"United in Diversity" – The Integration of Enhanced Cooperation into the European Constitutional Order

By Daniel Thym[*]

A. Introduction

The "unity dogma" has long characterized the European law discourse. In many of its landmark decisions the European Court of Justice had recourse to the "unity argument," such as in *Costa vs. E.N.E.L.*, where it rightly states that "the executive force of Community law cannot vary from one state to another … without jeopardizing the attainment of the objectives of the Treaty."[1] Other expressions of the "unity dogma" include the legal principle of non-discrimination enshrined in the fundamental freedoms, which lie at the heart of the single market, or the political concept of *acquis communautaire* obliging new Member States to subscribe to all existing Community laws. Indeed, the establishment of a supranational legal order requires a continued focus on its uniform application in the Member States without which the effectiveness of European law is at stake. My intention is not to call into question the underlying rationale of this quest for unity. The aim of this contribution is rather to show that the asymmetric non-participation of individual Member States in selected areas of Union activity can be embedded into the existing European legal order and does not contradict its constitutional aspirations, thereby giving substance to the Union's motto "United in Diversity."[2]

Various forms of differentiation have characterized the European legal order since its beginning and persist under the Treaty establishing a Constitution for Europe (CT). They range from specific safeguard clauses in the original 1957 Treaty

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[1] Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 1251.

[2] Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) 53 [hereinafter CT].

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establishing the European Economic Community (EEC Treaty)[3] and the numerous protocols attached to the Treaties[4] to the differentiated treatment of Member States and their regions in the manifold exceptions and privileges in secondary legislation.[5] They add up to a complex picture in which even the single market, which is often regarded as the sacrosanct "core" of European integration, is subject to various degrees of flexibility and differentiation.[6] Moreover, the European constitutional order is fragmented horizontally with specific Treaty regimes governing, *inter alia*, the Common Foreign and Security Policy (CFSP) and Economic and Monetary Union.[7] All these specificities do, however, have one thing in common: they do not generally limit the scope of European law by exempting one or several Member States from its geographic field of application. Rather, the law applies to all with only its legal effects being suspended or modified with regard to one or several Member States. This common ground extends to transitional periods which have been a regulatory tool of successive enlargements. They also suspend the application of European law in the new Member States for the time period specified in the accession treaty; but once this period has elapsed, European law automatically applies.[8]

In 1992, the heads of state or government agreed on a new formula: the asymmetric non-participation of Member States in a specific policy field in whose legislative implementation only the "ins" would participate, while the voting rights of the "outs" would be suspended. By granting the United Kingdom and Denmark a political opt-out from the third phase of monetary union, independent of the convergence criteria applicable to all Member States, they recognized that the

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[3] *E.g.* Treaty on European Union, 1992 O.J. (C191) 1 [hereinafter TEU], art. 95(4)-(10), CT art. III-172(4)-(10), and CT art. 176, Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hererinafter EC Treaty], art. III-234(6).

[4] One "minor" example: the Protocol on the Acquisition of Property in Denmark of 1992 which continues to be attached to the Constitution.

[5] For various forms of "actual and potential", "inter-state and intra-state", "temporary and non-temporary", "general and specific" as well as "positive and negative discrimination" in primary and secondary European law see the extensive analysis by FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999) and DOMINIK HANF, DIFFERENTIATION IN THE LAW OF EUROPEAN INTEGRATION (2002).

[6] Gráinne de Búrca, *Differentiation within the 'Core'?*, *in* CONSTITUTIONAL CHANGE IN THE EU 133, 133 (Gráinne de Búrca & Joanne Scott eds., 2000).

[7] On sector-specific forms of horizontal differentiation, *see* Bast in this volume.

[8] *See*, for example, Treaty of Accession art. 24, Sep. 23, 2003, 2003 O.J. (C 227) E. on the possible suspension of the free movement of workers for a period of up to seven years after the 2004 enlargement Art. 24 of the Act of Accession in combination with the respective Annexes.

Union would proceed non-simultaneously. There is no guarantee that the two "outs" will ever catch up with the *avant-garde* and the asymmetry of integration may, in fact, continue indefinitely.[9] This legal construction was taken up a few years later in the Treaty of Amsterdam, which combined the integration of the Schengen law into the European legal order and the partial communitarization of justice and home affairs law in Title IV EC with an asymmetric status for the UK and Denmark.[10] On its basis, one of the most important growth areas of European integration has been realized without the participation of all Member States in recent years. Thus, the asymmetric non-participation of some Member States has become a daily practice – and might be further extended in the years to come, if the general mechanism for enhanced cooperation is put into practice, which was first agreed upon in Amsterdam, reformed substantially in Nice and has now been codified in Articles I-44, III-416-423 CT.[11]

