forms of compact: the ‘administrative agreement’ and the ‘state contract.’ The difference is that the first form is restricted to the executive authorities of the Länder, whereas the second form, the ‘state contract,’ binds the Länder as such and must be approved by the Land parliaments, for example compacts establishing certain public radio and television networks and their listening and viewing fees or the compact regulating the distribution of students among the various universities. Compacts may involve all or only some of the Länder.

In addition to formal, legally binding compacts, there is the ‘political understanding’ (politische Absprache), which is usually the result of a conference of Land ministers which deals with policy matters that are of supra-national importance. For instance, the Standing Conference of the Ministers of Education and Cultural Affairs of the Lander in the Federal Republic of Germany (KMK), brings together the Lander ministers and senators who are responsible for education and training, higher education and research and cultural affairs. This body adopts resolutions that have the status of recommendations. These ‘understandings’ are not legally binding, but they are considered to be politically and morally binding.

### Outside the Union

Intergovernmental cooperation is a concept, which appears to different degree and in different configurations in a number of Federal States outside the European Union. The Rapporteur has examined in particular the case of the USA, Switzerland, Australia and Canada.

### USA

The US political and legal system foresees several forms of flexible cooperation (interstate compacts, uniform laws, memorandums of understanding) between the states, which could be somehow similar to enhanced cooperation in the EU. However, due to the different nature of the US Federalism (competitive federalism), the policy areas regulated by interstate compacts are very different than those, where enhanced cooperation is most likely to be used in the EU. Many of the policy interstate compacts in the US deal with policies linked to the internal market, such as taxation, mutual recognition of qualifications and access to shared infrastructure (waterways, metro system, and transportation). The general aim is to facilitate the life of citizens and companies without passing through the Federal level, which takes too long to regulate. Some interstate compacts are national, meaning all the states take part in them, but the federal level is not involved. Usually compacts are chosen because they would get the result faster than if the federal level is involved.

On the contrary, the EU has already achieved a significant degree of harmonisation of the rules for the internal market and the areas where enhanced cooperation is emerging are the more politically contentious ones where unanimous agreement between all Member States cannot be achieved. Many of the areas where the EU is launching enhanced cooperation, for example PESCO and the EPPO, are federal competencies in the US system.

Concerning the position of interstate compacts and enhanced cooperation in the legal order, interstate compacts are agreements between the states and are not federal laws. However, interstate compacts have the value of federal law when the Congress deems it necessary to validate them, which happens quite often. In the case of enhanced cooperation, on the contrary, any legislation passed under this procedure becomes Union law.

Interstate compacts also appear to be very flexible - members of the compact can vary and the addition and exit of states, as well as the expulsion of states is a normal practice.

All the same, there are some parallels that could be made between the two systems. For example, the so called uniform laws seem very similar to the EU enhanced cooperation cases of divorce law and property regime regulations, while the FTT if ever successful could be similar to one of the interstate compacts related to taxation.

Nevertheless, the US example of inter-state cooperation forms can be useful for the practical organisation of enhanced cooperation in the EU. What could be particularly beneficial could be the creation of a special commission for the monitoring of areas where future enhanced cooperation could be developed. In the USA, this is carried out by the National Governors' Association, the Uniform Laws Commission and the National Centre for Interstate Compacts, which proactively look for areas where interstate cooperation could be fruitful. Additionally, the interstate compacts usually have very detailed contents and adopt bylaws, which regulate the daily operation of the compact once the political agreement has been achieved. This could be another area which could be applied to future cases of enhanced cooperation - rules of procedure, which determine precisely the decision-making, functioning, administration and budget of the enhanced cooperation case after it has been launched.

### Canada

Intergovernmental relations are dominated by the executive branch in Canada and the Canadian constitution does not contain specific provisions on intergovernmental cooperation between the provinces, territories and the federal government. Furthermore, the role of parliaments in intergovernmental cooperation is almost absent.

Intergovernmental relations are institutionalised through the First Ministers Meetings (with the Prime Minister) and the Council of the Federation (without the Prime Minister). However, these fora do not seem to produce any binding intergovernmental legislation. Formal and informal concordats do exist in Canada but they are only suggestive and not legally binding on the contracting parties.

