



**UNIVERSITY
OF TURKU**
Faculty of Law

Enhanced Cooperation and the Danger of Undermining the Internal Market

The Law of the EU Internal Market
Bachelor's thesis

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8.6.2025

The originality of this thesis has been checked in accordance with the University of Turku quality assurance system using the Turnitin Originality Check service

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Subject: The Law of the EU Internal Market

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Title: Enhanced Cooperation and the Danger of Undermining the Internal Market

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Number of pages: VII + 21 pages

Date: 8.6.2025

This thesis discusses enhanced cooperation and the risk of the internal market being undermined in its use. Enhanced cooperation is a mechanism created to help make integration more flexible in situations where Member States are having issues integrating at the same speed. The Treaties offer the internal market broad protection, particularly Article 326 TFEU which requires that enhanced cooperation cannot undermine the internal market or economic, social and territorial cohesion nor shall it constitute a barrier to or discrimination in trade between Member States.

The main research question this thesis intends on answering is whether enhanced cooperation imposes a risk of the internal market being undermined. Additionally, there are two sub-questions. First, this thesis will discuss the protection offered to the internal market by the judicial review of enhanced cooperation. Second, it will be assessed what kind of integration enhanced cooperation represents.

This thesis uses the doctrinal method in answering the research questions by especially looking at the relevant EU legislation, mainly the Treaties and EU case law, the most important case being *Spain and Italy v. Council*.

The research results show that the Council has wide legislative powers in authorising enhanced cooperation. Regardless, the judicial review of enhanced cooperation needs revision and should be based on the four freedoms, which determine the internal market. This way better protection of the internal market could be granted. Second finding is that the Treaties' intent is for enhanced cooperation to represent multi-speed integration, however the way it has been applied more draws the conclusion of enhanced cooperation being variable geometry integration. Finally, it can be concluded that using enhanced cooperation in the field of the internal market does impose a risk of the internal market being undermined. Thus, enhanced cooperation would be better suited to be used in other policy areas.

Key words: enhanced cooperation, internal market, judicial review, multi-speed integration, variable geometry integration

ON-työ

Oppiaine: The Law of the EU Internal Market

Tekijä: Veera Lahtinen

Otsikko: Enhanced Cooperation and the Danger of Undermining the Internal Market

Ohjaajat: Heini Litmanen ja Jukka Snell

Sivumäärä: VII + 21 sivua

Päivämäärä: 8.6.2025

Tämä ON-työ käsittelee tiiviimpää yhteistyötä ja sen käytön aiheuttamaa mahdollista haittaa sisämarkkinoille. Tiiviimpi yhteistyö on mekanismi, joka luotiin integraation joustavoittamiseksi tilanteissa, joissa jäsenvaltioilla on ongelmia integroitua samaan tahtiin. EU:n perussopimukset tarjoavat sisämarkkinoille laajaa suojaa, erityisesti EUT-sopimuksen 326 artikla, joka edellyttää, että tiiviimpi yhteistyö ei saa haitata sisämarkkinoita eikä taloudellista, sosiaalista ja alueellista yhteenkuuluvuutta. Se ei myöskään saa luoda esteitä tai aiheuttaa syrjintää jäsenvaltioiden välisessä kaupankäynnissä tai vääristää niiden välistä kilpailua.

Päätutkimuskysymys, johon ON-työ pyrkii vastaamaan, on aiheutuuko tiiviimmän yhteistyön käytöstä riski sille, että sisämarkkinoille koituu haittaa. ON-työllä on myös kaksi lisäkysymystä. Ensiksi ON-työ pyrkii vastaamaan kysymykseen siitä, millaista suojaa tiiviimmän yhteistyön oikeudellinen valvonta antaa sisämarkkinoille. Toiseksi ON-työ arvioi millaista integraatiota tiiviimpi yhteistyö edustaa.

ON-työ hyödyntää lainopillista tutkimusmenetelmää tutkimuskysymyksiin vastaamisessa, erityisesti tarkastelemalla relevanttia EU-lainsäädäntöä, pääasiassa perussopimuksia, sekä EU:n tuomioistuimen oikeuskäytäntöä, josta tärkein ratkaisu on Espanja ja Italia vastaan Euroopan Unionin neuvosto.

Tutkimustulokset osoittavat, että neuvostolla on laaja lainsäädännöllinen toimivalta antaa lupa tiiviimmän yhteistyön käytölle. Siitä huolimatta oikeudellinen valvonta kaipaa muokkaamista ja sen tulisi perustua neljään vapauteen, jotka määrittävät sisämarkkinat. Näin varmistettaisiin sisämarkkinoiden parempi suojelu. Toinen tulos on, että EU:n perussopimukset tarkoittavat tiiviimmän yhteistyön ”multi-speed”-integraatioksi, mutta tapa, jolla sitä on sovellettu viittaa enemmänkin ”variable geometry” -integraatioon. Lopuksi voidaan todeta, että kun tiiviimpää yhteistyötä käytetään sisämarkkinoiden alueella, on olemassa riski, että sisämarkkinoille aiheutuu haittaa. Tästä syystä tiiviimpi yhteistyö sopisi paremmin käytettäväksi muilla EU:n toimialueilla.