In the following sections, the integration of the general mechanism for enhanced cooperation into the constitutional order of the European Union will be illustrated in the light of the practical experience with the existing forms of asymmetry. Section B will pay particular attention to the potential of asymmetry in accommodating diversity at a time when European integration transcended the functional logic of the single market towards political union. Section C takes a closer look at the substantive constraints of, and procedural requirements for enhanced cooperation demonstrating that they do not contradict the general principles of European law as characteristic features of its supranational legal order. Against this background, Section D illustrates that the general mechanism for enhanced cooperation and the other forms of asymmetry are integrated into the single legal and institutional framework of the European Union, thereby preserving its constitutional unity. Section E, the outlook, eventually reveals that a hardly noticed change in the regime governing enhanced cooperation may play an important part in preserving the dynamics of European integration in the era of the Constitutional Treaty. Lack of space unfortunately precludes a detailed analysis of asymmetry in the field of CFSP, including defense. The specificity of its legal regime for enhanced cooperation and extensive new forms of asymmetry in the

[9] CT Protocol No. 13, art. 9: "The UK may notify the Council at any time of its intention to adopt the euro." Similarly for Denmark Protocol No. 14.

[10] *See* DANIEL THYM, UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT 79-130 (2004); *available at* http://www.thym.de/daniel/ungleichzeitigkeit. The special status of the UK and Denmark is continued with slight modifications in Protocols Nos 17, 19 and 20 attached to the CT.

[11] This article follows the spelling of the Treaty of Nice and the constitutional Treaty which speaks of "cooperation" and does not use the British-English "co-operation".

Constitutional Treaty require a degree of attention which must be preserved for other publications.[12]

B. Accommodating Diversity

The introduction of the general mechanism for enhanced cooperation has been called a "Copernican revolution"[13] by some commentators and hailed as the way out of the alleged dilemma between enlargement and deepening integration "to strengthen the Union from within."[14] Others have warned of "constitutional chaos",[15] that is, a "blatant assault on,"[16] and "natural contradiction with"[17] the uniform application of Community law. Just like in law and in life, the correct answer lies somewhere between the antipodes of enhanced cooperation as the magic potion for the future success or European integration and a deadly poison leading to a constitutional heart attack. Instead, it appears as a pragmatic new institute which allows for limited asymmetrical progress in specific situations when the Member States cannot agree on the appropriateness of European action. Enhanced cooperation and the other forms of flexibility allow the accommodation of political diversity regarding the adequacy of specific integration projects within the existing institutional and legal framework of the European Union.

The initial introduction of asymmetry by the Maastricht Treaty illustrates this pragmatic character. It neither stemmed from the desire to establish a "hard federalist core" with its own institutional and legal structure besides the existing Treaty framework, nor followed the *à la carte*-logic of a principled freedom where Member States to pick and choose the policy areas in which they want to

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[12] The general mechanism for enhanced cooperation comprises specific rules for CFSP in Art. III-419(2) and 420(2) CT and is complimented by various forms of "asymmetric" defense cooperation in CT art. I-41, art III-310-312. A preliminary assessment is given by Matthias Jopp & Elfried Regelsberger, *GASP und ESVP im Verfassungsvertrag*, 26 INTEGRATIOQN 550, 552 (2003); Christian Deubner, *Verstärkte Zusammenarbeit in der verfassten Europäischen Union*, 27 INTEGRATION 274, 282 (2004) and THYM, *supra* note 10, at 162, 173.

[13] Vlad Constantinesco, *Les clauses de coopération renforcée*, 33 REVUE TRIMESTERIELLE DE DROIT EUROPEEN 751, 752 (1997) (quoting Renaud Dehousse).

[14] Guy Verhofstadt, Belgian prime minister, Speech to the European Policy Centre: A Vision for Europe (Sep. 21, 2000) (A few weeks before the Nice IGC), *available at*: http://www.europa.eu.int/futurum.

[15] Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET LAW REVIEW 17, 67 (1993), albeit not with regard to enhanced cooperation.

[16] Stephen Weatherhill, *'If I'd Wanted You to Understand I Would Have Explained It Better'*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY 21, 22 (David O'Keeffe & Patrick Twomey eds., 1999).

[17] Constantinesco, *supra* note 13, at 758.

participate. Granting a political opt-out to two Member States and obliging the others to participate in monetary union on the basis of the convergence criteria, was simply the only compromise on which the United Kingdom, which opposed monetary union in principle, and its continental partners, which argued for the equal participation of all, could agree. When the Schengen law and justice and home affairs were communitarized in Amsterdam, the Intergovernmental Conference (IGC) took up the model of individual opt-outs. At a first look, enhanced cooperation transcends this logic because it is not confined to specific Member States or subject matters, but rather characterized by a geographic and thematic openness. They neither give privilege nor exclude specific Member States and are *a priori* not limited to certain policy fields. However, a closer look at the procedural and substantive constraints illustrates a similar integrationist pragmatism, since they provide an abstract solution of political conflicts about the suitability of Union action. This may or may not occur at some point in the future during the legislative process.