A peculiarity of the Canadian system is the possibility of a province to opt out not to participate in a federal-provincial shared cost programme or to opt out of future constitutional amendments that would transfer legislative powers from the provincial legislatures to Parliament. Financial compensation is guaranteed for any province that opts out of such an amendment relating to education or other cultural matters, according to the Constitutional Act of 1982. In fact, Quebec

had already obtained opt outs from major programmes, such as hospital insurance, vocational training, public health and aid to the old and disabled, since 1965, through the Established Programs Act.

### Switzerland

Article 48 of the Swiss Constitution gives cantons the right to conclude ‘intercantonal agreements’. The most important form of inter-cantonal cooperation are the Concordats, which are used to implement existing legislation or to create and harmonize legislation and regulations across different cantons. Each Concordat must go through the respective canton’s legislative process and is treated as binding interactional law.

Another form of horizontal cooperation are the intercantonal conferences, which are permanent forums for intergovernmental relations, where members of the governing council responsible for certain field of each canton meet in order to exchange views. One particular example of such conferences is the Conference of Cantonal Governments, which was mainly created to influence policies regarding international relations and in particular European integration.

### Australia

In addition to intergovernmental agreements between the provinces, which are important and flexible instruments to address issues where both federal and sub-federal levels have some powers, Australian provinces practice a lot of what is called ‘mirroring legislation’. In basic terms, this means that one state can adopt legislation following the usual legislative procedure applicable on state level, and once it is adopted the legislation is directly applicable in any other state that wishes to copy it.

## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on the implementation of the Treaty provisions concerning enhanced cooperation (2018/2112(INI))

*The European Parliament,*

- having regard to the Treaty provisions related to enhanced cooperation and in particular Articles 20, 42(6), 44, 45 and 46 of the Treaty on European Union (TEU), and Articles 82, 83, 86, 87, 187, 188, 326, 327, 328, 329, 330, 331, 332, 333 and 334 of the Treaty on the Functioning of the European Union (TFEU),
- having regard to the Treaty provisions on other existing forms of differentiated integration and in particular Articles 136, 137 and 138 TFEU relating to provisions specific to Member States whose currency is the euro,
- having regard to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG),
- having regard to Protocol 10 on permanent structured cooperation established by Article 42 of the Treaty on European Union, Protocol 14 on the Euro Group and Protocol 19 on the Schengen *acquis* integrated into the framework of the European Union,
- having regard to its resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty<sup>1</sup>,
- having regard to its resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union<sup>2</sup>,
- having regard to its resolution of 16 February 2017 on budgetary capacity for the euro area<sup>3</sup>,
- having regard to its resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty<sup>4</sup>,
- having regard to its resolution of 17 January 2019 on differentiated integration<sup>5</sup>,
- having regard to the Commission white paper of 1 March 2017 (COM(2017)2025) and the five subsequent reflection papers (COM(2017)0206), COM(2017)0240, COM(2017)0291, COM(2017)0315, COM(2017)0358),
- having regard to the Rome Declaration of 25 March 2017,
- having regard to Rule 52 of its Rules of Procedure, as well as Article 1(1)(e) of, and

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<sup>1</sup> OJ C 252, 18.7.2018, p. 215.

<sup>2</sup> OJ C 252, 18.7.2018, p. 201.

<sup>3</sup> OJ C 252, 18.7.2018, p. 235.

<sup>4</sup> OJ C 263, 25.7.2018, p. 125.

<sup>5</sup> Texts adopted, P8\_TA(2019)0044.

Annex 3 to, the decision of the Conference of Presidents of 12 December 2002 on the procedure for granting authorisation to draw up own-initiative reports,

