Divorce, European Style: The First Authorization of Enhanced Cooperation

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Council Decision of July 2010 to authorize enhanced cooperation for the first time – Planned Regulation on conflicts of law in divorce – Analysis of the application of the substantive and procedural rules applying to the authorization of enhanced cooperation in this case – Links between the planned legislation on this issue and other EU or international rules on related topics – Broader impact of the decision upon the EU legal order

Introduction

The European Union has, for the first time, taken a decision to authorize *ad hoc* 'enhanced cooperation' among some (but not all) member states by means of a secondary law decision.[1] The subject-matter of the authorization is, appropriately enough, the issue of divorce. In particular, the Council has authorized a group of member states to adopt rules on conflict-of-law in divorce proceedings, known in practice as the 'Rome III' Regulation.

This paper examines the background to the new Decision and examines whether it meets the legal criteria for the start of enhanced cooperation as well as the broader constitutional context of the Council's decision.

Background

The primary law rules on 'flexibility'

After much public discussion, beginning in the 1970s, of the prospect of establishing various forms of flexibility or differentation among member states as re-

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gards European integration,[2] and the launch of several projects involving fewer than all member states outside the scope of the Community process,[3] the original Treaty on European Union (TEU) provided for opt-outs for certain member states within the Community legal order as regards specific policy areas: social policy and economic and monetary union. After further public discussion of this issue in light of the planned enlargement of the EU, the Treaty of Amsterdam provided for general rules for the possible authorization of 'closer cooperation' by some but not all member states within the EU legal framework, along with opt-outs for certain member states as regards the abolition of internal border controls, the integration of the Schengen *acquis* into the EU legal order, and specific aspects of Justice and Home Affairs (JHA) law – namely immigration, asylum and civil law (these areas were known in practice as 'Title IV', i.e., Title IV of Part Three of the EC Treaty).[4] Conversely, the British opt-out relating to social policy was repealed by the Treaty of Amsterdam.

The rules on potential closer cooperation comprised general rules set out in Title VII of the TEU (Articles 43-45, previous TEU), along with specific rules for the 'first pillar' (Community law) set out in the EC Treaty and for the 'third pillar' (policing and criminal law) set out in Title VI of the TEU.[5] There was no provision for closer cooperation as regards the 'second pillar' (EU foreign policy), but rather the possibility of 'constructive abstention'.[6] The general rules were quite strict, including requirements that closer cooperation could only be authorized as a 'last resort', must involve a majority of member state, could not affect the '*acquis communautaire*' or any measures adopted on the basis of other provisions of the Treaties, could not 'affect the competences, rights, obligations and interests of those Member States which do not participate therein', and had to be open to all member states.[7] There were further specific rules applicable to the first and third pillars; as regards the first pillar, closer cooperation could not concern areas within EC exclusive competence (not defined), could not 'affect Community policies, actions or programmes', 'concern the citizenship of the Union or discriminate between nationals of member states', 'constitute a discrimination or a restriction

[2] *See*, for instance, chapters 1 and 2 of F. Tuytschaever, *Differentiation in European Union Law* (Hart, 1999) and ch. 3 of A. Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* (Palgrave, 2002).

[3] Most notably the European Monetary System and the Schengen Conventions.

[4] On these rules, *see*, for instance, ch. 3 of Tuytschaever and ch. 4 of Stubb (both *supra* n. 2), as well as S. Weatherill, "'If I'd Wanted You to Understand I Would Have Explained it Better": What is the Purpose of the Provisions on Closer Cooperation Introduced by the Treaty of Amsterdam?', in D. O'Keeffe and P. Twomey, *Legal Issues of the Amsterdam Treaty* (Hart, 1999), p. 21.

[5] *See* respectively Art. 11 EC and Art. 40 TEU, before the entry into force of the Treaty of Nice.

[6] Art. 23(1), previous TEU.

[7] Art. 43(1) TEU, before the entry into force of the Treaty of Nice.

of trade between member states' or 'distort the conditions of competition between the latter', and had to remain within the limits of EC powers.[8]

Authorization for closer cooperation would in either the first or third pillar be granted by the Council, acting by a qualified majority vote (QMV), but any Council member could oppose this vote 'for important and stated reasons of national policy', in which case the Council, acting by QMV, could refer the issue to member states' leaders for a decision by unanimity.[9] Within the first pillar, the proposal to launch closer cooperation would have to be made by the Commission after a request from a group of member states; the European Parliament would have to be consulted.[10] There was a special procedure for member states to join closer cooperation in progress.[11]

The closer cooperation provisions set out in the Treaty of Amsterdam were never used in practice.[12] Due to misgivings about their feasibility, these provisions were renegotiated as part of the Treaty of Nice, at which point they were redubbed the 'enhanced cooperation' rules.[13] The revised provisions abolished the possible 'emergency brake' which could be pulled by any member state to block the authorization of first or third pillar enhanced cooperation;[14] included rules on enhanced cooperation in the field of foreign policy;[15] gave the European Parliament power of assent over the authorization of any first pillar enhanced cooperation which fell within the scope of the co-decision procedure; altered the threshold to launch enhanced cooperation from a majority of member states to eight mem-

[8] Art. 11(1) EC, before amendment by the Treaty of Nice.

[9] Art. 11(2) EC and Art. 40(2) TEU, before amendment by the Treaty of Nice.

[10] Art. 11(2) EC, before amendment by the Treaty of Nice. The third pillar rules (ibid.) provided for a more limited involvement of the EP and Commission.

[11] *See* Art. 11(3) EC and Art. 40(3) TEU, before amendment by the Treaty of Nice.

[12] *See* J. Shaw, 'Enhancing Cooperation After Nice: Will the Treaty Do the Trick?', in M. Andenas and J. Usher (eds.), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Hart, 2003), p. 207 at p. 217.