First, the establishment of enhanced cooperation is always a last resort, if the Union as a whole cannot agree on a specific measure because one or more Member States oppose an action and block its adoption, (classic example: unanimous tax harmonization on the basis of Article 93, 94 EC; Article III-171, 173 CT[18]). It is explicitly required that the Council shall only embark on enhanced cooperation "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."[19] Second, enhanced cooperation is, in principle, a one-way street leading towards closer integration. It should "aim to further the objectives of the Union"[20] with the existing *acquis communautaire* being taboo for retrogression.[21] European laws adopted in its framework are regular European law and enjoy the same legal effects as any other Union law, except that they are limited in geographic scope.[22] Eventually, the decision to participate in enhanced cooperation may not be revoked, since the later withdrawal of the participating Member States was deliberately not foreseen – in obvious contrast to the extensive procedural rules on the authorization of enhanced cooperation and the later participation of the initial outs.

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[18] Indeed, former internal market Commissioner Frits Bolkestein supported the idea of harmonizing corporate taxation asymmetrically; *see Leader: Strange Bedfellows*, FINANCIAL TIMES, July 20, 2004.

[19] CT art. I-44(2); TEU art. 44a.

[20] CT art. I-44(1); TEU art. 43(a).

[21] CT art. III-416, "Any enhanced cooperation shall comply with the Constitution and the law of the Union"; more explicitly TEU art. 43(c): "respect the acquis communautaire."

[22] CT art. I-44(4); TEU art. 44(2).

Enhanced cooperation, therefore, does not reverse the integrationist status quo achieved in the past decades and continues the tradition of "ever closer union." The only break in the integration logic of the Union's founding years is the harmonious alignment of integrationist dynamics in some Member States with national political decisions to stay out of new projects. The latter may result from political disagreement over the orientation of the proposed action or the conviction that the issue under debate would better be dealt with at the national level. In any case, this acceptance of diversity heralds a new approach to European integration beyond the functionalism of economic integration. In the single market field, a similar reference to national interests, that is, the acceptance of difference appears *a priori* as illegitimate, since the single market is all about the removal of barriers to, or discriminations in trade between the Member States. Any call for permanent national opt-outs and privileges does therefore immediately provoke criticism of social dumping or protectionism.[23] Existing forms of differentiation in the single market sphere, therefore, regularly require an objective justification and are often subject to specific political or legal supervision through the Commission and/or the Court of Justice.[24]

The various forms of asymmetry transcend this de-politicized integration logic of the internal market and illustrate the Union's gradual transition from the functional integration logic of the internal market to political union. Instead of viewing European integration as a quasi-natural phenomenon with spill-overs to ever new policy areas, the democratically formulated policy preferences of individual Member States are preserved and explicitly recognized as legitimate. Correspondingly, the asymmetry of the European legal order focuses on new policy fields such as security and defense, justice and home affairs or, potentially, social affairs and tax harmonization. These policy fields are closely associated with the concept and the *finalité* of political union, while the core of the single market *acquis* and the fundamental freedoms are preserved as pan-European principles.[25] Asymmetry thus holds a remarkable "democratic potential." It allows respect for national democratic majorities, without this majority, as a European minority preventing the realization of the European majority preference.[26] It underlines the

[23] Such as the British opt-out from Maastricht's Agreement on Social Policy criticized for "social dumping" among others by Gisbert Brinkmann, *Lawmaking under the Social Chapter of Maastricht*, *in* LAWMAKING IN THE EUROPEAN UNION 239, 261 (Paul Craig & Carol Harlow eds., 1998).

[24] *See*, *supra* notes 3-8 (and accompanying text within this piece).

[25] On the latter aspect, *infra* section C.II.

[26] Armin von Bogdandy, *Europäische Prinzipienlehre*, *in* EUROPÄISCHES VERFASSUNGSRECHT 149, 180 (Armin von Bogdandy ed., 2003). For further explanations of asymmetry as an expression of the gradual transition of European integration from the functionalist integration logic of the single market to political union *see* THYM, *supra* note 10, at 342-8.

political maturity of European integration, when asymmetry allows division without fundamental rupture. Diversity of opinion over the future pace of the Union is explicitly recognized and accommodated in the overall framework of common rules and institutions.

C. "Flexibility" in Chains?

So far, enhanced cooperation has not contributed widely to the facilitation of European integration. Instead, the Constitutional Treaty undertakes the third reform of its legal regime without a single case of application besides the pre-existing Schengen Protocol, which is legally construed as a specialized form of enhanced cooperation.[27] The only occasion when recourse to the procedure was seriously discussed was after Silvio Berlusoni's initial refusal to agree to the framework decision on the European Arrest Warrant in December 2001. The alternative of enhanced cooperation as a "veto-buster" contributed to the softening of the Italian opposition.[28] The limited practical impact of enhanced cooperation should however not be misinterpreted as the absence of any potential. The last section argued that its introduction did not stem from an underlying drive for a general "asymmetrization" of the European legal order. Rather, it offers a pragmatic compromise out of specific situations in which Member States disagree on the suitability of Union action. Arguably, such a situation has not arisen so far, since most projects could be realized among all. Nonetheless, many commentators hold the Treaty regime for enhanced cooperation responsible for its practical irrelevance.[29] This contribution, in contrast, intends to show that its substantive constraints (subsection I.) and procedural requirements (subsection II.) are not an excessive limitation.

