

EUROPEAN INTEGRATION VIA FLEXIBILITY TOOLS: THE CASES OF EPPO AND PESCO

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SUMMARY

Flexibility seems to have become **the new mantra of the debate on the future of the EU** as decision-makers have repeatedly stressed the need for more differentiated integration. The European Commission's White Paper of March 2017, for instance, contained a "Multi-speed Europe" scenario. But **differentiated integration is already a reality** of European integration: In recent months, there has only been **an acceleration of references and efforts related to differentiated integration, Multi-speed Europe, Enhanced cooperation and Permanent Structured Cooperation**.

This Policy Paper provides an assessment of how the two main flexibility tools of the Lisbon Treaty – **Enhanced Cooperation and Permanent Structured Cooperation** – function under the Treaty's legal provisions and have recently been used for the cases of the European Public Prosecutor's Office (EPPO) and Permanent Structured Cooperation (PESCO): EPPO is an independent EU body which, under certain conditions, will have the powers to investigate and prosecute EU-fraud and other crimes that affect the EU's financial interests. PESCO will constitute the framework for deepening defence cooperation between those EU member states that are capable and willing to do so. The analysis of the two cases will help to draw lessons from their establishment and clarify the preconditions for the further use of these flexibility tools in practice.

The two tools have several common features: They allow for non-participating member states to opt-in at a later stage and they aim for full and unitary integration in the long-term. Enhanced cooperation and Permanent Structured Cooperation are, however, also **two distinct flexibility tools**. While Enhanced Cooperation can, in principle, happen in all policy areas that are not within the exclusive competence of the EU, the situation is different for Permanent Structured Cooperation: It exclusively applies to well-defined aspects of the Common Security and Defence Policy (CSDP).

Finally, the Policy Paper shows that in the current political climate, **efforts to use these flexibility tools have been able to gather widespread political support**: The Regulation establishing a European Public Prosecutor's Office applies to 20 member states; and 23 member states signed the Joint Notification on Permanent Structured Cooperation on 13 November 2017. In both cases, the aim has been to have large groups of participating member states. Despite open questions about **interinstitutional cooperation and parliamentary scrutiny at the national and the EU level**, it may therefore well be that such "EU20+ formats" of European integration emerge more often in the future.

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INTRODUCTION

The EU Treaties provide for a certain flexibility.¹ The tools of Enhanced Cooperation and Permanent Structured Cooperation (PESCO) are examples of this kind of flexibility. Both tools are based on the aim to achieve unitary integration in a long-term perspective and allow for non-participating member states to join the Cooperation whenever they fulfil the relevant criteria or the political wish arises.

“THE LISBON TREATY WAS SIGNED TEN YEARS AGO, ON 13 DECEMBER 2007.”

For passionate observers of European integration, two recent efforts of EU decision-makers to exploit the potential of the Lisbon Treaty have not gone unnoticed: 2017 will be seen as marked by the launch of an Enhanced Cooperation on the **European Public Prosecutor’s Office** (EPPO) in October 2017 and the launch of the **Permanent Structured Cooperation** to deepen European defence in December 2017. The Lisbon Treaty was signed ten years ago, on 13 December 2007. The year in which the United Kingdom triggered Art. 50 TEU could now turn out to be the beginning of a tendency to really benefit from tools of flexible integration.

The first part of this Policy Paper takes stock of the “flexible EU” and recent developments in Enhanced Cooperation and PESCO; the second part analyses the respective legal provisions of the two instruments; and the third part examines future challenges after the agreement and adoption of EPPO and PESCO.

1. Taking stock of the “flexible EU” in 2017

The constitutional function of Enhanced Cooperation is “to create a pathway through which a ‘vanguard group’ of states can move ahead in achieving an ‘ever closer Union’ in new policy areas.”² But it is possibly the wide range of procedural and political preconditions that may explain why **Enhanced Cooperation has not been used at all before the Lisbon Treaty** and not extensively since then.³ By contrast, **PESCO only exists since the Lisbon Treaty**, but similarly, it has not been activated until late 2017. Currently, five cases of Enhanced Cooperation are in force, agreed or in preparation (see Box 1).

BOX 1 ► Enhanced Cooperation in the EU (2017)

EUROPEAN UNITARY PATENT: 26 participating member states

A specialised patent court will allow cases to be heard before judges with the highest level of legal and technical expertise in patents. A unified court will also mean that parties do not have to litigate in parallel in different countries incurring high costs.

DIVORCE LAW: 17 participating member states

International couples will be able to agree which law would apply to their divorce or legal separation. In case the couple cannot agree, judges would have a common formula for deciding which country’s law applies.

EUROPEAN PUBLIC PROSECUTOR (EPPO): 20 participating member states

The European Public Prosecutor’s Office will make sure that every case involving suspected fraud against the EU budget is followed up and completed, so that criminals know they will be prosecuted and brought to justice. This will have a strong deterrent effect.

FINANCIAL TRANSACTION TAX (FTT): 10 member states (in preparation)

A Financial transaction tax will strengthen the Single Market by reducing the number of divergent national approaches to financial transaction taxation and it will ensure that the financial sector makes a fair and substantial contribution to public revenues.

PROPERTY REGIME RULES: 17 participating member states (agreed)

Regulations dealing with the property regimes of international couples will establish clear rules in cases of divorce or death and bring an end to parallel and possibly conflicting proceedings in various member states, for instance on property or bank accounts.