Avainsanat: tiiviimpi yhteistyö, sisämarkkinat, oikeudellinen valvonta, multi-speed-integraatio, variable geometry -integraatio

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List of Abbreviations

EU	European Union
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
FTT	Financial Transaction Tax
MS	Member State
the Court	the Court of Justice

1 Introduction

Unity has for long been the core principle of integration in the European Union (EU).¹ However, as the Union gained more Member States and became more heterogenic, it was noticed that not all Member States could integrate at the same speed. In 1995 the President of France and the Chancellor of Germany advocated for differentiated integration in situations where a Member State could not integrate at the same speed as others.²

Enhanced cooperation is the instrument created to answer that need. The basic idea of enhanced cooperation is to enable more flexible integration by letting a group of Member States create legislation between them in the EU legal framework, while simultaneously letting other Member States remain outside this cooperation.³ Enhanced cooperation is regulated in article 20 in the Treaty on the European Union⁴, and in articles 326–334 in the Treaty on the Functioning of the European Union.⁵

Enhanced cooperation was first introduced in the Treaty of Amsterdam. Later, it was reformed in the Treaty of Nice, and finally in the Treaty of Lisbon enhanced cooperation was created in the form we know it today. Prior to this reform, it had not yet been used, and this wanted to be changed.⁷ After the reforms in the Treaty of Lisbon, enhanced cooperation has been used five times; the most important example for this paper is the unitary patent, as the authorisation of enhanced cooperation in the creation of the unitary patent was contested before the Court of Justice (the Court) for the first time.

This paper discusses enhanced cooperation, in its current form, and its compatibility with the internal market. The main question this paper intends to answer is whether enhanced cooperation, when used in the field of the internal market, imposes a risk of the internal market being undermined. In addition, there are two sub-questions. First, it will be discussed what the role of judicial review is in protecting the internal market in the use of enhanced cooperation. Second, it will be considered what kind of integration enhanced cooperation represents. These sub-questions will help in answering the main question.

¹ Blanke – Mangiameli 2013, p. 822

² Letter of 6 December 1995 from the President of the French Republic, Jacques Chirac, and the Chancellor of the Federal Republic of Germany, Helmut Kohl

³ Böttner 2021, p. 2

⁴ Consolidated Version of the Treaty on the European Union [2016] OJ C202/3

⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/3

⁷ Böttner 2021, pp. 44–45

As will be established later, the Treaties demand that enhanced cooperation cannot undermine the internal market. This requirement is assessed both at the authorisation stage and when exercising powers within enhanced cooperation, which shows the importance of the internal market when discussing enhanced cooperation.

Prior studies have been made of the enhanced cooperation mechanism. They have, however, more so focused on enhanced cooperation in general and, for example, covered the Court ruling in the case of the unitary patent. The research questions in this paper bring a new perspective to the discussion, as they focus more specifically on the relationship of the internal market and the enhanced cooperation instrument.

This paper will use the doctrinal method to answer the research questions. It will do this by looking at the EU legislation currently in force, mainly the Treaties. It will also use the case law of the Court of Justice, mainly *Spain and Italy v. Council*, and other relevant sources, like scholarly papers and background materials, such as the Impact Assessment of the Commission. These sources will be compared, and from them conclusions will be drawn to assert answers to the research questions.¹¹

The paper is structured as follows: section two focuses on enhanced cooperation in the Treaty framework and aims to compose a background for its use. Section three will discuss the unitary patent, and mainly, the judicial review by the Court of the authorisation decision. It will evaluate the arguments set forth by the Court and the Advocate General. The fourth section will consider enhanced cooperation as a tool for integration. The fifth section will discuss the compatibility of enhanced cooperation and the internal market, and lastly the sixth section will conclude.

¹¹ Van Hoecke 2013, pp. 19–35

2 Enhanced Cooperation in the EU Framework

2.1 Authorisation of Enhanced Cooperation

Authorising enhanced cooperation is a multi-step procedure, which needs the approval and assessment of many institutions. Explaining the authorisation process is useful to better understand the concept of enhanced cooperation. It also creates a standard for the level of review the authorisation needs.

Article 329 of the Treaty on the Functioning of the European Union (TFEU) sets out the process for authorisation of enhanced cooperation. The establishment of enhanced cooperation requires a request from Member States wanting to participate, addressed to the Commission.¹² The request should specify both the scope and the objectives of said cooperation. This does not have to be a joint request, and each Member State can state their interest to the same cooperation individually, if they so please.¹³

Based on the request by Member States, the Commission may submit a proposal to the Council. If it does not submit a proposal, it must inform the Member States the reasoning for not doing so. According to Article 17 of the Treaty on the European Union (TEU) it is the duty of the Commission to protect the interests of the Union. For this reason, the Commission must, before submitting a proposal to the Council, assess whether the requirements for authorising enhanced cooperation are fulfilled.