I. Substantive Constraints

A closer analysis reveals that most substantive requirements laid down in Articles I-44 and III-416-423 CT are declaratory confirmations of general principles of

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[27] *See* art. 1 Schengen Protocol (= Protocol No. 17 attached to the CT).

[28] *See* Chairman of the EP-Committee on Justice and Home Affairs Graham Watson, *Go Ahead on Arrest Warrant Without Italy*, FINANCIAL TIMES, Dec. 8, 2001. The debate on the asymmetric introduction of carbon dioxide taxes never got off the ground; *Europas Umweltschützer fordern ‚Öko-Schengen'*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 15, 2000. On corporate tax harmonization *see Leader: Strange Bedfellows, supra* note 18.

[29] *See* Giorgio Gaja, *How Flexible is Flexibility under the Amsterdam Treaty*, 35 COMMON MARKET LAW REVIEW 855, 870 (1998) (a criticism of the Amsterdam and Nice regimes); Wolfgang Wessels, *Die Vertragsreform von Nizza*, 24 INTEGRATION 8, 15 (2001) and Jo Shaw, *The Treaty of Nice: Legal and Constitutional Implications*, 7 EUROPEAN PUBLIC LAW 195, 202 (2001).

Community law. Among the hitherto "ten commandments" enshrined in EU Article 43(a)-(j), which are continued in different articles of Constitutional Treaty, the minimum threshold for Member State participation of one third is probably the most prominent and effective substantive constraint (excluding for example an enhanced cooperation of the "mythical" six founding members, which are often cited as the core of integration).[30] The numerous declaratory confirmations of general principles of Community law include the obligation to further the objectives of the Union and protect its interests.[31] Likewise, the obligation to comply with the Constitution and the existing *acquis* adopted with the participation of all Member States,[32] the necessary respect for the latter's competencies, rights and obligations[33] and the condition to remain within the limits of the powers of the Union in line with the principle of conferral, are self-evident features of secondary European law. However, this excludes the exclusive competencies.[34]

Any asymmetric realization of Union policies in the economic or social field will, however, be measured by the standard of Article III-416 CT that it "shall not undermine the internal market or economic, social and territorial cohesion." The legal interpretation of this clause defies easy definition and is further complicated by textual changes in the Constitutional Treaty which improve the literary quality of the text but blur its legal meaning. The Treaty of Nice is much clearer when it obliges enhanced cooperation not to undermine the internal market "as defined in Article 14(2) EC" and economic and social cohesion "in accordance with Title XVII EC". Read in combination with the said references, the Treaty of Nice commands compliance with the fundamental freedoms explicitly referred to in Article 14(2)

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[30] The Amsterdam Treaty had originally required the participation of the *majority* of Member States, while the Treaty of Nice lowered the criterion to *eight* Member States *in* TEU art. 43(g), (8 are the majority of 15, but about one third of 25). The Constitution now returns to a relative threshold of one third *in* CT art. I-44(2).

[31] CT art. I-44(1); TEU art. 43(a). The additional requirement of protecting the Union's interests and reinforcing the integration process does not constitute independent legal hurdles, since respect for them is arguably inherent in the Union's objectives and assessed during the complicated authorization procedure discussed below.

[32] CT art. III-416(1); TEU art. 43(b) and (c).

[33] CT art. III-417 and TEU art. 43(h); the rather unclear Amsterdam obligation to respect the "interests" of the non-participating Member States had already been deleted by the Treaty of Nice. The remaining obligation stems logically from the limited geographic scope of asymmetric Union law.

[34] Explicitly TEU art. 43(d) and, without explicit reference to the principle of conferral, CT art. I-44(1). The deletion of the explicit reference to the principle of attributed powers does of course not entail that they are not bound by the principle of conferral under CT art. I-11(1), (EC Treaty art. 5(2)) as suggested by Janis A. Emmanoulidisj & Claus Giering, *In Vielfalt geeint – Elemente der Differenzierung im Verfassungsentwurf*, 26 INTEGRATION 454, 457 (2003).