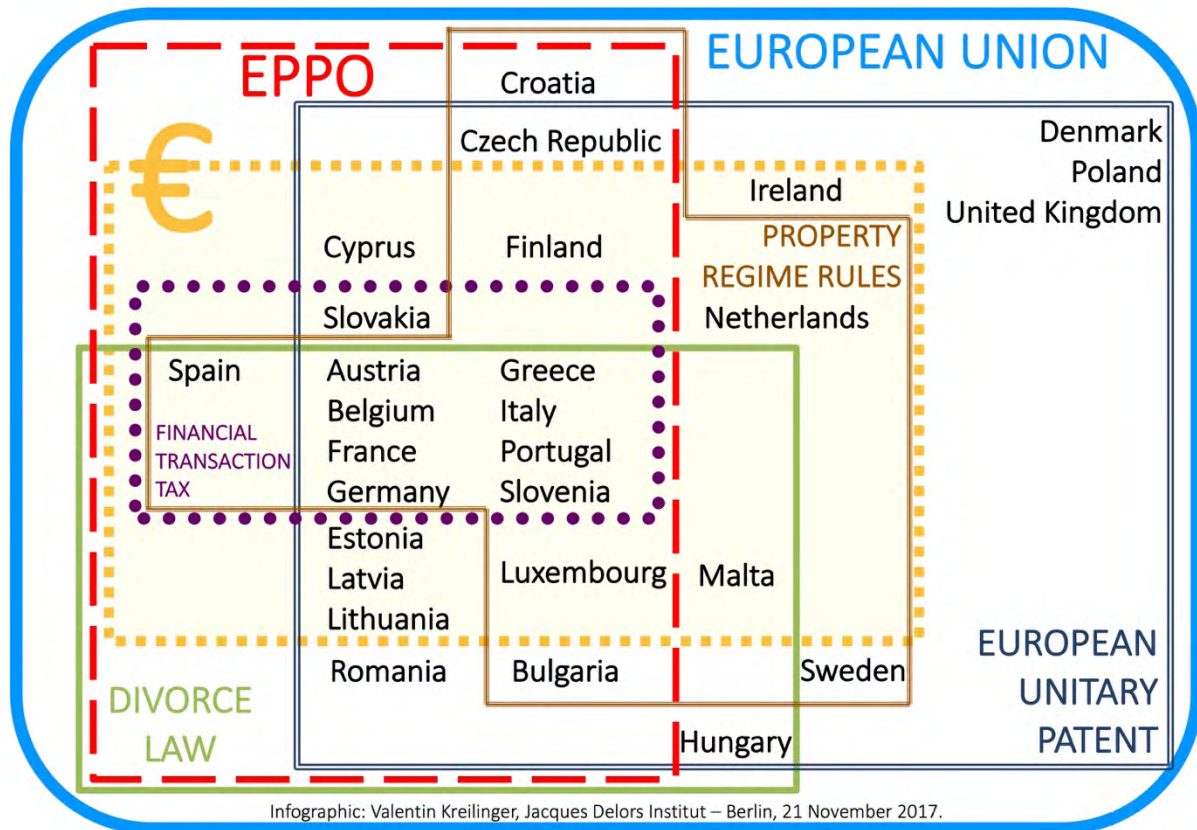
Source: European Commission (2017), *Enhanced Cooperation – Already a reality today. Informal Dinner of Heads of State or Government ahead of the Tallinn Summit*, p. 2.

1. See e.g. Thym Daniel, *Ungleichzeitigkeit im europäischen Verfassungsrecht*, 2004.

2. Fabbrini Federico, “Enhanced cooperation under scrutiny: Revisiting the law and practice of multi-speed integration in light of the first involvement of the EU judiciary”, *Legal Issues of Economic Integration* 40(3), 2013, pp. 197-224, here: p. 204.

3. See Koenig Nicole, “A differentiated view of differentiated integration”, Policy Paper n°140, Jacques Delors Institute, July 2015, p. 7.

FIGURE 1 ► Enhanced Cooperation in one figure (November 2017)



Source: Own elaboration. The Euro Area (€) was included for information purposes. Data on member states' participation in Enhanced Cooperation: European Commission (2017), *Enhanced Cooperation – Already a reality today. Informal Dinner of Heads of State or Government ahead of the Tallinn Summit*.

Figure 1 shows the differentiated levels of participation in the five cases of Enhanced Cooperation. Only **eight member states** (Austria, Belgium, France, Germany, Greece, Italy, Portugal and Slovenia) **are currently participants all of them** - in the Enhanced Cooperations on Divorce Law, the European Unitary Patent, EPPO, Property Regime Rules and the Financial Transactions Tax.

On the basis of this brief assessment on the state of Enhanced Cooperation in the EU, the next sections take stock of the **current political momentum behind the mantra of a (more) “flexible EU”** that can be observed in the European Commission’s White Paper of March 2017 with its “Multi-speed Europe” scenario and numerous references to differentiated integration, Multi-speed Europe, Enhanced cooperation and Permanent Structured Cooperation in other contributions to the debate on the Future of Europe. The first part of this Policy Paper proceeds as follows: It examines the most recent case of Enhanced Cooperation, the creation of the European Public Prosecutor via Enhanced Cooperation (1.1); proposals for Enhanced Cooperation in other policy areas (1.2); and the establishment of PESCO via the provisions of Protocol No. 10 of the EU Treaties in late 2017 which has been accompanied by other instruments that lead to a significant strengthening of CSDP (1.3).