[13] The revised general rules were still set out in Title VII (Arts. 43-45) of the previous TEU, which now included Arts. 43a, 43b and 44a. The revised first pillar rules were set out in Arts. 11 and 11a EC, while the revised third pillar rules were set out in Arts. 40, 40a and 40b of the previous TEU. On the Nice provisions, *see* Shaw, ibid.; Stubbs (*supra* n. 2), ch. 5; and J. De Areilza, 'The Reform of Enhanced Cooperation Rules: Towards Less Flexibility?', in B. de Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001), p. 27.

[14] Art. 11(2) EC and Art. 40a(2), previous TEU. It was still possible for an individual Member State to insist upon discussion of a proposal to launch enhanced cooperation at the European Council, but the latter body had no power to block the authorization.

[15] Arts. 27a to 27e, previous TEU. Enhanced cooperation in foreign policy is not discussed in this article.

ber states;[16] and softened the substantive conditions to which the authorization of enhanced cooperation was subject. On the last point, this meant in particular that enhanced cooperation measures only had to 'respect' the *acquis communautaire* and other EU measures, rather than 'not affect' them;[17] that enhanced cooperation measures could not 'undermine' the internal market or economic or social cohesion, in place of the prior requirements that it not 'affect' EC policies et al., concern EU citizenship or discriminate between the nationals of member states;[18] and that enhanced cooperation no longer had to avoid affecting the 'interests' of non-participating member states.[19] The requirement that enhanced cooperation could only be undertaken as a 'last resort' was retained, but further explained.[20] It was also specified that enhanced cooperation measures did not form part of the EU's *acquis*.[21]

Despite the softening of the substantive and procedural conditions needed to authorize enhanced cooperation, as well as the enlargement of the Union in 2004 and 2007 (which had triggered advance fears among some member states that enhanced cooperation would be necessary in order to avoid a slowdown in EU integration), the enhanced cooperation rules in the Treaty of Nice were never used. Their use was seriously considered in 2007 when a qualified majority of member states supported the adoption of a proposal on Framework Decision on criminal suspects' procedural rights,[22] but a small group of member states exercised a veto on the proposal. However, there was insufficient support among the member states supporting the proposal to go ahead with the measure on the basis of enhanced cooperation.[23]

But even though no enhanced cooperation was ever approved before the entry into force of the Treaty of Lisbon, the EC Treaty provisions on the authorization

[16] Art. 43(g) TEU (Nice); *see* previously Art. 43(1)(d) TEU (Amsterdam). This change had no immediate impact, since eight member states anyway constituted a majority of the fifteen member states; rather it was obviously aimed at facilitating enhanced cooperation once the EU enlarged further, as it did in 2004 and 2007.

[17] Compare Art. 43(1)(e) TEU (Amsterdam) with Art. 43(c) TEU (Nice).

[18] Art. 43(e) TEU (Nice); *see* previously Art. 43(1)(b) and (c) EC (Amsterdam). The condition relating to trade barriers or discrimination in trade, or distortions of competition, was retained (Art. 43(f) TEU (Nice); compare to Art. 11(1)(e) EC (Amsterdam)).

[19] Art. 43(h) TEU (Nice); *see* previously Art. 43(1)(f) TEU (Amsterdam). Enhanced cooperation still had to 'respect' (rather than 'not affect') the 'competences, rights and obligations' of the non-participants.

[20] Art. 43(a) TEU (Nice), replacing Art. 43(1)(c) TEU (Amsterdam). The revised provisions now specified that this condition was satisifed when it was 'established within the Council that the objectives of such cooperation cannot be attained within a reasonable period' by (as before) applying the normal rules in the Treaties.

[21] Art. 44(1) TEU (Nice).

[22] COM(2004) 328, 28 Apr. 2004.

[23] *See* the Press Release of the June 2007 JHA Council.

of member states to join enhanced cooperation in progress *were* used,[24] because those provisions applied also to the authorization of the UK or Ireland to join immigration, asylum or civil law measures which had already been adopted, pursuant to the special 'Title IV' Protocol on those member states' opt-outs from this area. In practice, the Commission quickly authorized those member states' participation in such measures on five separate occasions.[25] On the other hand, it should also be noted that there were disputes about the UK's exclusion from certain measures (arguably) building upon the Schengen *acquis* in which it wished to participate, but was prevented from participating in by the Council.[26]

This brings us to the Treaty of Lisbon, which amended the enhanced cooperation provisions again. The relevant provisions now comprise a single Article of the TEU and a special Title in the Treaty on the Functioning of European Union (TFEU).[27] The revised rules include the provisions discussed already,[28] except that the threshold for the number of particpating member states has been increased to nine;[29] the specific rules for the third pillar have been merged into the first pillar rules;[30] the European Parliament now has the power of consent over all authorizations of enhanced cooperation (except those relating to foreign policy);[31] in the event that the Commission does not approve a member state's application to join enhanced cooperation in progress, the member state concerned can (in

[24] Art. 11a EC (Nice).

[25] The Commission authorized Ireland to participate in Dir. 2001/55 on temporary protection (*OJ* [2001] L 212/12), Reg. 1030/2002 on uniform residence permits (*OJ* [2002] L 157/1), and the Decision establishing a Migration Network (*OJ* [2008] L 131/7). *See* respective Commission Decisions: *OJ* [2003] L 251/23; Decision C(2007)4589/F of 11 Oct. 2007 (not published in the *OJ*); and *OJ* [2009] L 138/53. The Commission authorized the UK to participate in Regs. 593/2008 on conflict of law in contract (Rome I Reg.) and 4/2009 on maintenance (respectively *OJ* [2008] L 177/6 and *OJ* [2009] L 7/1), by means of Decisions in *OJ* [2009] L 10/22 and *OJ* [2009] L 149/73.

[26] Cases C-77/05 *UK* v. *Council* [2007] *ECR* I-11459, C-137/05 *UK* v. *Council* [2007] *ECR* I-11593, and C-482/08 *UK* v. *Council*, judgment of 26 Oct. 2010 (nyr). The UK lost all three cases.