EC. Measures of "positive integration" such as the harmonization of national legislation in the environmental, social, tax or consumer protection field are therefore permitted as long as they respect the fundamental freedoms.[35] In this respect, asymmetry is again not treated any better or worse than regular Community law, which has to respect the fundamental freedoms as general principles of Community law alike.[36] In the same vein, the reference to economic and social cohesion read in combination with Title XVII EC guarantees the uniform continuation and financing of structural funds adopted on its basis.[37] The drafting history of the Constitutional Treaty suggests that the deletion of these references was motivated by stylistic considerations and did not intend a change of legal substance.[38]

The additional prohibition in Article III-416 CT to "constitute a barrier to or discrimination in trade between Member States" leads us even deeper into the eccentricities of European Treaty change and the challenge of multilingualism. Lack of space precludes a comprehensive presentation, but in short the following history supports my argument that the rule contains an additional obligation to respect fundamental freedoms and is therefore not as prohibitive as some commentators suggest.[39] The linguistic version of the Treaty of Amsterdam, *inter alia* in English and German, took up the wording of Article 30 EC and the Court's *Dassonville* jurisprudence and obliged enhanced cooperation (then known as *closer* cooperation) not to constitute a "discrimination or restriction of trade between the Member States."[40] Only the French version of the Amsterdam Treaty contained a different linguistic version and was, nonetheless, interpreted as a reference to the free movement of goods.[41] Comprehensibly, the French presidency based its reform

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[35] Elsewhere, I have given a more thorough analysis of this argument, including references to and discussion of possible alternative views. *See* THYM, *supra* note 10, at 68-9, 250-4.

[36] *See*, for instance, Case 240/83, Procureur de la République v. ADBHU, 1985 E.C.R. 539, para. 9.

[37] The transfer of structural funds such as the European Regional Development Fund (ERDF) into enhanced cooperation would have implied asymmetric financing in accordance with CT art. III-423, TEU art. 44a and would be in obvious conflict with the underlying principle of solidarity.

[38] The comment on the original proposal of a new art. J in TheEuropean Convention, CONV 723/03, (May14, 2003), at 20 simply states that the wording was taken from the Treaty of Nice.

[39] *E.g.* Armin Hatje, *Art. 11 EGV*, *in* EU-KOMMENTAR 11 (Jürgen Schwarze ed., 2000) ("entscheidend einschränkt").

[40] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communitites and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 art. 11(1)(e) and, similarly, Case 8/74, Procureur du Roi v. Benoît, 1974 E.C.R. 837, para. 7.

[41] Three commentators work in different languages. *See* Helmut Kortenberg (pseudonym), *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MARKET LAW REVIEW 833, 849 (1998); Rainer

proposals for the new Article 43(f) EU (now Article III-416 CT) on the French text of the Amsterdam Treaty during the IGC drafting the Treaty of Nice. The French presidency aligned the other linguistic versions to it, thereby eliminating the textual reference to Articles 28, 30 EC (Articles III-153-154 CT). Still, the drafting history and the absence of another convincing interpretation suggest that Article III-416 CT obliges enhanced cooperation to respect the free movement of goods.[42] Thus, the harmonization of national legislation on the environment, consumer protection, taxes and social standards is not generally excluded from the scope of enhanced cooperation, while the fundamental freedoms, as the "core" of the internal market, preserve a level-playing field of equality of Union citizens and economic actors.

II. Procedural Requirements

If the substantive constraints for enhanced cooperation are largely declaratory confirmations of general principles of Community law, then it cannot be implied that any enhanced cooperation supported by at least one third of the Member States will eventually be put into practice. Instead, the Treaties foresee a sophisticated authorization procedure which, like any decision-making procedure, is meant to feed different political opinions into a formalized outcome. With respect to the procedural requirements, the institutions will first assess compliance with the substantive constraints discussed above, whose adjudication is eventually left to the Court of Justice in cases of conflict.[43] But compliance with the largely declaratory legal constraints will probably not dominate the debate (although many academic observers tend to overstretch the implications of the substantive constraints and underestimate the role of political considerations). The main purpose of the authorization and participation procedures is the exchange of political pros and cons of asymmetric progress. Various procedural safeguards guarantee that the decision is not hasted but thoroughly debated, thereby facilitating that the Union as a whole agrees with the asymmetric project, including the non-participating

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Hofmann, *Wie viel Flexibilität für welches Europa*, 34 EUROPARECHT 713, 724 (1999); and Constantinesco, *supra* note 13, at 761.

[42] I have developed this argument in more detail in Thym, *supra* note 10, at 69-72. There, I also show that the additional prohibition of distortions of competition in CT art. III-416, TEU art. 43(f) should be interpreted in line with EC competition law, *i.e.* the Commission is obliged to asses and explain possible distortions in its decision (not) to propose the authorization of enhanced cooperation under CT art. III-419(1), (EC Treaty art. 11(1)), while judicial review of these complex economic evaluations is largely confined to an examination of the underlying facts and the legal consequences the Commission deduces therefrom.

[43] Any Member State or institution may challenge the authorization to establish an enhanced cooperation (or the refusal of the Commission to present a proposal) in accordance with the general rules on access to the Court.

Member States. More specifically, the authorization and participation procedures are modeled on the "Community method," albeit with some modifications.