Still according to Article 329 TFEU, Parliamentary approval is needed for the Council to be able to grant authorisation of enhanced cooperation. According to Article 330 TFEU, all Member States can participate in the discussions in the Council, but only the participating Member States can take part in the vote. The decision to authorise enhanced cooperation shall be decided on by a qualified majority, which is calculated based on the participating Member States, not all Members of the Council.

2.2 Requirements for Authorisation of Enhanced Cooperation

The requirements set out in the Treaties can be divided into two categories: the requirements for the authorisation of enhanced cooperation and requirements for the legal acts later adopted

¹² In the area of common foreign and security policy requests are addressed to the Council, however this paper is not concerned with this policy area.

¹³ Böttner 2021, p. 108

within its framework. Clarifying these requirements is needed to answer the research questions, as they set the base for later assessment.

Article 20 TEU sets out the requirements that must be met for enhanced cooperation to be authorised. These are to be assessed within the authorisation process.

First, enhanced cooperation cannot be used “within the framework of the Union’s exclusive competences”, as these areas are deemed vital for the Unions legal unity.¹⁴ Article 2 TFEU states that in areas of shared competence, Member States shall legislate and make use of their competence to the extent that the Union has not used its competence and again to the extent that the Union has decided to “cease exercising its competence”. However, as enhanced cooperation, while not being Union-wide, is still Union legislation, it also cannot be used in areas where the Union has no competence at all, as was established in Case Pringle.¹⁵

Second, at least nine Member States must participate in Enhanced Cooperation according to article 20 TEU. This requirement has been adjusted in the Treaty reforms to better serve the idea of flexible integration, as the prior requirement of majority of the Member States participating made enhanced cooperation difficult to use in practice.¹⁶ However, it is worth mentioning that out of the five times enhanced cooperation has been used so far, four times a majority of Member States have participated.¹⁷ The Financial Transaction Tax (FTT) is the only example where the minimum requirement was barely reached with 11 Member States, and after Estonia left the cooperation, 10 Member States participating. No legislation has been adopted within the FTT, which suggests that enhanced cooperation cannot very easily succeed with a minority of Member States participating, especially within an area with such a strong connection to the internal market.

The third requirement for enhanced cooperation, according to article 20 TEU, is that it shall have as its aim the progress of the Union’s objectives, the protection of its interests and the reinforcement of the process of integration. These objectives are set out in Article 3 TEU, which states goals i.a. the establishment of an internal market, economic growth, scientific and technological advance and economic, social and territorial cohesion.

¹⁴ Böttner 2021, p. 75

¹⁵ Case C-370/12 Pringle, paragraphs 166–167

¹⁶ Böttner 2021, p. 42

¹⁷ Law applicable to divorce and legal separation 17 MSs, Unitary patent 25 MSs, Matrimonial and registered partnership property issues 18 MSs, European Public Prosecutor’s Office (EPPO) 22 MSs.

As a result of the internal market being one of the objectives of the Union, it comes clear that Article 326 TFEU has to be taken into consideration both as a requirement for the authorisation of enhanced cooperation as well as for the acts later adopted within its framework. It mentions that enhanced cooperation shall comply with the Treaties and Union law and that the cooperation shall not undermine the internal market, economic, social or territorial cohesion, nor shall it constitute a barrier to or discrimination in trade or distort competition between Member States.

The requirement of enhanced cooperation having to further the integration process is a notable one, as more flexible integration within a group of heterogeneous Member States was one of the main reasons for the creation of such an instrument. Therefore, this criterion should be considered carefully.

Lastly, Article 20 TEU states that enhanced cooperation can only be used as a last resort. The Treaties do not regulate a specific time frame for when Union-wide regulation is not possible. However, this condition has been covered by the Court, which established that this condition is fulfilled in situations where adopting Union-wide regulation is not possible in the foreseeable future.¹⁸

2.3 Conditions for the Exercising of Powers within Enhanced Cooperation

After the authorisation of enhanced cooperation, a group of requirements take place for how the participating Member States can make use of the authorised cooperation.

The most significant requirement for the questions this paper intends to answer is in Article 326 TFEU, which instructs that enhanced cooperation shall comply with the Treaties and Union law and it shall not undermine the internal market or economic, social and territorial cohesion. It also shall not constitute barriers to or discrimination in trade between Member States, nor shall it distort competition between Member States.

Second, Article 327 TFEU requires that even when some Member States establish among them enhanced cooperation, the competences, rights and obligations of non-participating Member States shall be respected. The Member States not participating also cannot impede the enhanced cooperation's implementation.

¹⁸ Joined Cases C-274/11 and C-295/11 Spain & Italy v. Council, paragraphs 47–50

Third, enhanced cooperation being open to all Member States to join is required under Article 328 TFEU. Member States wanting to join must comply with the conditions laid down in the authorising decision and the acts already adopted within that framework. It is important to point out, that the Article further states that the participation of as many Member States as possible must be promoted by the Commission and the participating Member States.

Lastly, the Council and the Commission shall ensure the consistency of the activities undertaken within that enhanced cooperation and also the consistency of those activities with the policies of the Union.