1.1. The long way to the European Public Prosecutor’s Office (EPPO)

The idea behind a European Public Prosecutor’s Office (EPPO) has been to have an independent EU body that has, under certain conditions, the authority to investigate and prosecute EU-fraud and other crimes that affect the EU’s financial interests. In order to achieve this, EPPO has been designed to bring together European

and national law-enforcement efforts. Its legal basis is the Lisbon Treaty (Art. 86 TFEU) which provides for Enhanced Cooperation in case of the absence of unanimity on the dossier.⁴

14 NATIONAL PARLIAMENTS TRIGGERED A “YELLOW CARD”

In 2013, after the European Commission had tabled its initial proposal for an EPPO regulation (EPPO as a decentralised EU body with a European Public Prosecutor at the EU level and European Delegated Prosecutors located in member states), **14 national parliaments triggered a “yellow card” against the draft regulation.**⁵ In their “reasoned opinions”, some of them were opposed to the proposal and used subsidiarity as a pretext. Other national parliaments were in favour of setting up EPPO, but concerned by the Commission’s control over it. A third group used subsidiarity as a pretext to argue that the proposal was not ambitious enough.⁶ The European Commission maintained its proposal, but significant amendments were made in the legislative process: When member states were still unable to reach agreement after four years, the Council registered the absence of unanimity in support of the proposal in February 2017.⁷ In April 2017, 16 member states notified the Commission and the Council about their intention to launch an Enhanced Cooperation.

Finally, **a group of 20 member states decided to participate in the Enhanced Cooperation** on EPPO and reached an agreement in June 2017. Interestingly, in line with the diverse motivations of national parliaments behind their reasoned opinions against EPPO in 2013 and confirming the significant evolution of the proposal, five member states, in which the national parliaments or at least one parliamentary chamber (in case of bicameral systems) had raised a reasoned opinion in 2013, have changed their mind and decided to participate in the Enhanced Cooperation on EPPO in 2017. Six member states whose national parliaments had issued a reasoned opinion in 2013 decided to stay outside the Enhanced Cooperation on EPPO in 2017 (see Table 1).⁸

TABLE 1 – The European Public Prosecutor’s Office (EPPO): Reasoned opinions (2013) and participation in Enhanced Cooperation (2017)

REASONED OPINION BY A NATIONAL PARLIAMENT IN 2013	MEMBER STATES PARTICIPATING IN ENHANCED COOPERATION ON EPPO (2017)	MEMBER STATES NOT PARTICIPATING IN ENHANCED COOPERATION ON EPPO (2017)
Cypriot House of Representatives	Austria	Italy
Czech Senate	Belgium	Latvia
Dutch Senate and Dutch House of Representatives	Bulgaria	Lithuania
French Senate	Croatia	Luxembourg
Hungarian National Assembly	<i>Cyprus*</i>	Portugal
Irish Houses of the Oirecheas	<i>Czech Republic*</i>	<i>Romania*</i>
Maltese House of Representatives	Estonia	Slovakia
Romanian Chamber of Deputies	Finland	<i>Slovenia*</i>
Slovenian National Assembly	<i>France*</i>	Spain
Swedish Riksdag	Germany	
UK House of Lords and UK House of Commons	Greece	
National parliaments from 11 member states (14 out of 41 Parliamentary chambers)	20 member states	8 member states

* For member states highlighted in **bold and italics**, the national parliament (in case of unicameral systems) or a least one parliamentary chamber (in case of bicameral systems) had issued a reasoned opinion in 2013.

Source: Own elaboration.

4. See below, Section 2.1.1 and Table 2 in Section 2.3.4.

5. IPEX platform for EU Interparliamentary Exchange, *Proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office*, COM/2013/0534 (Yellow card)

6. Fromage Diane, “The second yellow card on the EPPO proposal: An encouraging development for Member State parliaments?” *Yearbook of European Law* 35 (1), 2016, pp. 5-27.

7. Council of the EU, “European Public Prosecutor’s Office: Council takes first step towards a possible enhanced cooperation”, Press Release 48/17, 7 February 2017.

8. The length of the decision-making in the case of EPPO means that the national MPs active at the beginning and the end of establishing EPPO were most likely not the same – the average lifespan of a parliamentary majority in Europe is around three years. See, for a broader discussion: Rozenberg Olivier, *The Role of the National Parliaments after Lisbon: Potentialities and Challenges*, 2017, pp. 54-55.

1.2. Attempts and proposals for Enhanced Cooperation in other policy areas

From time to time, **calls and commitments for using Enhanced Cooperation** have been put forward with respect to different issues and policy areas, for instance in Art. 10 TSCG.⁹ For Enhanced Cooperation to be legal, the member states must allow a “reasonable period”¹⁰ for the proposal to be adopted in the full Council of Ministers. Neither the EU Treaties nor the case law of the Court of Justice of the EU have quantitatively defined this, but Enhanced Cooperation is really a “last resort mechanism”, designed to be used when it is impossible to adopt a measure otherwise. In all proposals to launch an Enhanced Cooperation both the Commission and the Council itself tried to **build a consensus among all member states for a certain time period** (i.e. at least twelve months), as the examples of divorce law¹¹, patent law¹² and the financial transaction tax show. From a legal point of view, **the desire not to disappoint the minority is not a good reason to use Enhanced Cooperation** as an ultima ratio.