[27] Art. 20, revised TEU (Title IV of that Treaty) and Arts. 326-334 TFEU (Title III of Part Six of that Treaty). For comments on the new provisions, *see* M. Dougan, 'The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications', in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (Asser, 2009), p. 157, and F. Amtenbrink and D. Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation', in *idem*, p. 181.

[28] Note that the Treaty now defines the 'exclusive competence' of the EU: Art. 3 TFEU.

[29] Art. 20(2), revised TEU.

[30] There are still some distinct rules for enhanced cooperation in foreign policy (Arts. 329(2) and 331(2) TFEU), which are not further discussed here.

[31] Art. 329(1) TFEU. The possibility of a member state demanding a discussion at the European Council has been dropped.

effect) appeal to the Council for authorization to join;[32] and it is possible for the member states participating in enhanced cooperation to change the decision-making rules applicable to the adoption of measures in the relevant area as regards themselves.[33]

The Treaty of Lisbon also amended other rules relevant to differentiation among member states, in particular the JHA opt-outs for the UK, Ireland and Denmark and the rules relating to defence and monetary union. Furthermore, there are now special rules providing for fast-track authorization of enhanced cooperation as regards certain criminal law and policing issues, in the event of either a veto or the use of an 'emergency brake' as regards a proposal in the relevant areas.[34]

EU legislation on divorce

The European Union first drew up a measure on divorce issues in 1998, in the form of the 'Brussels II Convention',[35] which regulated the issue of *jurisdiction* for divorce, rather than the *choice of law*, which is the subject of the 'Rome III' proposal. This measure was then replaced by an EC Regulation (known informally as the 'Brussels II' Regulation) shortly after the entry into force of the Treaty of Amsterdam,[36] in light of the EC's acquisition of competence over this matter following the entry into force of that Treaty. The Brussels II Regulation was amended in 2003 to incorporate more provisions relating to children.[37] Furthermore, in 2009 the EC adopted a Regulation governing maintenance proceedings,[38] including, *inter alia*, rules on conflict of laws in maintenance, by means of incorporating the rules on this issue set out within the Protocol to the Hague Convention on maintenance proceedings.[39]

[32] Art. 331(1) TFEU; the Treaty also now specifies that the Commission 'shall' authorize participation if the relevant conditions are met.

[33] Art. 333 TFEU. The participating member states must be unanimous making this decision, but there is no requirement of consent by the EP or control by national parliaments (compare to Art. 48(7), revised TEU).

[34] Arts. 82(3), 83(3), 86(1) and 87(3) TFEU. These provisions have not yet been used. According to these procedures, enhanced cooperation would automatically be authorized (if requested) if decision-making is blocked and if a dispute settlement process in the European Council is unsuccessful. Only the requirement of a minimum of nine participating member states would apply.

[35] *OJ* [1998] C 221/1.

[36] Reg. 1347/2000, *OJ* [2000] L 160/19.

[37] Reg. 2201/2003, *OJ* [2003] L 338/1.

[38] Reg. 4/2009, *OJ* [2009] L 7/1.

[39] The EC concluded this Protocol without the participation of its member states (*OJ* [2009] L 331/17). It was assumed that the EC was exclusively competent to do so by analogy with *Opinion 1/2003* [2006] *ECR* I-1145. Note that the UK is not bound by the rules in the Reg. relating to conflict of law.

These measures fell within the scope a distinct institutional framework: 'Title IV', dealing with immigration, asylum and civil judicial cooperation issues.[40] This point is relevant because these measures therefore do not apply to Denmark, which has a complete opt-out from Title IV measures, and the UK and Ireland had to decide whether to opt-in (they did in all cases).[41] As for decision-making, issues relating to family law were (and still are) subject to unanimity in the Council and consultation of the European Parliament.[42] Until the entry into force of the Treaty of Lisbon, the jurisdiction of the Court of Justice on these matters was also limited, in that only final courts could send questions for a preliminary ruling in Title IV matters. Nonetheless, the Brussels II Regulation has been the subject of eleven references from national courts,[43] of which only three concerned jurisdiction over divorce proceedings (the others concerned jurisdiction over parental responsibility).[44]

It should also be noted that the EU has adopted legislation concerning the choice of law in other areas: contractual liability generally, non-contractual liability generally, and insolvency proceedings.[45] Also, the Commission has proposed a Regulation setting out choice of law rules relating to inheritance.[46]

The absence of any EU measure on the conflict of laws in divorce cases is parallelled by the absence of any measure on this issue in any other international forum (most notably the Hague Conference, but also the Council of Europe).[47]

[40] For an overview, *see* generally ch. 8 of S. Peers, *EU Justice and Home Affairs Law*, 3rd edn. (OUP, forthcoming early 2011).

[41] As regards the maintenance Reg, the UK opted in only after the adoption of the Reg. (*supra* n. 25).

[42] *See* the current Art. 81 TFEU, as amended by the Treaty of Lisbon, and previously Art. 67(5) EC, inserted by the Treaty of Nice. Prior to the Treaty of Nice this rule applied to the adoption of all EC legislation on civil judicial cooperation.

[43] Cases: C-435/06 *C* [2007] *ECR* I-10141; C-68/07 *Sundelind Lopez* [2007] *ECR* I-10403; C-523/07 *A* [2009] *ECR* I-2805; C-168/08 *Hadadi* [2009] *ECR* I-6871; C-195/08 *Rinau* [2008] *ECR* I-5271; C-256/09 *Purrucker I* (judgment of 15 July 2010, nyr); C-312/09 *Michalias* (order of 17 June 2010); C-403/09 PPU *Detiček*, judgment of 23 Dec. 2009, nyr; C-211/10 PPU *Povse*, judgment of 1 July 2010, nyr; C-296/10 *Purrucker II*, judgment of 9 Nov. 2010, nyr; and C-400/10 PPU *McB*, judgment of 5 Oct. 2010, nyr.

[44] These cases were *Sundelind Lopez*, *Hadadi* and *Michalias* (all ibid.).