First, the Commission's role as gatekeeper of Union action is extended to the authorization of enhanced cooperation, even if it may only table a proposal after a request from the Member States who want to cooperate.[44] This divergence from Community orthodoxy was explicitly sought for by the Commission, since it lays the potentially politically divisive initiative for the launch of the procedure on national capitals and allows the Commission to focus on its role as neutral guardian of the Community interest without bias towards the "ins" or the "outs." The Constitutional Treaty reinforces the supranational element in the authorization procedure by giving Parliament a similar right to block any enhanced cooperation it deems harmful to the integration process.[45] Even now, Parliament needs to consent to the authorization of asymmetric cooperation in areas where the adoption of individual laws does not foresee co-decision, such as tax issues and social policy. Parliament may possibly even use the consent requirement as leverage to introduce co-decision within the future enhanced cooperation in line with Article 422(2) CT. However, the Council's eventual authorized decision must be adopted by a qualified majority in accordance with Articles I-23(3), 44(2), III-419(1) CT. Thus, an individual Member State may not block the go-ahead for asymmetric action, contrary to the Parliament and the Commission.[46]

It should be emphasized again that during the authorization procedure the institutions do not only asses compliance with the substantive constraints, but also exercise original political discretion on the suitability of asymmetric action. This political leeway contrasts with the facilitation of the later participation of an initial out, which is crucial to prevent asymmetric division from resulting in political rupture. Therefore, the European Treaties have always guaranteed the "essential principle of openness."[47] For example, any closer cooperation shall initially "be open to all Member States" (Article III-418(1) CT; Article 43(f), 43b EU) and the

[44] CT art. III-419(1); EC Treaty art. 11(1); the specific procedure for criminal matters in Art. 40a EU is given up in the Constitution, but specificities continue in CFSP.

[45] Art. III-419(1) CT goes beyond TEU art. 45 and the Nice version of EC Treaty art. 11(2).

[46] The vote by qualified majority corresponds to EC Treaty art. 11(2) EC, while the Treaty of Nice's additional *renvoi* to the European Council without veto option has been abolished (under the Treaty of Amsterdam any Member State could veto the decision at this level). Only for CFSP unanimity is required under CT art. I-23(3), III-419(2). On the harmonization of criminal law see the specific rules *in* CT art. III-270(3), (4) and CT art. III-271(3), (4).

[47] Claus Dieter Ehlermann, *Differentiation, Flexibility, Closer Co-operation*, 4 EUROPEAN LAW JOURNAL 246, 254 (1998).

Commission shall, upon request and without the participation of any other institution, "confirm the participation of the Member State concerned" (Article III-420(1) CT). The Constitutional Treaty therefore seems to exclude any political discretion on the side of the Commission, let alone a veto of the "ins". The non-fulfillment of "conditions of participation laid down in the European authorization decision" is the only ground on which the desire to participate may be rejected.[48] The concept of participation criteria is modeled on the convergence criteria of monetary union and the Schengen evaluation procedure. However, this ignores the political character of asymmetry, which says that participation shall *not* be obligatory, if the criteria are met like in monetary union or under the Schengen system.[49] One may therefore question the rationale behind the new participation conditions, since questions of political preference will eventually continue to characterize the composition of asymmetric integration groups, with the initial outs having no right to participate.

D. Asymmetric Constitutionalism

The European Union is, much more than the nation state, a creation of the law whose abstract equality and normative neutrality have always been crucial tools used to overcome the national differences between European states and integrate them into a supranational legal order. In other words, "a Community based on the rule of law,"[50] or as Hallstein observed thirty years ago: "equality results in unity – this is the rationale behind the Treaty of Rome."[51] It has been mentioned at the outset that there is an undeniable tension between the different forms of asymmetry and the concept of legal and political unity which has characterized the discourse on European integration for many years. This focus on the unifying, centripetal elements was crucial to overcome the divisions of the past and "forge a common destiny."[52] But given the advance of European integration towards political union, the time had eventually become ripe for the integration of the existing diverse and potentially centrifugal forces into the European constitution by

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[48] *See* Treaty Establishing a Constitution for Europe art. III-418(1) and art. III-420(1).

[49] Comment on European Convention, *supra* note 38, at 10, 22 explicitly refer to monetary union and the Schengen evaluation procedure under Art. 3(2) of the 2003 Act of Accession (which is no example of asymmetry, since the new Member States are – contrary to the UK and Ireland – members of the Schengen group, with the duration of the transition period depending on technical adaptations; *see* Thym, *supra* note 10, at 114-8).

[50] Opinion Case C-1/91, *European Economic Area*, 1991 E.C.R. I-6079, para 21.

[51] WALTER HALLSTEIN, DER UNVOLLENDETE BUNDESSTAAT 33 (1969) (author's translation).

[52] CT, Preamble Recital 3.

diffusing latent tensions and uniting Europe in diversity.[53] The achievement of the specific Treaty regime of enhanced cooperation discussed above, and indeed of asymmetry in general, is their harmonious integration into the existing institutional and legal order of the European Union, thereby allowing it the pursuit of its constitutional aspirations.