“BUT ENHANCED COOPERATION IS REALLY A ‘LAST RESORT MECHANISM’”

“CONSIDER USING ENHANCED COOPERATION WITH RESPECT TO THE RELOCATION OF REFUGEES”

Already in 2015, a proposal had been put forward to consider using Enhanced Cooperation with respect to the Commission’s plan for a mandatory **quota for the relocation of refugees** to overcome the deadlock.¹³ Since the Commission tabled its refugee relocation plan in June 2015 and the Council adopted it with a rare qualified majority vote in September 2015, more than two years have passed. In September 2017, the EU’s Court of Justice dismissed complaints by Hungary and Slovakia over the refugee quota, but little progress has been made since then. It therefore makes sense to **reconsider how progress can be made**.¹⁴

At the same time, all EU member states are subject to the same human rights obligations under the refugee conventions. Pursuing Enhanced Cooperation might give the impression that refugee protection is not (or no longer) a common responsibility. Enhanced Cooperation on a mandatory quota for the relocation of refugees would also establish a club with the “good” of improved refugee protection which could ultimately lead to uncertainties about “how [EU] institutions should act and decide when objectives and tasks for the fulfilment of ‘club goods’ conflict with steps needed to safeguard the policies of the Union as a whole.”¹⁵ But the **member states** remaining outside the Enhanced Cooperation on the quota would have sought their **outsider-status and non-participation** in sharing refugees. They would therefore not have to fear suffering from negative externalities.¹⁶

Enhanced cooperation could also be an option for a establishing a Common Consolidated Corporate Tax Base (CCCTB), which aims at harmonising the bases on which tax rates are calculated.¹⁷

9. Art. 10 of the Treaty on Stability, Coordination and Economic Governance: “[...] the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those member states whose currency is the euro, as provided for in Art. 136 TFEU, and of enhanced cooperation, as provided for in Art. 20 TEU and in Art. 326 to 334 TFEU on matters that are essential for the proper functioning of the euro area, without undermining the internal market.” The Economic and Monetary Union itself is an area with little scope for flexibility. See Gnath Katharina, “Drin heißt drin: wenig Spielraum für Flexibilität in der Europäischen Wirtschafts- und Währungsunion”, *integration*, 3/2017, pp. 226-30.

10. Art. 20 (2) TEU.

11. The Commission first proposed EU-wide rules on divorce in 2006. After it had emerged that no consensus was possible – ten member states asked the Commission in 2008 to issue a proposal, which finally proposed a framework in 2010.

12. In 2007 the Commission had published a Communication on improving the patent system in Europe, at the end of 2009 the Council had reached an agreement about the usefulness of a European patent system, but without specifying the language regime. Subsequently, it became clear that member states would be unable to reach unanimity on the translation arrangements due to opposition from Italy and Spain. In December 2010, the Commission proposed to launch the Enhanced Cooperation.

13. Kreilinger Valentin, “A Proposal to use Enhanced Cooperation in the Refugee Crisis”, Jacques Delors Institut – Berlin, September 2015.

14. See amongst others: Walter-Franke Marie, “The missing reflection paper on asylum policy”, Jacques Delors Institut – Berlin, July 2017; Toaldo Mattia, “Don’t close borders, manage them: how to improve EU policy on migration through Libya”, European Council on Foreign Relations, June 2017.

15. Dawson Mark and De Witte Floris, “Self-Determination in the Constitutional Future of the EU”, *European Law Journal* 21(3), 2015, pp. 371-383.

16. Kreilinger Valentin, “A Proposal to use Enhanced Cooperation in the Refugee Crisis”, Jacques Delors Institut – Berlin, September 2015.

17. Grant Charles et al., *Relaunching the EU*, Centre for European Reform, November 2017, p. 36.

1.3. PESCO and other new EU defence instruments

“23 MEMBER STATES NOTIFIED THE COUNCIL AND THE HIGH REPRESENTATIVE ON 13 NOVEMBER 2017 ABOUT THEIR INTENTION TO LAUNCH PESCO”

PESCO is part of an overall package for strengthening CSDP and provides the **political framework for those member states that are willing to commit themselves to deepening defence cooperation**. For many years, progress in CSDP has been cumbersome, but after some preparatory work in 2016 and 2017, 23 member states notified the Council and the High Representative on 13 November 2017 about their intention to launch PESCO. The document includes a list of possible common projects and indicates the participants' willingness and ability to fulfil the requirements of a PESCO according to Protocol No. 10.¹⁸ **A Council decision establishing PESCO is expected to be adopted on 11 December 2017**. The official launch of PESCO will take place at the European Council meeting on 14 and 15 December 2017.

PESCO overlaps with the EU and NATO, as *Figure 2* shows: Among the EU's 28 member states, 23 have signed the Joint Notification on PESCO. The five EU member states that have not (yet) signed the Joint Notification are the United Kingdom (which is currently negotiating its withdrawal from the EU under Art. 50 TEU), Denmark (which has an opt-out from CSDP), Malta, Ireland and Portugal. The latter two member states are expected to join PESCO and sign up to the Joint Notification in December 2017 after the completion of national parliamentary procedures.

PESCO shall respect the **obligations of NATO Members** (Art. 42 (2) TEU). This affects particularly the usability of certain military capabilities within the framework of missions in NATO and EU (see Art. 2 lit. d) Protocol No. 10). Four EU member states which are not members of NATO have joined PESCO (Austria, Cyprus, Finland, Sweden) while three EU member states which are members of NATO did not sign the Joint Notification on 13 November 2017 (Denmark, Portugal, United Kingdom).

It is also important to note that **PESCO offers third countries a possibility to participate**: “Third States may exceptionally be invited by project participants [...]. They would need to provide substantial added value to the project, contribute to strengthening PESCO and the CSDP and meet more demanding commitments.”¹⁹ Here, the question arises what “substantial added value” means. Furthermore, the provision that “[t]his will not grant decision powers to such Third States in the governance of PESCO”²⁰ remains ambiguous as it is not clear whether this only relates to the Council level or also to the project level. **After Brexit, the United Kingdom might consider this option** as part of remaining associated with the EU in the area of security and defence, but other countries, such as Norway, could also be interested in having a status as a third country participant in PESCO projects.