- having regard to the report of the Committee on Constitutional Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A8-0038/2019),
- A. whereas the Union has a particular interest in implementing enhanced cooperation in certain areas of non-exclusive EU competences in order to move forward the European project and to facilitate the life of citizens;
- B. whereas, pursuant to Article 20(2) TEU, enhanced cooperation is meant to be a measure of last resort, when the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole;
- C. whereas enhanced cooperation should not be seen as an instrument of exclusion or division of the Member States, but as a pragmatic solution to advance European integration;
- D. whereas the sensitive nature of certain policy areas makes it difficult to follow the ordinary legislative procedure, not only because of the unanimity requirement but also due to the established practice in the Council of always seeking consensus among the Member States, even when a qualified majority would be sufficient to take a decision;
- E. whereas with the exception of the Financial Transaction Tax, all enhanced cooperation initiatives could have been adopted in Council by qualified majority voting (QMV), had this rule been established instead of unanimity voting;
- F. whereas a number of cases exist of sub-groups of Member States carrying out bilateral or multilateral cooperation between themselves outside the Treaty framework, for example in fields such as defence; whereas the pressure exerted by the economic and monetary crisis to take swift decisions and to overcome the unanimity requirement in certain areas led to the adoption of intergovernmental instruments outside the EU legal framework, such as the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG or the ‘Fiscal Compact’);
- G. whereas enhanced cooperation is a procedure whereby a minimum of nine Member States are permitted to establish advanced cooperation in an area within the structures of the EU, but without the involvement of the remaining Member States; whereas enhanced cooperation allows those participating Member States to achieve a common goal or initiative and to overcome paralysis in negotiations or a blockage by another Member State or Member States when unanimity is required; whereas pursuant to Article 20(4) TEU acts adopted in the framework of enhanced cooperation should bind only participating Member States; whereas enhanced cooperation is limited to areas in which the EU does not have exclusive competences;
- H. whereas pursuant to Article 328(1) TFEU, ‘the Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible’;

- I. whereas experience shows that enhanced cooperation has delivered satisfactory results in divorce law<sup>1</sup>, and offers interesting prospects with regard to property regime rules<sup>2</sup>, the European unitary patent and the European Public Prosecutor's Office;
- J. whereas the initial experiences with enhanced cooperation have highlighted the difficulties associated with the application of this concept, due to the limited provisions available in the Treaties concerning its practical implementation and the lack of sufficient follow-up carried out by the Union institutions;
- K. whereas the analysis of different federal models used in EU Member States and federations outside the Union revealed that flexible cooperation mechanisms are often used by sub-federal entities in areas of common interest;
- L. whereas without the use of bridging clauses to move from unanimity to QMV in the Council, and in the absence of a thorough reform of the Treaties, it seems possible that in the future, the Member States would need to resort to the provisions on enhanced cooperation in order to address common problems and attain common goals;
- M. whereas it is of importance for the smooth application of enhanced cooperation to establish a list of questions that need to be addressed and to provide a roadmap for the effective functioning of enhanced cooperation in the letter and spirit of the Treaties;

### ***Main observations***

1. Is concerned by the fact that even though enhanced cooperation offers a solution to a common problem, by taking advantage of the Union institutional structure and thereby reducing the administrative costs for the participating Member States, it has not completely eliminated the need to resort to forms of intergovernmental subgrouping solutions outside the Treaties, which have a negative impact on how consistently the EU legal framework is applied and therefore lead to a lack of appropriate democratic scrutiny;
2. Believes that the EU's single institutional framework should be preserved in order to achieve its common objectives and guarantee the principle of equality of all citizens; insists that the Community or Union method should be upheld;
3. Underlines that contrary to intergovernmental Treaties, enhanced cooperation provides a tool for problem-solving that is not only legal but also convenient, as it is based on the Treaty provisions and operates within the Union institutional structure;
4. Points out that even though enhanced cooperation, due to its nature as a last resort measure, has not been used extensively since its inception in the Treaty of Amsterdam, it seems to be gaining importance and delivers tangible results;
5. Notes that, based on existing experience, enhanced cooperation most often arises in areas governed by a special legislative procedure requiring unanimity, and has

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<sup>1</sup> 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.