First, asymmetry continues the European logic of integration through law. Its constitutional norms have been introduced into its legal order through successive Treaty amendments, which were ratified by national Parliaments and are, therefore, an integral part of European primary law. They share its hierarchical primacy over secondary European law. Scope, substantive constraints of and procedural requirements for enhanced cooperation and other forms of asymmetry are explicitly laid down in detailed Treaty provisions. One may criticize them for their lack of readability, but they are of no greater or lesser legal value than any other rule of the Constitutional Treaty. These characteristics, which did not characterize the legally dubious 1992 Edinburgh compromise on Denmark following its initial rejection of the Maastricht Treaty, and the opaque legal construction of the Agreement on Social Policy, which were both heavily criticized by Curtin in her comment on a Europe of "bits and pieces" (with both of these legal problem areas being "resolved" by the Treaty of Amsterdam). Interestingly, the most explicit constitutional rule on asymmetry of the time, the British opt-out from monetary union, was not prominently featured among Curtin's points of criticism.[54]

Long before the present debate on European asymmetry, Hans Kelsen had recognized the possible need for substantive differentiation within a single legal order held together by its constitution:

> When individual rules of one legal order do have a divergent geographic scope of application, different normative regimes apply to different parts of that order. The formal unity of a legal unity does not necessarily entail substantive uniformity... Among the various reasons calling for differentiated geographic

[53] *See* von Bogdandy, *supra* note 26, 184-202, and Armin Hatje, *Grenzen der Flexibilität einer erweiterten Europäischen Union*, 40 EUROPARECHT 148 (2005) (on the asymmetric accommodation of diversity and section B above and on the sequence of the principles of unity and diversity among Europe's "constitutional principles").

[54] Curtin, *supra* note 15, at 51-2 only debates whether the present EC TreatyArt. 10 may be invoked to oblige the UK to rejoin the advance group at some point at the future. Unfortunately, ANNE PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 449 (2001) extends this criticism to later forms of asymmetry such as enhanced cooperation without analyzing their difference in form and substance.

> treatment ... greater geographic reach and heterogeneity of living conditions usually entail more specificity.[55]

Indeed, the European Union is not the only federal entity with asymmetric arrangements: At the height of the nation state, historic forms of asymmetry, such as the Austrian-Hungarian Empire, were usually associated with secession and eventual break-up. This led Georg Jellinek to conclude that they were "elements of an incomplete or disorganized state."[56] But modern experiences with asymmetric federalism are much more positive. Various degrees of asymmetric federalism and quasi-federalist regionalization in the United Kingdom, Canada, Spain, Belgium and Finland have arguably contributed to the stabilization of divisive conflicts and the accommodation of diversity in obvious resemblance to asymmetry in the European Treaties.[57]

The legal unity of European law as a single legal order united by the Constitutional Treaty and encompassing asymmetric and symmetric law alike is primarily of dogmatic interest. In practice, the preservation of the distinctive features of European law is pivotal for the maintenance of its supranational character. It is therefore central to the integration of asymmetry into the European constitutional order that it preserves its principles, such as the primacy of European law, its direct effect and uniform interpretation in cases of limited geographic scope, the commands for respect of the fundamental freedoms and the principle of non-discrimination, and the call for mutual respect and loyalty of the Union and the Member States, even if some of the latter are not bound by its rules, but maintain the implied external powers of the Union.[58] If enhanced cooperation and the other forms of asymmetry had transcended these characteristics, European law may well continue to constitute a single constitutional order, but its distinguishing supranational features on which its success is arguably based would have been lost. The procedural and legal limits flowing from the preservation of Europe's constitutional principles may in many cases prevent immediate groupings of some Member States. This would tempt them to cooperate outside the legal and

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[55] HANS KELSEN, ALLGEMEINE STAATSLEHRE 165 (1925) (author's translation).

[56] GEORG JELLINEK, STAATSLEHRE 642 (2nd ed. 1905) (author's translation).

[57] *See* the overview FLEXIBILITY IN CONSTITUTIONS, (Annette Schrauwen ed., 2nd ed. 2002).

[58] The maintenance of these characteristic principles of EU law stems from the deliberations above and is dealt with *in* THYM, *supra* note 10, at 233-268.

institutional framework of the Union on the basis of classic international law, but preserve the identity of the European Union and its constitutional order.[59]

A second important and arguably indispensable component of European constitutionalism is the single institutional framework and the respective roles of the institutions under the Community method and its deviations. Indeed, questions of institutional design and procedural arrangements have always been a means of organizational unity building, channeling the different political positions towards agreement. This applies to inter-institutional procedural rules in the same way it does to intra-institutional debates in the Parliament, the Commission and the Council. It is therefore essential that the authorization and participation procedures for asymmetric arrangements continue the path of procedural equation, reflecting the positive experiences with the Community method (*supra*, section C.II). Moreover, the regular institutional rules do of course apply inside enhanced cooperation when individual measures are debated and eventually adopted. Thus, an agreement for a framework of laws on tax harmonization or consumer protection binding 22 Member States does, for example, require compliance with the regular decision-making procedures.[60] This is because the adoption of asymmetric laws must, as any other European law, comply with the Constitutional Treaty and its procedural requirements.[61] Existing specific institutional regimes in asymmetric policy areas, such as monetary union or justice and home affairs are not conceptually related to their asymmetry and would not change if the United Kingdom and the other outs would joined the avant-garde and adopt a single currency. Contrary to international law-style cooperation outside the institutional and legal framework of the Union asymmetry is not a backdoor that allows a deviation from the regular decision-making procedures and the Community method.[62]