[45] *See* respectively Regs 593/2008 (*supra* n. 25), 864/2007 (*OJ* [2007] L 199/40) and 1346/2000 (*OJ* [2000] L 160/1). The former Reg. replaced the Rome Convention on the same subject. None of these measures apply to family law issues.

[46] COM(2009) 154, 14 Oct. 2009.

[47] It should be noted that the choice of law over *parental responsibility* is however the subject of a 1996 Hague Convention (which also addresses other issues relating to parental responsibility), which the EC has authorized its member states to sign and ratify: *see OJ* [2003] L 48/1 and *OJ* [2008] L 151/36. As of 16 Nov. 2010, 16 member states had ratified this Convention: Bulgaria, Cyprus, the Czech Republic, Estonia, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovakia, Slovenia and Spain. It had also been ratified by 11 non-member states.

Due to its conviction that the adoption of EU rules on this issue would simplify life for EU citizens obtaining a divorce (where there are cross-border elements to that divorce, such as movement between member states or different nationalities of the spouses), the Commission issued a Green Paper on this issue in 2005.[48] The Green Paper also addressed the issue of jurisdiction over divorce to a limited extent, due to the Commission's concern that the Brussels II rules on this issue were producing in some cases a 'rush to court', i.e., a race between estranged spouses to file for divorce first in a jurisdiction which would apply a choice of law which was most favourable to one spouse at the cost of the other.

Taking account of responses to the Green Paper, in 2006 the Commission proposed a Regulation on this issue,[49] which consisted entirely of amendments to the Brussels II Regulation, not only inserting a new chapter on choice of law rules but also amending the rules on jurisdiction. The UK and Ireland opted out of this proposal, and Denmark could not opt in to it. However, it proved impossible to reach unanimous agreement on the proposal even among a limited group of 24 member states, and it was clear that a deadlock had been reached by June 2008, although most member states were able to agree on a text.[50] Since a number of member states wanted nevertheless to see the adoption of rules on conflict of laws in divorce, even among a more select group of member states if necessary, they decided to push for the adoption of this proposal pursuant to the rules on 'enhanced cooperation'. First of all, the Council formally established that there was no prospect of attaining the objectives of this proposal within a reasonable period by using the provisions of the Treaties.[51] Secondly, a group of member states also made the required formal request to the Commission to make a proposal for enhanced cooperation.[52]

For awhile, it seemed that the Commission was unlikely to respond favourably to this request. In any event the Commission did not issue a formal response – even though the Treaty requires it to do so – for nearly two years. However, with the entry into force of the Treaty of Lisbon in December 2009 and (probably more importantly) the appointment of a new Commissioner in February 2010 (Justice Commissioner Viviane Reding), the proposal was quickly 'dusted off',

[48] COM(2005) 82, 14 March 2005.

[49] COM(2006) 399, 17 July 2006.

[50] The text as agreed by most member states is in Council Doc. 9712/08, 23 May 2008. For the EP's part, the EP plenary adopted the Gebhardt report (A6-0361/2008), suggesting some changes to the text, on 21 Oct. 2008.

[51] JHA Council Press Release, June 2008 and Council Doc. 9985/08, 29 May 2008, pursuant to Art. 43(a), previous TEU (now Art. 20(2), revised TEU)). *See also* JHA Council Press Release, July 2008 and Council Doc 11984/08, 18 July 2008.

[52] *See* Art. 11(1) EC (now Art. 329(1) TFEU).

and the Commission proposed simultaneously both the authorization of enhanced cooperation and a new version of the Rome III proposal itself in March 2010.[53]

The JHA Council agreed very quickly on the authorization of enhanced cooperation, in June 2010.[54] The authorization decision was then formally adopted by the Council in July 2010,[55] after the European Parliament's consent was granted in mid-June. While eight member states had initially requested the Commission in 2008 to make a proposal (Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia), joined soon by two more (Bulgaria and France), Greece later withdrew its request. After the Commission's proposal to authorize enhanced cooperation, Germany, Belgium, Latvia, Malta and Portugal also joined the request, adding up to fourteen member states and therefore including a majority of member states. Denmark, Poland and Sweden abstained on the decision to authorize enhanced cooperation, but no member state voted against it;[56] Finland made a declaration, stating that enhanced cooperation was better than cooperation outside the EU framework, but regretting that more flexibility had not been forthcoming to satisfy the concerns of all member states, and that enhanced cooperation was being launched in the field of family law, 'which is closely connected with fundamental values and traditions of member states.'[57]

So the fourteen participating member states managed to obtain the support of a further ten member states to go ahead and authorize enhanced cooperation. It is notable that the participating member states comprise eight of the first fifteen member states and six of the twelve newer member states – i.e., about half of each category – and that therefore the differential participation in Rome III clearly does *not* represent a move by the older member states to go ahead without the newer ones.

As for the substantive proposal for the Rome III Regulation, the June 2010 JHA Council agreed on 'a general approach on key elements of' the substance of this measure, with further (unspecified) issues to be examined.[58] The Council is at the moment of writing waiting for the opinion of the European Parliament before it can adopt the measure formally, probably in late 2010 or early 2011, unless there are some unforeseen complications. Comparing the 2010 proposal to the 2006 proposal (as agreed by most member states in 2008), the substantive conflict rules do not differ much, but it is striking that the 2010 proposal takes the form of

[53] Respectively COM(2010) 104 and COM(2010) 105, both 24 March 2010.

[54] JHA Council Press Release, June 2010.

[55] *OJ* [2010] L 189/12.

[56] Council Doc. 11809/3/10, 9 July 2010.

[57] Council Doc. 11429/10, 5 July 2010.