3 The Judicial Review of Enhanced Cooperation: The Unitary Patent as an example

3.1 The Need for Unification in the Field of Patent Protection

The state of patent protection in the EU has been fragmented for a long time. The main issues are that the European patent is very costly, does not offer unified protection and the patent must be translated into the languages of the Member States in which it will be protected. In most States, after the granting of the patent, it does not immediately come into effect, instead it needs to be validated in each of the States in which protection is sought.¹⁹

Union-wide patent protection was first proposed by the Commission in 2000,²⁰ which goes to show that unification in that area has been on the agenda for a long time. The negotiations were, however, fruitless. Even with the Treaty of Lisbon stepping into force in 2007, which created a new framework for protection of intellectual property in the EU, namely Article 118 TFEU, according to which only the language arrangements had to be agreed on unanimously, an agreement was not found. At the end of 2010, 12 Member States requested the authorisation of enhanced cooperation in the field of unitary patent protection, which 13 other Member States later joined.

In its impact assessment, the Commission states that patent protection “stops at national borders” due to lack of unified and comprehensive patent protection.²¹ The Commission considered that Union-wide patent protection would offer the best results but, due to the translation agreements posing “insurmountable difficulties”, this option would not be possible in the foreseeable future.²² The Commission found that enhanced cooperation would also increase integration, also between participating and non-participating Member States when compared to the prevailing situation.²³

In March of 2011 Council gave its decision authorising enhanced cooperation in the area of a unitary patent protection.²⁴

¹⁹ SEC(2011) 482 final, pp. 10-22

²⁰ COM(2000) 412 final

²¹ SEC(2011) 482 final, p. 23

²² SEC(2011) 482 final, p. 29

²³ SEC(2011) 482 final, p. 38

²⁴ 2011/167/EU: Council Decision of 10 March authorising enhanced cooperation in the area of the creation of unitary patent protection

3.2 Spain & Italy v. Council

In the creation of the unitary patent system, enhanced cooperation was brought before the Court for the first time when Spain and Italy contested its authorisation. The Court ruling in this case establishes the foundation for how enhanced cooperation should be judicially reviewed in the future. Thus, assessing the ruling of the Court is important.

Spain and Italy brought forward multiple pleas for why the authorisation was, according to them, unlawful, but this paper will focus on just one of those pleas. Spain and Italy argued that the contested decision infringes Article 326 TFEU, as it undermines the internal market, free competition and the free movement of goods because effects from the unitary patent are only produced in certain parts of the Union.²⁵

First, it must be mentioned that Advocate General Bot stated in his opinion that the authorising decision of enhanced cooperation and the acts later adopted in its procedural framework are two separate issues. Thus, their judicial review must be kept separate.²⁶ The Court, in its judgement, upheld this interpretation.²⁷ Spain and Italy contested exactly the authorisation of enhanced cooperation, not the acts adopted following it. For this reason, the Court only considered possible infringement of Article 326 TFEU from the point of view of whether the authorisation in itself caused the internal market to be undermined.

Additionally, the Advocate General saw that the Court's review is limited to only decide whether the Council has made a manifest error in authorising enhanced cooperation as that authorisation would undermine the internal market and economic social and territorial cohesion and would constitute a barrier to and discrimination in trade between Member States.²⁸ This is due to the fact that the Court is not to assess on the necessity or the suitability of a measure that belongs to an area where the Treaty has conferred wide legislative powers on the Council.²⁹

²⁵ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraph 128

²⁶ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraph 137

²⁷ Joined Cases C-274/11 and C-295/11 Spain & Italy v. Council, paragraph 76–78

²⁸ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraphs 27–29, 142

²⁹ Opinion of Mr Jacobs Joined Cases C-248/95 & C-249/95, paragraph 23

Advocate General Bot considered that no manifest error was made by the Council in determining whether the authorisation would have an undermining effect on the internal market.³⁰

Further, the Advocate General stated in his opinion that it is undisputed that differences in patent protection within the Union cause fragmentation of the internal market, especially when protection exists in some states but not in others. Due to this, challenges arise for patent holders trying to prevent entry of goods, which infringe their patent, to the markets of Member States in which their patent is not protected. Advocate General Bot went on to say that the functioning of the internal market would increase due to unitary patent protection producing uniform effects in 25 Member States. The fragmentation of the internal market would as a result be reduced, which would contribute to the development of the Union.³¹

The Court stated that it cannot “validly be maintained” that the creation of a unitary patent, only applicable in the Member States participating in the enhanced cooperation, and not the whole Union, would undermine the internal market or the economic, social and territorial cohesion of the Union. The court further dismissed the claims by Spain and Italy alleging that the planned language agreements would demonstrate such damage to the internal market, as the language agreements were only at a preparatory stage at the time the authorising decision was adopted and not an actual part of it. Thus, they could not be assessed in this context.³²

3.3 Assessment of the Arguments

The arguments put forth by the Advocate General and the Court need to be assessed to determine what kind of protection, and at what level, the judicial review of enhanced cooperation gives to the internal market.