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[59] *See* Bruno de Witte, "*Old Flexibility*", *in* CONSTITUTIONAL CHANGE IN THE EU, *supra* note 6, at 31-58; THYM , *supra* note 10, at 181-202, 297-320, (on the cooperation of some Member States the important contribution).

[60] Which *in casu* are the ordinary legislative procedure (hitherto known as co-decision) for consumer protection (Treaty Establishing a Constitution for Europe art. I-34(1), III-235) a unanimous Council decision after consultation of the Parliament for tax harmonization (Treaty Establishing a Constitution for Europe art. III-171).

[61] Treaty Establishing a Constitution for Europe art. III-416; the specific (and declaratory) obligation to respect "the relevant institutional provisions" of the Treaties in TEU art. 44(1) was not integrated in the constitutional Treaty.

[62] As remarked incorrectly by Werner Schröder, *Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften*, *in* von Bogdandy, *supra* note 26, at 413-4. Unfortunately, the wording of Treaty Establishing a Constitution for Europe Art. I-44(1), TEU art. 43 may be misunderstood in this respect when it refers to enhanced cooperation allowing some Member States to "make use" of the Union's institutions and procedures.

Eventually, it should also be highlighted that the intra-institutional rules on composition, deliberation and voting are only marginally adapted in cases of asymmetry. The unchanged institutional set-up of the supranational institutions Commission, Parliament and Court of Justice is of particular importance, because it symbolizes and enhances the integration of asymmetry into the Union's single constitutional order. While the unaffected composition of the Court and the Commission is conceptually not surprising in light of the formal independence of its members, the continued voting rights of all MEPs may be contested in the same way as in other asymmetric federal settings.[63] It may seem undemocratic not to suspend the voting rights of MEPs elected by citizens to whom a law under debate will not apply may seem undemocratic. However, it serves as a unitary element guaranteeing that the potential objections of the outs are taken seriously. In the same sense, the equal participation of all Member States in the deliberations of the Council and its working groups (with the exception of the Euro Group outside the Treaty framework[64]) guarantees a continued dialogue. In contrast, the suspension of a national right to vote on individual measures in the Council is the natural consequence of the legitimate national decision not to participate.[65] The otherwise unchanged intra-institutional set-up guarantees that the legal differentiation of asymmetry does not lead to political rupture.

E. Outlook: New Dynamics?

The integration of enhanced cooperation and other forms of flexibility in the European constitutional order allows Europe to accommodate diversity and adopt laws with limited geographic scope without political exclusion and rupture. Besides the existing forms of asymmetry the general mechanism for enhanced cooperation remains an offer which the Union may have recourse to when the regular legislative process leads to a dead end. In this respect, the Constitutional Treaty does not entail fundamental changes, because the substantive constraints and procedural requirements of enhanced cooperation remain largely unchanged. But in one respect, the Constitutional Treaty will considerably enhance the attractiveness of asymmetric arrangements. At the very last moment, the European Convention introduced a clause on the asymmetric introduction of qualified

[63] Such as the classic British debate on the "West Lothian Question" concerning the voting rights of Scottish MPs in matters devolved to the Scottish Parliament (but decided in Westminster for England).

[64] CT Protocol No. 12 does not change its legal nature as an informal "talking shop" with decisions being taken in the regular Ecofin Council; THYM, *supra* note 10, at 143-9.

[65] CT art. I-44(3); TEU art. 44(1).

majority voting within asymmetric arrangements.[66] Thus, some Member States may for example embark on the harmonization of tax law, including qualified majority voting the Council without non-participating Member States being able to unilaterally veto this move. Again, it remains to be seen whether developments in the years ahead will activate this potentially wide-ranging clause. It underlines the continued importance of enhanced cooperation as a means of maintaining the dynamics of the European Union in the age of the Constitutional Treaty. If the latter fails in the ratification process, the Treaties' existing mechanism for enhanced cooperation also provides a means for preserving the limited integration dynamics inside the present institutional and legal framework of the Union.

[66] CT art. III-422(2) was first proposed in the text submitted to the Convention for its *last* working session – one day before the text was solemnly adopted by consensus; The European Convention, CONV 847/03, (July 9, 2003). Its reference to Treaty Establishing a Constitution for Europe art. I-44(3) clearly indicates that the *outs* may not block the move towards qualified majority voting.