[58] Press Release of June 2010 JHA Council; for the text, *see* Council Doc. 10153/10, 1 June 2010.

an independent Regulation, not the form of a new chapter in the Brussels II Regulation as had originally been proposed; moreover, the Commission does not now propose to amend the jurisdiction rules in the Brussels II Regulation either.[59]

Applying the rules to trigger enhanced cooperation

According to the Commission,[60] the proposal to authorize enhanced cooperation as regards conflict of laws in divorce met the substantive criteria applicable, first of all because the Council had sufficiently established that use of enhanced cooperation was a 'last resort'. The Council's assessment seems sound in light of the earlier discussion of the proposal, which clearly seemed to have reached a deadlock. It should be noted that while this proposal was subject to unanimous voting, which undoubtedly contributed to the deadlock on agreement, the enhanced cooperation procedure is not limited to cases where unanimous voting applies (or, *a fortiori*, where QMV applies).[61] Having said that, it is, of course, more likely in practice that negotiations will become deadlocked where unanimity applies. The Treaty does not specify that there must have been a prior proposal on a measure for the 'last resort' principle to apply, and so it is arguable that this criterion could be satisfied also in cases where there is no formal proposal yet, but where one or more member states are in effect declaring that they will only approve an EU measure in a certain area 'over my dead body'. But that situation did not arise as regards the Rome III proposal, and there is least a stronger case that the 'last resort' criterion is fulfilled where a proposal has been made and discussions in Council have become deadlocked. It should be noted that a *de jure* requirement or *de facto* practice of an original proposal for a legal act before the authorization of enhanced cooperation is proposed strengthens the position of the Commission, given its near-monopoly over making the original proposal.[62] It is therefore overstating the case to suggest that the would-be participating member states have the

[59] The text on which the Council reached a 'general approach' (ibid.) does not differ on this point, and in general has few significant differences from the Commission's proposal.

[60] *See* the explanatory memorandum to COM(2010) 104, *supra* n. 53.

[61] The conditions for enhanced cooperation listed in the Treaties must be assumed to be exhaustive, in particular in light of the clear intention of the drafters of the Treaty of Nice to simplify the conditions which previously existed.

[62] The Commission is furthermore not obliged to respond *positively* to a request from Member States to authorize enhanced cooperation: Art. 329(1) TFEU states that 'the Commission *may* submit a proposal to the Council' [emphasis added]. Note that the Commission does not have a monopoly on initial proposals for police and criminal law legislation (Art. 76 TFEU), but it still has a monopoly on proposing *authorization of enhanced cooperation* in such areas according to Art. 329 TFEU, unless one of the relevant 'fast-track' routes to enhanced cooperation in this field is applicable (*see supra* n. 34).

right of 'initiative' as regards authorizing enhanced cooperation, although the willingness of a sufficient number of member states to participate is an essential condition which must be met before enhanced cooperation can be authorized.

On that point, the threshold of nine member states was met at the time when the Commission made its proposal for authorization of enhanced cooperation; it is interesting to observe that the proposal gained momentum (i.e., the participation of five more member states) after the official proposal was made. It also remains possible, as noted above, that member states join after enhanced cooperation has been authorized, subject to approval by the Commission or possibly the Council.[63] Perhaps some of the remaining non-participants will be willing to join in once the Rome III Regulation is actually adopted and its content is therefore certain.

Furthering EU objectives

In its proposal for the authorization of enhanced cooperation as regards Rome III, the Commission argued that conflict-of-law rules in family matters constitute a specific area covered by the Treaties – albeit a narrow area. On this point, it seems clear that the EU has the competence to adopt rules on this issue, since Article 81(2)(c) TFEU confers competence to adopt conflict of laws rules generally and specifically mentions the field of family law (paragraph 3). As the Commission notes, the Rome III proposal does not address substantive law on divorce as such, or even conflict of laws rules in the related issue of matrimonial property, a subject on which the Commission is planning to make a separate proposal in the near future.[64] More broadly, the Treaty does not lay out any rules governing the width or narrowness of the specific subject-matter of EU law to be governed by enhanced cooperation, and so it is up to the Council as to whether it wishes to authorize enhanced cooperation in a relative broad or relatively narrow area (for example, 'company tax' generally or a 'common consolidated tax base' more specifically) – assuming that the criteria for authorization are in any event satisifed.

As for the requirement that enhanced cooperation must further the EU's objectives, protect its interests and reinforce its integration process,[65] the Commission argued that adopting rules in this area would help to ensure mutual trust, develop an area of freedom, security and justice, and encourage greater (if not complete) compatibility of laws. While this is true, it is obviously only accurate as regards the *participating* member states. In particular, the 'rush to court' by spouses planning a divorce, which the Regulation is aiming to stop, would only be avoided

[63] Art. 331(1) TFEU.
[64] *See* the Green Paper on this issue: COM(2006) 400, 17 July 2006.
[65] Art. 20(2), revised TEU.

where there is no possible link to the court of a member state not participating in the Rome III Regulation. Where there is a link to a non-participating member state, the potential for a 'rush to court' will still exist in any case where one spouse has an interest in invoking the national law which will apply as a result of the application of the Rome III rules, and the other spouse has an interest in invoking the law which will apply as a result of the application of the conflict-of-law rules of the relevant non-participating member state. It should be noted that the Brussels II Regulation, which includes obligations to recognize divorce judgments issued by another member state, does not permit a refusal to recognize a judgment just because of differences in conflict of laws rules.

The Commission obviously assumes that the Treaty rules must be interpreted to mean that 'half a loaf is better than none', i.e., it is better for the EU that its objectives be furthered et al. by a group of member states within the EU context than if no measures are taken on this issue at all, or than if such measures are taken outside the EU context. At least the Rome III Regulation will reduce the incidence of the 'rush to court', because not every divorce proceeding will have a sufficiently strong link to the courts of a non-participating member state to provoke it. It is submitted that the Commission's interpretation of the Treaty rule is in principle correct, since the absence of any action to accomplish a particular EU objective by *any* member states can hardly be said to promote the EU's objectives, and the development of cooperation outside the EU framework clearly does not reinforce the EU's integration process, but rather detracts from it. Equally the development of integration processes outside the EU framework damages its interests, rather than protecting them.