“PESCO OFFERS THIRD COUNTRIES A POSSIBILITY TO PARTICIPATE”

18. Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017.

19. *Ibid.*, Annex III - Governance, p. 8.

20. *Ibid.*, Annex III - Governance, p. 8.

FIGURE 2 ► Permanent Structured Cooperation in one figure (November 2017)



Infographic: Valentin Kreillinger, Jacques Delors Institut – Berlin, 13 November 2017.

PESCO: EU Member States that signed the joint notification. It is possible for EU Member States to join at a later stage.

Source: Own elaboration. Denmark has an opt-out from CSDP (Art. 5 Protocol No. 22). Ireland and Portugal are expected to join PESCO and sign up to the Joint Notification in December 2017 after the completion of national parliamentary procedures.

PESCO will be **the umbrella for the different individual projects** that aim at strengthening the **military capabilities of PESCO participants**.²¹ All participating member states will have to submit plans for their national contributions and efforts that they have agreed to undertake. These **national implementation plans are subject to regular assessments**. In terms of its concrete day-to-day functioning, PESCO will have a two-layer governance structure²²:

- Key policy decisions and the assessment of whether member states fulfil their PESCO commitments will be made at the **EU level by the Council in a “PESCO-format”** by national ministers with only PESCO participants being allowed to vote. Decisions are taken by unanimity, except for decisions regarding the suspension of PESCO membership and the entry of new members (these are taken by qualified majority).
- **Each individual PESCO project** will be managed by those member states that contribute to it.²³

“PESCO IS LINKED TO OTHER INSTRUMENTS THAT COVER ALL MEMBER STATES PARTICIPATING IN CSDP”

Alongside the creation of PESCO, the establishment of two technical instruments in CSDP (for comprehensive monitoring and financial incentives) is underway. All three instruments are supposed to jointly contribute to the objective of strengthening CSDP.²⁴ PESCO is therefore linked to other instruments that cover all member states participating in CSDP.

On the one hand, the **Common Annual Review on Defence (CARD)** will systematically monitor national defence spending plans. Under the auspices of the European Defence Agency (EDA), it will help to identify gaps in military capabilities and opportunities for collaboration between member states. The Joint Notification refers to CARD when PESCO participants commit to “[p]laying a substantial role in capability development within the EU, including within the framework of CARD, in order to ensure the availability of the necessary capabilities for achieving the level of ambition in Europe”²⁵ and

21. It combines ambitious objectives with gradual implementation. See Fabry Elvire, Koenig Nicole and Pellerin-Carlin Thomas, “Strengthening European Defence: who sits at the PESCO table, what’s on the menu?”, Jacques Delors Institute, 20 October 2017, p. 2.
 22. See Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017. See also European External Action Service, *Permanent Structured Cooperation (PESCO) – Factsheet*, 19 October 2017.
 23. For examples of some of the projects under discussion, see Fabry Elvire, Koenig Nicole and Pellerin-Carlin Thomas, “Strengthening European Defence: who sits at the PESCO table, what’s on the menu?”, Jacques Delors Institute, 20 October 2017, p. 3.
 24. See European External Action Service, *Permanent Structured Cooperation (PESCO) – Factsheet*, 19 October 2017 p. 2; Billon-Galland Alice and Quencez Martin, “Can France and Germany Make PESCO Work as a Process Toward EU Defense?”, German Marshall Fund of the United States, Policy Brief No. 033, 2017; Koenig Nicole and Walter-Franke Marie, “France and Germany: Spearheading a European Security and Defence Union?”, Jacques Delors Institut – Berlin, Policy Paper No. 202, 19 July 2017, in particular pp. 11-15.
 25. Annex II - List of ambitious and more binding common commitments in the five areas set out by Article 2 of Protocol No 10, Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017, point 6.

“to support the CARD to the maximum extent possible acknowledging the voluntary nature of the review and individual constraints of participating member states.”²⁶ Participation in CARD has not been made a compulsory entry criterion for PESCO, but CARD and the review of PESCO commitments should be closely linked in order to avoid the creation of parallel review mechanisms.

MEMBER STATES RECEIVE FINANCIAL INCENTIVES FROM THE EU BUDGET TO ACTIVELY PARTICIPATE IN PESCO”

On the other hand, the **European Defence Fund (EDF)** is being set up as part of the European Defence Industrial Development Programme (EDIDP). It will provide financial incentives to foster defence cooperation. The European Commission has indicated that it is prepared to increase the 20% contribution to joint capability projects under the EDF with an additional 10 % financing for the defence-industrial development phase of eligible projects that are developed in the PESCO framework.²⁷ This means that EU member states receive financial incentives from the EU budget to actively participate in PESCO. The EDA proposes that it could advise member states on the impact of proposed EDIDP projects on the European capability landscape and their coherence.²⁸

The **political guidance via PESCO seems essential** for CARD and the EDF to work properly. The three instruments are separate initiatives, but they are all directed towards improving the coherence of member states’ military capabilities. In particular, the involvement of the EDA²⁹ and of seconded national experts in the EDA³⁰ could be a way of helping to achieve the necessary linkages between CARD, PESCO and EDF in accordance with the agreed priorities.

2. The legal provisions of the EU’s two main flexibility tools

After taking stock of the long reluctance and current political dynamic, the second part of this Policy Paper revisits what the EU Treaties say about Enhanced Cooperation and PESCO. **The EU Treaties contain three sets of legal provisions for each of the two instruments:** Firstly, they set out preconditions and prescribe the establishment process; secondly, they stipulate the framework for the functioning of these tools during the cooperation and the opting-in procedure; thirdly, they advise on the possible ending of these cooperations and on opting-out. Each set of legal provisions is now discussed in turn for Enhanced Cooperation (2.1) and PESCO (2.2). After that, the two tools and their common objective, long-term integration, are compared (2.3).