<sup>2</sup> 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.

predominantly been used in the area of justice and home affairs;

6. Points out that so far the procedure for the engagement and implementation of enhanced cooperation has been quite lengthy, notably due to the unclear definition of a reasonable period to ascertain that the necessary voting threshold cannot be reached and the lack of strong political will to move forward faster;
7. Notes that the lack of clear operational guidelines for creating and administering enhanced cooperation, for example the applicable law for common institutions or procedures to withdraw from already existing cooperation, might have rendered the conclusion of enhanced cooperation less likely;
8. Recalls that even though enhanced cooperation benefits from the Union institutional and legal order, its automatic integration into the *acquis* is not foreseen;
9. Believes that even though enhanced cooperation is considered as a second-best scenario, it is still a viable tool for problem-solving at the Union level and a tool to overcome some of the institutional deadlocks;
10. Is of the opinion that the same set of questions needs to be answered in order to effectively implement and organise enhanced cooperation, irrespective of the policy area that it concerns or the form it takes;

### ***Recommendations***

11. Proposes, therefore, that a number of questions need to be answered and a roadmap followed as set out below in order to ensure the smooth and effective implementation of enhanced cooperation;

### ***Decision-making process***

12. Points out that the political impetus for enhanced cooperation should come from the Member States, but discussions on its contents should be based on a Commission proposal;
13. Recalls that Article 225 TFEU gives Parliament the right of quasi-legislative initiative, which should be interpreted as the possibility for Parliament to initiate enhanced cooperation on the basis of a Commission proposal that did not manage to reach an agreement through the regular decision-making procedure within the mandate of two consecutive Council presidencies;
14. Believes that it should be concluded that the objectives of an instance of cooperation cannot be attained by the Union as a whole, in line with the requirement in Article 20 TEU, if during a period covering two consecutive Council presidencies, no substantive progress has been made in the Council;
15. Recommends that Member States' requests to establish enhanced cooperation between themselves should, in principle, be based on objectives that are at least as ambitious as those presented by the Commission, before it is established that the objectives cannot be achieved by the Union as a whole within a reasonable timeframe;

16. Strongly recommends that the special passerelle clause enshrined in Article 333 TFEU be activated to switch from unanimity to QMV, and from a special to the ordinary legislative procedure, immediately after an agreement on the start of enhanced cooperation is approved by the Council, in order to avoid new blockages if the number of participating Member States is significant;
17. Finds it necessary that the decision authorising enhanced cooperation should specify the framework for relations with the non-participating Member States; considers that the Member States not participating in such enhanced cooperation should nevertheless be involved in the deliberations on the subject it addresses;
18. Recalls that both the Commission and the Council secretariats have an important role to play in ensuring that Member States that do not participate in enhanced cooperation are not left behind in a way that makes their participation at a later stage difficult;

#### *Administration*

19. Recommends that the Commission play an active role in all stages of enhanced cooperation from the proposal through the deliberations to the implementation of enhanced cooperation;
20. Affirms that the unity of EU institutions should be maintained and that enhanced cooperation should not lead to the creation of parallel institutional arrangements, but could allow specific bodies to be established where appropriate within the EU legal framework and without prejudice to the competences and role of the Union institutions and bodies;

#### *Parliamentary scrutiny*

21. Recalls that Parliament is in charge of the parliamentary control of enhanced cooperation; calls for stronger involvement from national parliaments, and in those Member States where it is relevant, from regional parliaments, alongside the European Parliament in the democratic scrutiny of enhanced cooperation if it concerns policy areas of shared competence; underlines the possibility of establishing an interparliamentary forum similar, for instance, to the Interparliamentary conference under Article 13 of the TSCG and the Interparliamentary conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), where necessary and without prejudice to the powers of Parliament;
22. Stresses the need for the Member States participating in enhanced cooperation to include those regions that have legislative powers in matters that affect them, with a view to respecting the internal division of powers and reinforcing the social legitimacy of such enhanced cooperation;
23. Recommends that Parliament play a stronger role in enhanced cooperation by suggesting to the Commission new forms of cooperation via Article 225 TFEU, and by monitoring proposals or existing cooperation; expresses the conviction that Parliament should be involved in every stage of the procedure, rather than just being expected to provide its consent, and that it should receive regular reports and be able to comment on the implementation of enhanced cooperation;