As for compliance with the Treaties and EU law,[66] the Commission argues that the Rome III measure will not affect the Brussels II rules concerning jurisdiction over divorce and responsibility for children, which are binding on 26 member states. This is only true because the Commission removed the provisions which would have amended the Brussels II jurisdiction rules from the 2010 version of the Rome III proposal. It would still be possible to amend the Brussels II rules separately as regards all (26) member states.[67] The Commission also convincingly argues that Article 18 TFEU will not be infringed, as there will be no discrimination on the basis of nationality, given that the Rome III rules will apply regardless of the nationality of the parties.[68]

[66] *See* Art. 326 TFEU.

[67] Note that the Commission has not formally withdrawn the 2006 Rome III proposal (*supra* n. 49), which contained these proposed amendments to the jurisdiction rules.

[68] Note, however, that nationality might be a ground for choosing the applicable law: *see* Arts. 3(1)(c) and 4(c) of the substantive Rome III proposal (*supra* n. 53).

Next, the Commission argues that enhanced cooperation on this subject will not affect the internal market, economic and social cohesion or trade, or distort competition.[69] The proposal does not affect cohesion policy, trade or competition, and will facilitate the internal market to the extent that it will eliminate obstacles to the free movement of persons in the participating member states, leaving the position of couples in the non-participating member states no worse off than before. Although the internal market arguments of the Commission can be questioned, because the link between simplifying divorce proceedings and facilitating the free movement of persons is arguably too indirect, and because a reduction in costs and complications for persons in the participating member states as compared to persons in the non-participating member states puts the former in a better position,[70] this begs the question as to whether there is an internal market aspect to this measure at all.[71] However, it should be noted that after the entry into force of the Treaty of Lisbon, there is no longer a legal requirement that civil law measures have to contribute to the functioning of the internal market.[72]

Respect for the competences and rights of non-participating members

In the Commission's view, the Rome III proposal respects the competences, rights and obligations of non-participating member states,[73] because the national rules of the non-participating member states would not be affected, there are no relevant international agreements between participating and non-participating member states that would be affected, and the agreed rules relating to conflict-of-law as regards parental responsibility and maintenance are severable from the rules governing conflict of laws in divorce. This argument is sound, given that the international rules on conflict of laws as regards the former two issues are not in any way linked to the conflict of laws rules concerning divorce. If the conflict of laws rules on the other issues were linked to the conflict of laws rules governing divorce, this issue would arguably be more problematic. It remains to be seen whether the forthcoming proposal on conflict of laws regarding matrimonial property links back to the rules regarding conflict of laws in divorce.[74] If so, it could be prob-

[69] *See* again Art. 326 TFEU.

[70] Except where a 'rush to court' might still apply to couples in a participating State due to possible links to the courts of a non-participating member state, as discussed above.

[71] *See also* the very tentative estimates of cost savings set out in para. 23 of the Explanatory Memorandum.

[72] Compare Art. 67 EC to Art. 81 TFEU, which now reads: '*particularly* when necessary for the proper functioning of the internal market' [emphasis added].

[73] *See* Art. 327 TFEU.

[74] It should be noted that there is an existing Hague Convention on the conflict of law in matrimonial property (dating from 1978), which has been ratified by only three member states

lematic – assuming that the matrimonial property measure, if and when adopted, applies to a different group of member states than the Rome III Regulation. This raises the interesting question of whether the authorization of enhanced cooperation could be impugned if it respects the substantive criteria governing the authorization of enhanced cooperation at the time when it was *adopted*, but arguably breaches the criteria at a later date due to subsequent legal, political or economic developments.

It might be objected that the competences, rights and obligations of non-participating member states will be affected by the Rome III measure in the event that the rules designate the law of a non-participating member state as the law governing the divorce.[75] However, this will not impose an obligation on the non-participating State as such, since its national law will in this case be applied by the courts of another jurisdiction; and such a designation could have been made anyway on the basis of different national conflict-of-law rules, even without the adoption of the Rome III Regulation. While non-participating member states will have to recognize judgments which were decided on the basis of an applicable law decided on the basis of the Rome III conflict rules, those member states would anyway have had to recognize judgments decided on the basis of purely national conflict rules, since, as noted above, the Brussels II Regulation does not permit refusal to recognize a judgment just because of differences in conflict of laws rules.

The divergence between jurisdiction rules and conflict of laws rules on divorce may appear odd, but then rules on jursidiction and conflict of laws do not always match as regards civil and commercial law (i.e., there is no general rule that the court seized according to the rules on jurisdiction can or must apply its own law). There are other examples in EU law of the different territorial scope of rules on jurisdiction on the one hand and conflict of laws on the other. As regards civil and commercial law generally, the Brussels Convention on jurisdiction rules applied long before the Rome Convention and the Rome II Regulation on conflicts of law were drawn up, and in any event these measures continue to have different territorial scope, since the Brussels rules (but not the Rome rules) apply to some third States,[76] and the Rome II rules do not apply to Denmark. As regards maintenance proceedings, the relevant Regulation provides that a participating member state

(France, Luxembourg and the Netherlands) and signed by two others (Austria and Portugal). This Convention does *not* link the choice of law as regards matrimonial property to the law applicable to the divorce proceedings, so the Rome III measure cannot be criticized for affecting the application of this Convention.

[75] *See* Art. 2 of the substantive Rome III proposal (*supra* n. 53).

[76] *See*, for instance, the current Lugano Convention (*OJ* [2007] L 339/1).