2.1. Enhanced Cooperation

Enhanced Cooperation is laid down in **Art. 20 TEU and Art. 326-334 TFEU**. In addition to its normal provisions, there are special provisions concerning the Common Foreign and Security Policy (CFSP)³¹ and Police and Judicial Cooperation in Criminal Matters (PJCC)³² – as for EPPO in **Art. 86 (1) subpara. 3 TFEU** (see Table 2).

26. Ibid., point 7.

27. Fiott Daniel, Missiroli Antonio and Tardy Thierry, “Permanent Structured Cooperation: What’s in a name?” Chailot Paper No. 142, European Union Institute for Security Studies: November 2017, p. 47.

28. European Defence Agency, *Intervention by Chief Executive Jorge Domecq before the Security and Defence Committee of the European Parliament*, 25 September 2017, p. 8.

29. As member states asked the EDA to support the consolidation, clustering and analysis of proposed PESCO projects in the preparatory phase of autumn 2017, one could consider giving the EDA an enhanced role in the overall PESCO governance framework, taking into account the conclusions from the EDA Long Term Review. According to Art. 3 Protocol No. 10, “[t]he European Defence Agency shall contribute to the regular assessment of participating member states’ contributions with regard to capabilities, in particular contributions made in accordance with the criteria to be established, [...] and shall report thereon at least once a year.”

30. European Defence Agency, *Intervention by Chief Executive Jorge Domecq before the Security and Defence Committee of the European Parliament*, 25 September 2017, p. 8.

31. See Art. 329 (2), Art. 331 (2) TFEU. The establishment procedure is much more intergovernmental. Commission and European Parliament have a significantly weaker role during the process. The HR/VP gives her opinion to the Council about whether the cooperation is consistent with CFSP.

32. See Art. 82 (3), subpara 2, Art. 83 (3), subpara 2, Art. 86 (1), subpara 3, Art. 87 (3), subpara 3 TFEU.

2.1.1. Preconditions and establishment process

Enhanced Cooperation is supposed to be an **ultima ratio**. It is to be established “as a last resort, when [...] the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” (Art. 20 (2) 1 TEU). This means that there must have been an attempt to adopt common legislation for all EU member states. **Art. 326 TFEU** sets further limits to the use of this instrument: It “shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between member states, nor shall it distort competition between them” (Art. 326 subpara. 2 TFEU). The cooperation must be in line with the **objectives and the values of the Union** and preserve the **acquis communautaire**. Moreover, it cannot be established in policy fields of **exclusive competence** of the Union. In contrast to PESCO, whose participation requirements are definitely listed in primary law, the Council decision for Enhanced Cooperation can require **further conditions** for the establishment or the opting-in.

A **request** must be made to the Commission and name the scope and the objectives of cooperation (Art. 329 (1) phrase 1 TFEU). The Commission is then expected to prepare a **proposal**. It is not obliged to do so, but it has to inform the member states if it refuses to prepare a proposal. The European Parliament must give its **consent** and the Council decides whether to establish the Enhanced Cooperation.

“THE PROCEDURAL RULES THUS DO NOT CREATE SPECIFIC OBSTACLES”

For a launch of Enhanced Cooperation in CFSP, the Council must decide by unanimity (Art. 329 (2) subpara 2 TFEU). For judicial cooperation in criminal matters, the establishment of an **EPPO** following the rules of Art. 86 (1) subpara 3 TFEU is easier: If consensus on a EPPO regulation cannot be found, but at least 9 member states agree to establish an Enhanced Cooperation on the basis of the intended regulation, this is sufficient. The procedural rules thus **do not create specific obstacles**. If the political willingness exists, the procedure could be completed within a few weeks.³³

2.1.2. During the cooperation and opting-in

During the cooperation, decisions are made by the **Council** composed of representatives of the **member states participating in the Enhanced Cooperation**. Representatives of non-participating member states can take part in the consultation (Art. 20 (3) TEU, Art. 330 TFEU), yet they are not allowed to vote and not bound by the decision.

The later participation in an existing Enhanced Cooperation is possible along the provisions of Art. 331 TFEU as long as the Member State fulfils the criteria laid down in the establishment decision and respects the legal acts already met during the cooperation (Art. 20 (4) TEU, Art. 328 (1) 2 TFEU). The procedure of Art. 331 TFEU mainly consist of a notification to the Council and the Commission (and to the HR/VP in the area of CFSP), a confirmation of the Commission (or of the Council in cases of CFSP) that the Member State fulfils the criteria and a decision of the Council.

2.1.3. Opting-out and ending

Neither a **suspension** of a certain Member State nor the possibility of a **withdrawal** from Enhanced Cooperation is described in Art. 20 TEU. Whereas a suspension of participation seems to be inappropriate in view of the general possibility of sanctions on the basis of the provisions of Art. 7 TEU³⁴, there is disagreement about the possibility to withdraw³⁵.

33. Thym, *EuR-Beih.* (2013) 23, 30.

34. Becker in: von der Groeben/Schwarze Hatje, Art. 20 TEU n. 74. According to Art. 7 (2) TEU, the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 TEU may be determined and sanctioned, according to Art. 7 (3) TEU, by suspending certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights in the Council. This requires unanimity among all member states (except the Member State concerned).

35. Against: Becker in: von der Groeben/Schwarze Hatje, Art. 20 n. 74; For a mutual dismissal: Blanke in Grabitz/Hilf/Nettesheim, Art. 20 TEU n. 61.