24. Calls on the Council to engage with Parliament in a possible future enhanced cooperation procedure prior to the request for Parliament's consent on the final text, so as to ensure maximum cooperation between the Union's co-legislators;
25. Regrets, however, that despite Parliament's constructive and measured approach to the enhanced cooperation procedure, the Council has shown little interest in engaging formally with Parliament prior to the request for Parliament's consent on the final negotiated text;
26. Deems it necessary that Parliament improve its internal organisation in relation to enhanced cooperation; believes, to this end, that each case of enhanced cooperation should be followed by the relevant standing committee and recommends that Parliament's rules of procedure should therefore authorise the setting up of ad-hoc sub-committees in which full membership is primarily given to those MEPs elected in the Member States that are participating in such enhanced cooperation;

#### *Budget*

27. Takes the view that operating expenditure linked to enhanced cooperation should be borne by the participating Member States, and if this cost is borne by the EU budget, the non-participating Member States should be reimbursed, unless the Council, after consulting Parliament, decides in accordance with Article 332 TFEU that such cooperation is to be funded by the EU budget, thereby making such expenditure part of the latter and therefore subject to the annual budgetary procedure;
28. Considers that if the activity regulated by enhanced cooperation generates revenue, this revenue should be assigned to cover the operating expenditure linked to the enhanced cooperation;

#### *Jurisdiction*

29. Believes that enhanced cooperation should fall under the direct jurisdiction of the Court of Justice of the European Union (CJEU), without prejudice to the possibility of establishing an arbitration procedure or a dispute settlement court of first instance that could be required for the functioning of a particular case of enhanced cooperation, unless the Treaty provides otherwise, which should be specified in the legal act establishing such enhanced cooperation;
30. Points out that if a case of enhanced cooperation requires that a special arbitration mechanism or court be put in place, the final arbitration body should always be the CJEU;

#### *Adjustments to the institutional structure of the Union*

31. Proposes the creation of a special enhanced cooperation unit in the Commission, under the leadership of the Commissioner responsible for inter-institutional relations, to coordinate and streamline the institutional setting up of enhanced cooperation initiatives;

32. Considers it necessary to make the role of both the Commission and Council secretariats more proactive in the context of enhanced cooperation, and therefore proposes that they actively search, in conjunction with the Committee of the Regions and, in particular, with its European Grouping of Territorial Cooperation (EGTC) platform, for areas where enhanced cooperation could be useful for the advancement of the European project or for areas adjacent to existing forms of enhanced cooperation, in order to avoid overlaps or contradictions;

#### *Withdrawal or expulsion of Member States*

33. Points out that there are no provisions in the Treaties regarding the possibilities for Member States to withdraw, or be expelled, from existing cases of enhanced cooperation, with the exception of Permanent Structured Cooperation (PESCO);
34. Believes that clear rules should be laid down in all cases of enhanced cooperation on the withdrawal of a Member State that no longer wishes to participate and on the expulsion of a Member State that no longer fulfils the conditions of the enhanced cooperation; advises that the terms and conditions of the possible withdrawal or expulsion of a Member State should be specified in the act establishing the enhanced cooperation;

#### *Recommendations for the future evolution of enhanced cooperation*

35. Considers it necessary to devise a procedure for the fast-track authorisation of enhanced cooperation in fields of high political salience to be accomplished within a shorter timeframe than the duration of two consecutive Council presidencies;
36. Urges Member States participating in enhanced cooperation to work towards integrating enhanced cooperation into the *acquis communautaire*;
37. Calls on the Commission to propose a regulation, on the basis of Article 175, third subparagraph, or Article 352 TFEU, in order to simplify and unify the relevant legal framework for enhanced cooperation (for example, the guiding principles on the applicable law for common institutions or a Member's withdrawal), thereby facilitating the conclusion of such cooperation;
38. Suggests that the next revision of the Treaties should explore the possibility of regions or sub-national entities playing a role in enhanced cooperation where the latter relates to an area of exclusive competence of the level in question, with due respect for national constitutions;

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39. Instructs its President to forward this resolution to the Council, the Commission and the national parliaments.