(i.e., the UK) may decide to apply the jurisdiction rules but not the conflict of laws rules referred to by that Regulation.[77]

It might also be argued that the authorization of enhanced cooperation will impact upon the non-participating member states in that, following the adoption of the Rome III Regulation, the participating member states will negotiate as a block in international negotiations as regards conflict of laws in divorce, due to the exclusive competence that the EU will acquire over the subject-matter.[78] This argument must be rejected because although the relative negotiating power of the individual non-participating member states in international negotiations might well diminish as compared to the joint power of the participating member states (i.e., the EU), the non-participating member states will not as such be bound by the EU's external competence on this matter, and can therefore take any position which they might wish in those negotiations. This raises the interesting question of the extent of the obligation on non-member states not to 'impede' the operation of enhanced cooperation.[79] But given that the same provision of the Treaty expressly preserves the competences of non-participating member states, the obligation not to impede enhanced cooperation cannot go as far as to require the non-participants to be bound by the EU's external competence resulting from the authorization of enhanced cooperation. Equally the Treaty rule preventing interference with non-participating member states' competences when enhanced cooperation is authorized cannot mean that, for the sake of preserving the non-participants' relative decision-making power, the normal rules on external competence, which are also now expressly set out in the primary law of the Treaties,[80] are overruled by implication.[81]

[77] Reg. 4/2009 (*supra* n. 25).

[78] *See* Art. 3(2) TFEU, in conjunction with *Opinion 1/2003* (*supra* n. 39). It should be noted that there is a Reg. giving member states power to negotiate treaties with third States in family law matters, despite the EU's exclusive competence, subject to special rules: Reg. 662/2009 (*OJ* [2009] L 200/25). However, this Reg. only applies to Regs. 2201/2003 and 4/2009 (Art. 1(2), Reg. 662/2009), unless it is amended also to apply to the Rome III Reg. in future. The substantive Rome III proposal does not suggest such an amendment. If Reg. 662/2009 were amended to this end, it would raise the interesting question of how the Reg. would apply to negotiations *between member states*. Arguably the Reg. would not apply (and therefore participating member states could *not* enter into negotiations with non-participating member states which affect the Rome III Reg. unless the EU granted a fresh authorization for them to do so) because it only gives authorization to negotiate with *third countries* (Art. 1(1), Reg. 662/2009), although the Reg. does not define 'third country'.

[79] Art. 327 TFEU.

[80] *See* Art. 3(2) TFEU.

[81] Note also that Art. 20(1), revised TEU, specifies that enhanced cooperation entails the use of the EU's institutions and the exercise of its 'competences'.

The position of the European Parliament

As for the broader institutional framework, it should be pointed out that there is no sign that the participating member states have any interest in changing the decision-making rules as regards conflict of laws in family matters pursuant to Article 333 TFEU, even though the European Parliament urged them to consider this when it expressed its consent to the enhanced cooperation. A move to change the decision-making rules in this sensitive field might well have reduced the number of member states willing to participate in the enhanced cooperation, as well as the number of member states willing to authorize it, perhaps to the point where there were insufficient member states to launch enhanced cooperation or insufficient votes to authorize it. It might be predicted that Article 333 TFEU will most likely be used, if at all, when a move to change decision-making rules pursuant to Treaty amendment or the use of a *passerelle* clause in the Treaty has failed despite the support of a large number of member states, and the use of enhanced cooperation and the Article 333 TFEU procedure appeals to those member states as an alternative route to this end.

Finally, it is notable that the European Parliament did not seek to use its power of consent over authorization of enhanced cooperation to influence the content of the substantive Rome III rules, thereby abstaining from indirectly increasing its influence over the future Rome III Regulation, which is subject only to consultation of the Parliament (even though it was simultaneously trying to influence the content of the Decision establishing the European External Action Service by using its ordinary legislative powers over parallel legal acts).[82] Of course, this is probably because the Parliament was in broad agreement with the content of the substantive Rome III proposal.[83] If it had wanted to see major changes to the substantive text, it would likely have considered to refuse (or to threaten to refuse) the authorization of enhanced cooperation, unless some changes were made to the substantive proposal. If it had objected to the adoption of EU legislation on this issue in principle, or (more obviously) to the use of the enhanced cooperation procedure as regards this legislation, there is no reason to doubt that the European Parliament would simply have vetoed the authorization. The role of the Parliament as regards authorization of enhanced cooperation should therefore not be overlooked.

[82] *OJ* [2010] L 201/30 (Decision establishing the external action service), adopted pursuant to Art. 27(3), revised TEU; proposed amendments to the financial regulations and staff rules (COM(2010) 85, 24 Feb. 2010 and COM(2010) 309, 9 June 2010).

[83] The amendments which the EP had called for as regards the 2006 Rome III proposal in its 2008 vote (*supra* n. 50) were mostly taken up in the 2010 substantive Rome III proposal. The draft Zwiefka report setting out the EP's views on the 2010 proposal was circulated in Oct. 2010.

On this point, one observer has argued that in two cases there is insufficient involvement of the European and national Parliaments as regards enhanced cooperation,[84] namely a) 'fast-track' authorization of enhanced cooperation as regards criminal law or policing measures and b) the decision to change the decision-making rules as regards the member states participating in enhanced cooperation.[85] However, as regards the European Parliament, this critique does not take into account the broader dynamics of the process. As regards the JHA 'fast-track', despite the circumvention of the European Parliament's veto the over the *authorization* of enhanced cooperation, the Parliament could in most cases still block the *substantive legislation* concerned afterward if it wishes, because most such measures would be subject either to the ordinary legislative procedure or the Parliament's powers of consent. Similarly, as regards decision-making, while the Parliament could not veto *a decision to change* the decision-making rules pursuant to Article 333 TFEU, it *could* then block any and all of the proposed subsequent *authorizations* of enhanced cooperation (except as regards foreign policy). The latter line of argument in any event assumes that the European Parliament might conceivably disagree with the Council's decision to extend QMV or the ordinary legislative procedure (!) – which is surely about as likely as the proverbial turkeys voting for Christmas.

Conclusion

The first authorization of enhanced cooperation will certainly not, in and of itself, tip the European Union over into an incoherent and fragmented legal framework. Even though barely half of the member states will participate (at least initially), the modest scope of the Rome III Regulation, its limited economic impact, and its relative isolation from other EU and international measures, will mean that it can function as a self-contained regime. The Rome III rules will constitute the development of EU rules in a new policy area, rather than a set of rules building on existing EU measures[86] – and if the analysis of the enhanced cooperation provisions above is correct, enhanced cooperation is legally much easier to defend (and perhaps more likely to be successful politically) in the former scenario than the latter. Certainly the Rome III Regulation will be a pinprick in the uniformity of EU law, as compared to the well-established differentiation as regards monetary union, JHA law generally, and defence (the latter partly outside the EU legal framework).