Enhanced Cooperation is **ending** as soon as all member states have joined or after a decision of the Council to end the cooperation. Since there are no provisions for such a dissolution in the Treaties, the applying rules are not clear. Either it would follow the rules of its establishment as an *actus contrarius*, which means that the Council would decide composed of representatives of all member states and with the consent of the European Parliament.³⁶ Or the establishment decision is treated as an authorisation to end the Enhanced Cooperation by decision of the Council composed of the representatives of the participating member states.³⁷

2.2. Permanent Structured Cooperation (PESCO)

With PESCO, the Lisbon Treaty has also established a new flexibility tool for security and defence policy in Art. 42 (6), 46 TEU and Protocol No. 10.³⁸ However, its scope of application is strictly limited to **military capabilities** as the wording of Art. 42 (6) phrase 1 shows: “whose military capabilities fulfil higher criteria”. Neither civil or police capabilities nor measures of any other policy field are encompassed by this instrument. It is an instrument for the coordination and strengthening of projects in the area of the Common Security and Defence Policy (CSDP) and therefore to a certain extent similar to additional research programs.³⁹

2.2.1. Preconditions and establishment process

PESCO is open to all member states which agree to “proceed more intensively to **develop its defence capabilities** through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency)” (Art. 1 lit. a) Protocol No. 10). The further precondition of Art. 1 lit. b) Protocol No. 10 refers to the capacity to supply **targeted combat units** for battle groups carrying out on short notice the tasks referred to in Art. 43 TEU.

“PESCO DOES NOT REQUIRE TO BE THE ULTIMA RATIO AND HAS NO MINIMUM NUMBER OF PARTICIPANTS”

In contrast to Enhanced Cooperation, PESCO does not require to be the **ultima ratio** and has no **minimum number** of participants⁴⁰, but – as a part of CSDP – it is to be conducted without prejudice to the obligations that member states may have towards **NATO** (Art. 42 (2) subpara 2 TEU). This provision was included in order to dispel concerns that EU defence policy could undermine NATO.

The establishment of a Permanent Structured Cooperation requires that the member states’ military capabilities “fulfil higher criteria” and that participants “have made more binding commitments to one another” (Art. 46 (6) 1 TEU). It can be seen as a two-step-process: member states are expected to achieve a **commitment** first and then introduce it to the EU.⁴¹ The member states that wish to establish a PESCO notify the Council that they have reached an agreement and make a **request** to the Council for its establishment. The **HR/VP** gives a non-binding opinion about whether the criteria are fulfilled by the requesting member states and if the proposed PESCO fits to the objectives of the Union’s CFSP/CSDP policies.⁴² The **Council decides** by qualified majority.⁴³ The decision must name the subject of the foreseen PESCO and contain a list of participating member states. Neither the **European Parliament** nor the **Commission** are explicitly involved in the procedure. The HR/VP acts in her capacity as High Representative and Chairperson of the Foreign Affairs Council.

36. For as one of two possible ways Becker in: von der Groeben/Schwarze/Hatje, Art. 20 TEU n. 72.

37. Blanke in: Grabitz/Hilf/Nettesheim, Art. 20 TEU n. 62.

38. During the Constitutional Convention called ‘Structured Cooperation’ but then intended to be a long-term tool and called ‘Permanent Structured Cooperation’ in the Constitutional Treaty.

39. Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 17.

40. Some state that even two participants are sufficient: Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 7.

41. Like this Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 15; Marquardt/Gaedtke in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, Art. 46 TEU, n. 3 who accepts the possibility of overlapping; dissenting Cremer in: Calliess/Ruffert, Art. 46 TEU n. 6 who only requires a declaration of political willingness without legal obligation as a first step. Member states signed their commitment on 13 November 2017 and gave it as a notification to the HR/VP at the same time. The wording of the notification underpins the view to see it as a non-binding commitment before the decision of the Council.

42. In her coordinative role in CFSP/CSDP-policies and as the President of the Foreign Affairs Council she may also prepare the request for the member states on the basis of their political declaration and represent it in front of the Council, see Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 22.

43. member states have no right for establishment even if they fulfil all criteria. A negative decision by the Council does not even need to be justified. It is not allowed, by contrast, to exclude single member states beyond the criteria recorded in Art. 42 (6) and Art. 46 TEU and Protocol No. 10.

2.2.2. During the cooperation and opting-in

The obligations of member states participating in PESCO are described in Art. 2 of Protocol No. 10. According to this provision, PESCO participants are obliged to

- cooperate in investment expenditure on defence,
- bring their defence apparatus into line with each other,
- enhance the availability, interoperability, flexibility and deployability of their forces,
- make good the shortfalls perceived in the “Capability Development Mechanism” and
- take part in the development of equipment programs of the European Defence Agency.

In their “Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy” of 13 November 2017⁴⁴ the 23 participating member states agreed to specify the Treaty provisions by a **list of ambitious and more binding common commitments** in these five areas.

They also wrote down certain rules for governing PESCO: During the cooperation, the EU Foreign and Defence ministers meet in a joint **Foreign Affairs Council/Defence meeting** to decide about the overall policy direction of PESCO and assess if member states are fulfilling their commitments. Preparatory and permanent bodies dealing with CSDP (e.g. the European Union Military Committee (EUMC), the Political and Security Committee (PSC) and the Politico-Military Group (PMG)) can gather in “PESCO formats”.

Furthermore, participating member states can **submit projects** that they deem useful to the PESCO Secretariat which coordinates the assessment of project proposals. The European Defence Agency (EDA) ensures that there will be no duplication with existing initiatives and the High Representative provides a recommendation on proposals. Projects will be **implemented by a unanimous Council decision** among the member states participating in PESCO according to Art. 46 (6) TEU. The governance of a project is the responsibility of the participating member states which guarantee the fulfilment of their commitments. The High Representative will **report on this fulfilment** at least once a year.