11.1.2019

## **OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

for the Committee on Constitutional Affairs

on implementation of the Treaty provisions concerning enhanced cooperation  
(2018/2112(INI))

Rapporteur: Tomáš Zdechovský

### **SUGGESTIONS**

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Constitutional Affairs, as the committee responsible, to incorporate the following suggestions into its motion for a resolution:

- A. whereas Article 86 of the Treaty on the Functioning of the European Union (TFEU) provides an explicit formal basis for the creation of a European Public Prosecutor's Office (EPPO) and determines the applicable legislative procedure and instrument, as well as the scope and competence, of the future EPPO;
- B. whereas it is important that the EU and all its Member States detect and prosecute in an effective and dissuasive manner fraud which affects the EU's financial interests, so as to protect taxpayers of all the Member States who contribute to the Union's budget;
- C. whereas Article 86 TFEU explicitly stipulates the possibility of establishing enhanced cooperation in the event of disagreement;
- D. whereas enhanced cooperation is a procedure whereby a minimum of nine Member States are permitted to establish advanced cooperation in an area within the structures of the EU, but without the involvement of the remaining Member States; whereas enhanced cooperation allows those participating Member States to achieve a common goal or initiative and to overcome paralysis in negotiations or a blockage by another Member State or Member States when unanimity is required; whereas pursuant to Article 20(4) of the Treaty on European Union acts adopted in the framework of enhanced cooperation should bind only participating Member States; whereas enhanced cooperation is limited to areas in which the EU does not have exclusive competences;

- E. whereas pursuant to Article 328(1) TFEU, ‘the Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible’;
1. Reaffirms Parliament’s strong support for establishing an efficient and independent EPPO, in order to reduce the presently fragmented nature of national law enforcement efforts to protect the EU budget, and to strengthen the fight against fraud in the European Union;
  2. Recalls that Parliament adopted three resolutions on 29 April 2015<sup>1</sup>, 5 October 2016<sup>2</sup> and 5 October 2017<sup>3</sup> on the establishment of the European Public Prosecutor’s Office; acknowledges that a number of Parliament’s concerns, as expressed in these resolutions, were addressed to some extent in the final negotiated text adopted by the Council; calls on the Council to engage with Parliament in a possible future enhanced cooperation procedure prior to the request for Parliament’s consent on the final text, to ensure maximum cooperation between the Union’s co-legislators;
  3. Regrets, however, that despite Parliament’s constructive and measured approach to the enhanced cooperation procedure, the Council has shown little interest in engaging formally with Parliament prior to the request for Parliament’s consent on the final negotiated text;
  4. Welcomes the fact that 22 Member States are already participating in enhanced cooperation on the EPPO, and recalls the inclusive nature of the EPPO; encourages non-participating Member States to join as soon as possible with a view to improving the Office’s efficiency;
  5. Notes that following the completion of a three-year build-up phase, it is envisaged that the EPPO will assume its duties by the end of 2020, rendering any assessment of its implementation premature at this stage;
  6. Emphasises that the implementation of the EPPO will require effective and efficient cooperation between the national prosecutors and the EPPO, and with the agencies of the EU, such as the European Anti-Fraud Office (OLAF) and Eurojust;
  7. Is closely following all steps taken hitherto to establish the EPPO, including implementing measures for the selection and appointment of the European Chief Prosecutor and European Prosecutors, as well as budgetary measures;
  8. Calls on the Commission to keep Parliament regularly and fully informed at every stage of the implementation and institutional development of the EPPO, in the light of the potential expansion of its mandate to include the fight against cross-border terrorism;
  9. Welcomes the fact that 18 Member States will participate in enhanced cooperation on property regimes of marriages and registered partnerships, as applicable from 29 January 2019; underlines the need to protect fundamental rights, including the right to respect for private and family life and the prohibition of discrimination.

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<sup>1</sup> OJ C 346, 21.9.2016, p. 27.

<sup>2</sup> OJ C 215, 19.6.2018, p. 18.

<sup>3</sup> OJ C 346, 27.9.2018, p. 246.