[84] Dougan, *supra* n. 27 at p. 164-168.

[85] *See* respectively Arts. 82(3) and 83(3) TFEU (ordinary legislative procedure) and Art. 86(1) TFEU (consent). However, the EP is only consulted as regards Art. 87(3) TFEU.

[86] *See* generally Dougan, *supra* n. 27.

This first authorization of enhanced cooperation has answered those critics who doubted that enhanced cooperation would ever be authorized, in light of the substantive and procedural conditions for launching it and the conditions relating to member states joining later.[87] But it is also necessary to examine the substance of these criticisms. As for the conditions for launching enhanced cooperation, given that the whole point of enhanced cooperation is to develop integration (albeit among not all member states) within the *EU legal order*, the Treaty drafters were right to set out substantive conditions which ensure the integrity of the EU legal system, and procedural conditions which set out an appropriate role for the Commission and the European Parliament. And since the EU legal order belongs in principle to *all* member states, it is not outrageous to expect at least a qualified majority of them to approve enhanced cooperation taking place within that legal framework.

Next, the rules on member states joining enhanced cooperation in progress have already proved quite workable in practice, as noted above.[88] The further suggestion that the *avant-garde* member states should have the decisive say as to who joins them is not convincing. First of all, the comparison between joining enhanced cooperation in progress and acceding to the EU is unpersuasive, since EU accession is a vastly more politically important and technically complex project than, for example, deciding whether a particular member state is ready to introduce particular conflict of laws rules on divorce or biometric residence permits. Most obviously, the accession of new member states has vastly more impact on the existing member states than the participation of a new member state in particular enhanced cooperation (or Title IV) measures. Secondly, the very principle that the *avant-garde* member states should be able to launch enhanced cooperation within the EU legal order and shut the door behind them to other member states was anathema to many member states when negotiating the enhanced cooperation rules,[89] and understandably so. If the *avant-garde* member states want to be 'snotty' about other member states joining them, they always have the option of proceeding with their differentiated integration outside the EU legal order. But given that – again – the EU legal order in principle belongs to all member states, it would be wrong in principle to allow a select group of member states to launch enhanced cooperation within that legal order and then pull up the ladder behind them, for any reason other than the objective inability or unwillingness of other member states who wished to join them later to comply with the relevant rules.

[87] *See* generally Amtenbrink and Kochenov, ibid.

[88] *Supra* n. 25; the Commission decisions on the UK and Ireland joining JHA measures were overlooked by the authors.

[89] *See* generally Stubb, *supra* n. 2.

It is true that the conditions placed on launching enhanced cooperation and perhaps also the rules on joining enhanced cooperation in progress may deter member states from using the enhanced cooperation framework, instead pushing them to use frameworks outside the EU legal order. However, such fragmentation is a price worth paying if the alternative is the destruction of key elements of the EU legal order purely in order to encourage enhanced cooperation to take place within it.

In light of this historic reluctance by member states to use the enhanced cooperation rules, it is interesting to speculate as to why a sufficient number of member states now wanted finally to embark upon enhanced cooperation, and why an even bigger number of member states was finally willing to authorize it. The answer may be a combination of the particular subject-matter, in particular the limited economic impact of Rome III and a genuine desire to simplify life for individuals getting divorced, and a broader political objective of finding an opportunity to launch the first enhanced cooperation. With one enhanced cooperation authorized, it may prove easier politically to authorize enhanced cooperation again in future, just as it was similarly easier to justify the use of enhanced cooperation in an area (JHA) where differentiation between member states is long-standing. And with a view to the possible desire to authorize enhanced cooperation in more difficult and controversial areas (such as company tax harmonization or the creation of an EU patent) in the near future, it makes sense to launch enhanced cooperation as regards a less high-profile subject.

The desire to find an opportunity to launch the first enhanced cooperation within the EU legal system may equally explain partly why the member states concerned did not simply attempt to agree a treaty on this issue within the framework of the Hague Conference, or between themselves, as in the case of the 'Prum Treaty' in 2005.[90] The member states concerned were presumably also attracted by the features of the EU legal order, which would not be on offer elsewhere: the quick application of the measure concerned and the greater uniformity of interpretation secured by the legal form of a Regulation and the (newly expanded) jurisdiction of the Court of Justice. As regards the Hague Conference, the member states concerned may also not have been keen to involve third States in the negotiation and ratification of a treaty on this issue, in particular because of the differences in the social and cultural background between EU member states and some of the other members of the Hague Conference.

Now the obligation to ensure a coherent application of EU law in this area shifts to the Court of Justice. With great respect, the Court should not follow its case law which suggests that EU legal rules with different territorial scope should

[90] It is notable, however, that this treaty was later absorbed within the EU framework: *OJ* [2008] L 210/1.

not be interpreted consistently with each other for that reason alone.[91] It is perfectly possible to, for example, insist upon the same basic interpretation of the 'public policy' exception to the Rome I, II and III Regulations in the interests of coherence and simplicity, without that common interpretation having the effect of binding non-participating member states to comply with the Rome III Regulation.

The idea of Quebec separating from Canada but retaining many close legal and political links (known as 'sovereignty-association') was once sarcastically described by then-Prime Minister Pierre Trudeau as 'divorce with bed privileges'. Leaving aside the merits of Quebec separatism, perhaps this phrase aptly describes the arrangement between the participating and non-participating member states as regards the Rome III Regulation. They have parted ways on this particular occasion without significantly jeopardizing their ongoing close relationship. Time will tell whether this feat can be repeated so easily again in the future.

[91] Case C-288/05 *Kretzinger* [2007] *ECR* I-6441.

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