The Court’s assessment of the possible infringement of Article 326 TFEU was very sparse. Advocate General Bot, however, covered it more in detail as it determined that the Council had not made a manifest error in authorising the use of enhanced cooperation in the field of the unitary patent.

On the one hand, it has been seen that in its ruling, the Court had two routes it could have chosen. It could have taken seriously the requirement in Article 326 TFEU of the internal

³⁰ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraph 143–147

³¹ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraph 148–151

³² Joined Cases C-274/11 and C-295/11 Spain & Italy v. Council, paragraph 75–78

market not being undermined, and the protection which that requirement promises. However, that is not what the Court decided to do. Instead, it treated the protection promised by the Treaties to the internal market as “in practice devoid of concrete legal meaning and force”.³³

Further, there are grounds to believe that filling the requirements of enhanced cooperation is, as a result of this Court ruling, more just a process of “ticking the boxes”. It is possible that this will set the base for political decisions overruling legal consideration.³⁴ However, this could be a natural outcome of the limited legal review of the Court in areas where the Council has been granted wide legislative powers. Advocate General Bot stated that in the process of authorising enhanced cooperation, the institutions involved need to assess multiple elements in order to make political decisions.³⁵

On the other hand, it can be viewed that the Court made a very clear distinction between the judicial review of the authorisation decision of enhanced cooperation and the acts later adopted within its framework. The Advocate General applied this distinction more extensively and suggested the Court dismissed all relevant claims. However, the Court, by virtue of this distinction, rejected only the plea alleging that the language arrangements of the unitary patent would infringe Article 326 TFEU. This shows that the Court was willing to protect the requirements of the internal market not being undermined and no barriers to or discrimination in trade being established between Member States, by assessing the arguments brought forward by the parties, instead of dismissing them.³⁶

The distinction between the authorisation decision and the acts later adopted in its framework do set a logical base for judicial review of enhanced cooperation. However, if as mentioned earlier, decisions are just made based on political determination, including the requirement set out in Article 326 into the Treaty on the Functioning of the European Union has no concrete value. To ensure that this scenario does not become a reality, the judicial review of enhanced cooperation does need to be reconsidered to better ensure the protection of the internal market.

Based on this need, the following can be said. From Article 26 TFEU, which requires the free movement of goods, persons, services and capital to be ensured, it can be concluded that the

³³ Weatherill 2017, p. 34

³⁴ Weatherill 2017, p. 34

³⁵ Opinion of Mr Bot Joined Cases C-274/11 & C-295/11, paragraph 28

³⁶ Pistoia 2014, pp. 259–260

internal market is determined by these four freedoms. This is further confirmed by Bernard, who states that “the single market is defined by reference only to the four freedoms”.³⁷ Consequently, to make sure enhanced cooperation does not pose an infringement to Article 326 and the requirement of not undermining the internal market, it needs to be argued that none of the four freedoms are undermined.³⁸ This means that enhanced cooperation should not pose challenges to the free movement of goods, persons, services or capital. This way the integrity and functioning of the internal market would be ensured best.

In its current state, the judicial review is at least not willing to go very far to protect the internal market, and it could be seen as limited. The Court has tried, to some extent, to take the requirement of not undermining the internal market into consideration. However, the legal assessment lacks a certain depth by not taking the four freedoms of the internal market into consideration.

Even when it must be recognized that the Council makes political choices in the areas of its legislative competence, as was presented by the Advocate General, the judicial review provided by the Court has to be a legitimate way to establish that the effect on the internal market has been assessed properly. To ensure that the judicial review does not fall short of offering the internal market the protection that the Treaties intend to give it, and turn into a process of driving political agenda, the four freedoms should be implemented as the foundation for such evaluation.

³⁷ Bernard 2022, p. 17

³⁸ see also Wessels – Gerards 2018, p. 20

4 Enhanced Cooperation as a Tool for Integration

As was already established earlier, enhanced cooperation was created as an instrument that would help make integration more flexible in situations where Member States are having difficulties integrating at the same speed. For this reason, it is important to settle which integration model enhanced cooperation represents. Answering this question will further help in answering the question of whether enhanced cooperation and the internal market are compatible.

The three possible integration models are multi-speed integration, variable geometry integration and à la carte integration. In multi-speed integration a group of Member States, both able and willing to integrate, has common objectives and integrates at a faster pace. It is hoped and assumed that non-participating Member States will eventually follow behind in that integration.³⁹ Multi-speed integration thus represents the most unity-oriented approach to integration.