## INFORMATION ON ADOPTION IN COMMITTEE ASKED FOR OPINION

<b>Date adopted</b>	10.1.2019
<b>Result of final vote</b>	+:                36 -:                6 0:                3
<b>Members present for the final vote</b>	Asim Ademov, Martina Anderson, Heinz K. Becker, Monika Beňová, Michał Boni, Caterina Chinnici, Rachida Dati, Frank Engel, Laura Ferrara, Romeo Franz, Ana Gomes, Nathalie Griesbeck, Sylvie Guillaume, Monika Hohlmeier, Sophia in 't Veld, Cécile Kashetu Kyenge, Monica Macovei, Roberta Metsola, Claude Moraes, Ivari Padar, Judith Sargentini, Birgit Sippel, Csaba Sógor, Helga Stevens, Traian Ungureanu, Bodil Valero, Marie-Christine Vergiat, Udo Voigt, Josef Weidenholzer, Cecilia Wikström, Kristina Winberg, Tomáš Zdechovský, Auke Zijlstra
<b>Substitutes present for the final vote</b>	Dennis de Jong, Anna Hedh, Lívia Járóka, Marek Jurek, Jean Lambert, Jeroen Lenaers, Andrejs Mamikins, Angelika Mlinar, Maite Pagazaurtundúa Ruiz, Christine Revault d'Allonnes Bonnefoy
<b>Substitutes under Rule 200(2) present for the final vote</b>	Fernando Ruas, Adam Szejnfeld

## FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

36	+
ALDE	Nathalie Griesbeck, Sophia in 't Veld, Angelika Mlinar, Maite Pagazaurtundúa Ruiz, Cecilia Wikström
EFDD	Laura Ferrara
PPE	Asim Ademov, Heinz K. Becker, Michał Boni, Rachida Dati, Frank Engel, Monika Hohlmeier, Livia Járóka, Jeroen Lenaers, Roberta Metsola, Fernando Ruas, Csaba Sógor, Adam Szejnfeld, Traian Ungureanu, Tomáš Zdechovský
S&D	Monika Beňová, Caterina Chinnici, Ana Gomes, Sylvie Guillaume, Anna Hedh, Cécile Kashetu Kyenge, Andrejs Mamikins, Claude Moraes, Ivari Padar, Christine Revault d'Allonnes Bonnefoy, Birgit Sippel, Josef Weidenholzer
VERTS/ALE	Romeo Franz, Jean Lambert, Judith Sargentini, Bodil Valero

6	-
ECR	Marek Jurek, Monica Macovei, Helga Stevens, Kristina Winberg
ENF	Auke Zijlstra
NI	Udo Voigt

3	0
GUE/NGL	Martina Anderson, Dennis de Jong, Marie-Christine Vergiat

Key to symbols:

+ : in favour

- : against

0 : abstention

## INFORMATION ON ADOPTION IN COMMITTEE RESPONSIBLE

<b>Date adopted</b>	22.1.2019
<b>Result of final vote</b>	+: 18 -: 2 0: 2
<b>Members present for the final vote</b>	Gerolf Annemans, Mercedes Bresso, Pascal Durand, Esteban González Pons, Danuta Maria Hübner, Ramón Jáuregui Atondo, Alain Lamassoure, Jo Leinen, Maite Pagazaurtundúa Ruiz, Markus Pieper, Paulo Rangel, Helmut Scholz, György Schöpflin, Pedro Silva Pereira, Barbara Spinelli, Josep-Maria Terricabras, Kazimierz Michał Ujazdowski
<b>Substitutes present for the final vote</b>	Pervenche Berès, Ashley Fox, Sylvia-Yvonne Kaufmann
<b>Substitutes under Rule 200(2) present for the final vote</b>	Michael Gahler, Jarosław Wałęsa

## FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

<b>18</b>	<b>+</b>
ALDE	Maite Pagazaurtundúa Ruiz
NI	Kazimierz Michał Ujazdowski
PPE	Michael Gahler, Esteban González Pons, Danuta Maria Hübner, Alain Lamassoure, Markus Pieper, Paulo Rangel, György Schöpflin, Jarosław Wałęsa
S&D	Pervenche Berès, Mercedes Bresso, Ramón Jáuregui Atondo, Sylvia Yvonne Kaufmann, Jo Leinen, Pedro Silva Pereira
VERTS/ALE	Pascal Durand, Josep Maria Terricabras

<b>2</b>	<b>-</b>
ECR	Ashley Fox
ENF	Gerolf Annemans

<b>2</b>	<b>0</b>
GUE/NGL	Helmut Scholz, Barbara Spinelli

Key to symbols:

+ : in favour

- : against

0 : abstention