Variable geometry, on the other hand, differs from multi-speed integration in that it recognizes that the broad diversity within the European Union can make ambitious common goals unrealistic.⁴⁰ A possibly permanent divide between Member States is created,⁴¹ and the goal of unified integration could, in some areas, be disregarded.⁴² Variable geometry works as a middle ground between multi-speed and à la carte when it comes to the level of integration it offers.⁴³

Finally, à la carte integration stands for integration where common objectives are abandoned in comparison to national interests, and Member States get to choose “as from a menu” which policy areas they want to integrate in. À la carte integration offers the least amount of unified integration and intends to protect national interests more.⁴⁴

Arguments for the kind of integration that enhanced cooperation represents can be put forward. There are arguments which point to the direction of enhanced cooperation being

³⁹ Stubb 1996, p. 287; Jensen – Slapin 2012, p. 781

⁴⁰ Stubb 1996, p. 287

⁴¹ Jensen – Slapin 2012, p. 781

⁴² Blanke – Mangiameli 2013, p. 791; Ultan 2017, p. 1812

⁴³ Stubb 1996, p. 288

⁴⁴ Stubb 1996, p.288

variable geometry integration and others which would show enhanced cooperation as multi-speed integration; not so many see enhanced cooperation as *à la carte* integration.

That is to say, the aim of enhanced cooperation is not to create a so-called *à la carte* integration model, which would allow Member States to pick and choose which areas of Union integration they would want to be involved in. The European Parliament stated in its resolution of 16 February 2017 that enhanced cooperation should be used “as a first step towards further integration of policies” and it should not be a tool creating *à la carte* integration.⁴⁵

The Treaties set a good base for analysing which integration enhanced cooperation represents. Article 20 TEU states that enhanced cooperation shall, for one, have as its aim to reinforce the integration process of the Union. Article 328 TFEU requires that enhanced cooperation is at all times open for non-participating Member States to join. The participants of enhanced cooperation and the Commission must also promote participation by as many Member States as possible. These sections in the Treaties would suggest that enhanced cooperation represents multi-speed integration, because from them it comes clear that it is hoped that acts at first adopted as enhanced cooperation between just some Member States, would later on be accepted by more Member States, thus supporting the unified integration of the Union.

As mentioned earlier, Article 20 TEU refers to Article 3 TEU in defining the objectives of the Union. The idea, that Article 3 TEU drafts EU integration as a determined project and thus implies that enhanced cooperation is constructed to help the creation of an “ever closer union”, supports the idea of enhanced cooperation as multi-speed integration.⁴⁹

On the other hand, it has also been considered that the opinion of the Advocate General and the Court’s ruling in the case *Spain and Italy v. Council* show, that the “idyllic picture” of enhanced cooperation as multi-speed integration has been pushed aside. Instead, enhanced cooperation is treated as a tool to handle a deadlock situation and still legislate in the EU framework.⁵⁰ This would signal enhanced cooperation to be variable geometry, because due to the inabilities of some Member States to adopt certain legislation, they stay behind, while other Member States integrate.

⁴⁵ P8_TA(2017)0048, paragraph H

⁴⁹ Fabbrini 2013, p. 206

⁵⁰ Pistoia 2014, p. 251

Consequently, it could be seen that the intent behind the Treaties and the Court's ruling are not completely aligned in the kind of integration that enhanced cooperation offers. Enhanced cooperation entails features of both integration systems. It is not the intent of enhanced cooperation to create permanent divisions in integration. On the other hand, it also cannot be promised that non-participating Member States will eventually join the others, especially if there are requirements that a Member State deems impossible to overcome. This was the case in *Spain and Italy v. Council*, where Spain argued that the language arrangements that it could not accept would prevent it from joining the cooperation in the future.

An interesting study has been made about the scenarios in which non-participating Member States will join enhanced cooperation at a later stage. It suggests that in cases where non-participating Member States deem that they would be faced with negative effects by the enhanced cooperation that they are not participating in, and they cannot stop said cooperation, they are likely to join it.⁵¹ These preconditions are reached in the case of the unitary patent, at least according to the pleas by Spain and Italy which claimed that the enhanced cooperation would happen at the detriment of non-participating Member States.⁵² Out of the two Member States not participating, Italy has later joined said cooperation.⁵³ However, due to Spain still remaining outside the unitary patent, this hypothesis has not been proven correct.

Counting on non-participating Member States to join, due to otherwise facing adverse effects, is nonetheless not a good base for enhanced cooperation, and not to be trusted on. Integration of this sort cannot be viewed as multi-speed integration just because it would end in non-participating Member States later joining the cooperation.

The terms “multi-speed”, “variable geometry” and “à la carte” are not free of differing attitudes. It must be noted that the choice of the term used in order to describe what kind of differentiated integration enhanced cooperation represents means choosing the kind of integration one wants it to be.⁵⁴ The chosen form of integration naturally determines also the perception of the Treaty requirements for the authorisation and the use of enhanced cooperation.⁵⁵

⁵¹ Kroll – Leuffen 2015, p. 356

⁵² Joined Cases C-274/11 and C-295/11 *Spain & Italy v. Council*, paragraphs 71–73

⁵³ There are still 25 participating Member States due to the UK leaving the EU, and Croatia joining, after the authorisation. Spain and Croatia remain the two Member States not involved.

⁵⁴ Ehlermann 1998, p 246

⁵⁵ Editorial Comments CMLRev 2011, p. 327

Enhanced cooperation should aim at being multi-speed integration. If the requirement of promoting the participation of as many Member States as possible is considered thoroughly in creating acts within the framework of enhanced cooperation, it could be a useful tool also within the internal market. That is to say, that the conditions of enhanced cooperation have to be agreed on in a way that they would not cause insurmountable obstacles for other Member States to join, and only with the intent of others eventually joining.

It is clear that there are difficulties with combining the internal market and enhanced cooperation if enhanced cooperation follows the idea of variable geometry or *à la carte* integration. The internal market demands an area without internal frontiers in which the four freedoms are ensured to function, based on Article 26 TFEU. A creation of permanently different legislated areas within the internal market would create such frontiers.

Although the relevant Treaty provisions suggest that enhanced cooperation was created as a tool of multi-speed integration, the way it has been applied, more draws the conclusion of enhanced cooperation being variable geometry integration. The court has made it clear that creating a framework for enhanced cooperation to which all Member States could join is secondary to being able to solve a “deadlock situation”.

5 The compatibility of enhanced cooperation and the internal market

Different views can be taken on how the internal market is affected by enhanced cooperation. It is important to notice that the perspective through which these effects are viewed, impacts the results. It is clear that for participating Member States enhanced cooperation deepens integration and offers unity. However, from the perspective of non-participating Member States, more unity between the participants can create obstacles to trade or other discriminatory effects to the Member States outside the cooperation.⁵⁶

Again, the Treaties work as foundation for the consideration of the compatibility of enhanced cooperation and the internal market. As established earlier, Article 20 TEU requires that enhanced cooperation shall aim to further the objectives of the Union set out in Article 3 TEU, which also mentions the internal market.

The internal market is further covered in Article 26 TFEU, which states that the EU shall adopt measures which have as their aim the establishment of or ensuring the functioning of the internal market. It also confirms that the internal market shall comprise an area without “internal frontiers” and in which the four freedoms, the free movement of goods, persons, services and capital, are ensured.

By definition, enhanced cooperation does not cover the whole Union, which means that it does not create a single regulated space.⁵⁷ Further, the Court established in *Spain and Italy v. Council* that it is inherent that regulations adopted through enhanced cooperation do not cover the whole Union and thus create differentiated legal systems within it.⁵⁸ It is also in the nature of enhanced cooperation that these different rules affect e.g. trade.⁵⁹ That is to say, that enhanced cooperation will inevitably create “internal frontiers”, of some level, within the internal market.

Enhanced cooperation will in addition have adverse effects to the internal market, that might go against the four freedoms, which have earlier been established as the main base for consideration of whether the requirement on the internal market not being undermined is met.

⁵⁶ Heber 2021, pp. 159–160

⁵⁷ Weatherill 2017, pp. 32–33

⁵⁸ Joined Cases C-274/11 and C-295/11 *Spain & Italy v. Council*, paragraphs 68, 75

⁵⁹ Böttner 2021, p. 331

It could be assessed in this context whether there is a risk of the internal market being undermined merely, because out of the two possibilities, the option that has less benefits to the internal market, is chosen. For example, in the case of the unitary patent, Spain and Italy both supported the idea of harmonisation in the field of patent protection. Using enhanced cooperation was decided on to overcome the deadlock situation where the language arrangements could not be agreed on.

It is true that compared to harmonisation across the whole Union, enhanced cooperation will always be “a minus”. On the other hand, compared to a situation where no harmonisation is made within the Union, enhanced cooperation will always be “a plus”.⁶⁰ If enhanced cooperation being the “lesser good”, between the possible Union wide legislation or enhanced cooperation, is seen as undermining the internal market, the instrument would in reality be useless.

Consequently, it has been suggested that to comply with the requirement of not undermining the internal market, the positive effects must outweigh the negative ones.⁶⁴

However, the internal market enjoys broad protection. This can be seen from the fact that the protection of the internal market already falls within the area of the first paragraph of Article 326 TFEU, which requires enhanced cooperation to abide by the Treaties and Union law. The addition of the protection of the internal market, and the matters closely tied to it, specifically shows their importance. This requirement also shows that the possibly tense relationship between enhanced cooperation and the internal market has not gone without consideration, and that the sensitivity of the internal market must be paid close attention to, when establishing enhanced cooperation within the internal market. On the other hand, the fact that a requirement like this exists could show that enhanced cooperation is also available for use within the internal market.⁶⁵

Some have considered that the Treaty provisions favour uniformity of the EU legal framework rather than ensuring the effectiveness of the instrument of enhanced cooperation, which is demonstrated through the scarce use of the system.⁶⁶ However, it has also been expressed that even though enhanced cooperation not being used many times would indicate

⁶⁰ Böttner 2021, p. 92

⁶⁴ Böttner 2021, p. 331

⁶⁵ Böttner 2021, pp. 189–190

⁶⁶ Editorial comments CMLRev 2011, pp. 326–327

that protecting the internal market has significant value, the way it has been used states otherwise.⁶⁷

It could have been assumed that enhanced cooperation was mainly designed to be used in social policy areas rather than economic.⁶⁸ However, twice it has been authorised in an area with close ties to the internal market, i.e. the unitary patent and the financial transaction tax, which would suggest otherwise. These authorisations could be proof of acceptance that enhanced cooperation entailing legislation which directly affects economic activities, is not “incompatible with the very idea of an internal market”.⁶⁹

Nonetheless, based on the times enhanced cooperation has been used so far, cases with a strong connection to the internal market have faced the most struggle, as both times the authorisation decision has been brought before the Court.⁷⁰ It has been suggested that the requirement of not undermining the internal market is very hard to meet when using enhanced cooperation within the field of the internal market. Thus, enhanced cooperation is steered more towards other policy areas.⁷¹

From the discussion in this chapter, it is clear that although enhanced cooperation and the internal market are not fundamentally incompatible, they do not fit together perfectly, and the conclusion can be drawn that enhanced cooperation is a better tool to be used in other policy areas.

The authorisation of enhanced cooperation is a multi-step procedure and requires the approval of the Commission, the Parliament and the Council, as has been explained earlier. The authorisation decision and the acts later adopted within its framework can also be subject to judicial review by the Court, as was seen, e.g., with the case *Spain and Italy v. Council*. This demonstrates that using enhanced cooperation should not be easy and meeting the requirements set out in the Treaties should be carefully considered. There should be multiple points, at which enhanced cooperation could be deemed to undermine the internal market, if suspicion of that arises, and it should not just be a matter of pushing political agenda.

⁶⁷ Weatherill 2017, p. 34

⁶⁸ Editorial comments CMLRev 2013, p. 676

⁶⁹ Editorial comments CMLRev 2013, p. 676

⁷⁰ Wessels – Gerards 2018, p. 28

⁷¹ Wessels – Gerards 2018, p. 20

It cannot be denied that, if authorised in the area of the internal market, enhanced cooperation cannot ensure the functioning of the internal market as well as Union-wide regulation could. Using enhanced cooperation within the internal market becomes a matter of discussing what needs to be protected more, the integrity of the internal market or the, possibly partial, integration of it. The risk of the internal market being undermined is inevitable.

6 Conclusions

This paper has reviewed the compatibility of the enhanced cooperation instrument and the internal market. It has done this by first considering two questions: the role of judicial review in protecting the internal market in the framework of enhanced cooperation, and then the kind of integration enhanced cooperation represents. The answers to these questions are partial answers to the main question as well. That is, whether the use of enhanced cooperation in the field of the internal market imposes a risk of the internal market being undermined.

A first conclusion to be made is that enhanced cooperation needs more careful judicial review when used in the area of the internal market. Although the Advocate General and the Court made it clear that the authorisation of enhanced cooperation is a political process and within the area of the Council's wide legislative powers, judicial review should still be a tool to ensure compliance with the Treaties, which set out the foundation for the EU legal system and the main objectives of the Union.

Thus, reconsideration of how to ensure the functioning of the internal market best, when reviewing enhanced cooperation, is needed. This paper suggests that the best foundation for judicial review of compliance with Article 326 TFEU, would be the four freedoms, which define the internal market.

However, it is important to note that this paper only assesses the judicial review in the case *Spain and Italy v. Council*. Too broad a conclusion cannot be drawn from a singular case. Nevertheless, it is a landmark ruling, as it is the first time the Court has assessed the authorisation of enhanced cooperation and thus holds important value for possible future evaluation.

The second conclusion determines that the kind of differentiated integration that enhanced cooperation is seen as holds much value. If enhanced cooperation follows the intent of the Treaties, it can be seen as aiming to be multi-speed integration. Multi-speed integration would also be a better option for preserving the integrity of the internal market. In practice it has, on the contrary, been interpreted more as variable geometry integration by the Court. This imposes a risk for the internal market, as it fails the requirement of promoting the participation of as many Member States as possible.

It is understandable that integration is wanted within the internal market, e.g. in the protection of intellectual property rights. However, meeting the requirements of the Treaties for the

authorisation of enhanced cooperation cannot be secondary to such political goals. To preserve the internal market it needs to be ensured that, as required in the Treaties, enhanced cooperation has as its aim the reinforcement of the integration process and that the participation of as many Member States as possible is promoted to make sure that the enhanced cooperation is factually open for all Member States to join at a later point in time.

Finally, it can be concluded that the Treaties themselves aim to ensure the protection of the internal market when using enhanced cooperation. It is undeniable that within using enhanced cooperation in the field of the internal market, lies the danger of undermining the internal market. However, the determining factor has been the action of the Court, which has not chosen the internal market as its main priority.

It is worth noting that meeting the requirement of not undermining the internal market has proven out to be hard to do without the parties outside the cooperation questioning it before the Court, because naturally the internal market holds great interest to all Member States. With the current level of protection offered to the internal market by judicial review, and if enhanced cooperation does not follow multi-speed integration, enhanced cooperation might be of better use in other policy sectors.

Lastly, it must be pointed out that enhanced cooperation, since its creation, has only been used a small number of times. Within the internal market, just twice. This paper recognizes the risk of the internal market being undermined that enhanced cooperation imposes. However, more research is still needed in this area.