In order to **opt-in**, a Member State must fulfil the criteria and give a notification to the HR/VP and the Council. The Council’s decision about an opt-in-request is taken by qualified majority among the participating member states (Art. 46 (3) TEU). In concrete terms, a Member State willing to join what have to meet the criteria, convince a qualified majority of PESCO participants to approve its request and sign up to the commitments.

2.2.3. Opting-out and ending

Member states can give a notification to the Council if they want to **withdraw** from their participation (Art. 46 (5) TEU) or their participation can be **suspended** by a Council decision if they do not fulfil the criteria any longer (Art. 46 (4) TEU).

Since there are no specific rules about ending PESCO in the Treaties, general rules of international law are applicable. PESCO would therefore **end** by unanimous decision of the Council (as *actus contrarius*) or by the transition of PESCO provisions into EU law which is applicable to all member states.⁴⁵ The above-described way of a Council decision among participating member states on the basis of the Council’s authorisation decision (see 1.3) may be legally possible for PESCO, too.

⁴⁴. Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017.

⁴⁵. See Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 27.

2.3. Two tools and a common objective: long-term integration

“ COMPARED TO ENHANCED COOPERATION, PESCO IS EASIER TO ESTABLISH IN TERMS OF PROCEDURE AND CONDITIONS ”

Compared to Enhanced Cooperation, PESCO is **easier to establish** in terms of procedure and conditions: There is no need for a minimum number of participating member states, no ultima ratio requirement, a qualified majority is sufficient and neither the Commission nor the European Parliament must be involved in the authorization process.⁴⁶ In contrast, its scope of application is limited to defence.

Both flexibility tools have the same constructive opt-in mechanism that allows to build up a more or less permanent structure under the framework of the EU. They also allow non-participating member states to observe the cooperation until they decide to join or fulfil the given criteria. The two instruments are open to all member states and aim to achieve unitary integration in the long run.

2.3.1. Principle of openness

Enhanced Cooperation and PESCO both contain the principle of openness. This is meant to prevent an exclusive club of member states that could divide the EU. They aim to involve as many member states as possible and keep the cooperation open and transparent for all (also non-participating) member states.

Every non-participating Member State has a right to **take part in Council debates**. This is emphasized twice in the provisions in question (Art. 20 (3), phrase 3 TEU, Art. 330 subpara. 1 TFEU). This transparency is supposed to safeguard the openness. Neither Enhanced Cooperation nor PESCO are meant to be exclusive. Every Member State has the right to join at any time, if it meets the criteria. Later **opting-in** member states do not have to meet higher, but the same criteria as those member states that established the Cooperation.⁴⁷ Building up **barriers** that keep certain member states out would be inadmissible.

2.3.2. Priority of unitary integration

It is an open question whether both tools are meant to establish a lasting cooperation. Even if the first linguistic association of “*Permanent*” Structured Cooperation is that it is meant to last for a long time, both flexibility tools see differentiation as temporary.⁴⁸ They follow the idea of unitary integration.

“ BOTH FLEXIBILITY TOOLS SEE DIFFERENTIATION AS TEMPORARY ”

This becomes evident by the **ultima ratio** provision which states that Enhanced Cooperation can only be established when “the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” (Art. 20 (2), phrase 1 TEU). The **minimum number** of nine participants to establish Enhanced Cooperation can also be interpreted as a provision to prevent small avant-garde groups that could provoke fragmentation within the Union. Finally, the obligation to “**promote participation by as many member states as possible**” (Art. 328 (1), subpara. 2 TFEU)⁴⁹ confirms the objective of unitary integration. The priority of unitary integration may not have the same emphasis in the case of CSDP and PESCO, but is the general idea of developing CSDP described in Art. 42 (2) subpara 1 TEU.

2.3.3. Maintaining the Union’s objectives and acquis

In addition, there are some provisions which prevent derogation from the general objectives and the *acquis* of the EU: The **Treaties’ objectives may not be endangered** by the cooperation (Art. 326 TFEU and Art. 20

46. V. Kielmansegg, Die Verteidigungspolitik der Europäischen Union, p. 225.

47. For Enhanced Cooperation opting-in member states have no obligation to undertake as an *acquis* the decisions already taken during the time of cooperation (Art. 20 (4) 2 TEU).

48. For PESCO see Kaufmann-Bühler in: Grabitz/Hilf/Nettesheim, Art. 46 TEU n. 9. For Enhanced Cooperation see Pechstein in: Streinz, Art. 20 TEU n. 5 f.

49. It was only to ensure that “as many member states as possible are encouraged to take part” in Art. 43b phrase 3 TEU-Nice.

(1), subpara. 2, phrase 1 TEU). As a guardian of the Union's interests, either the Commission or the HR/VP are partly involved in the establishment process by giving **opinions on the coherence** of the cooperation with the Union's objectives and policies. The right for non-participating member states to **take part in Council debates** should also prevent divergence within the Union.

2.3.4. Inclusion into the EU's institutional infrastructure

THE FLEXIBILITY PROVISIONS OF THE TREATIES TRY TO KEEP COOPERATION AMONG SUB-GROUPS OF MEMBER STATES WITHIN

In case of cooperation outside the EU framework, which is not banned by the EU Treaties, member states are still bound by the general principle of loyalty.⁵⁰ But the flexibility provisions of the Treaties try to keep cooperation among sub-groups of member states within the Union's institutional infrastructure.

THE UNION'S INSTITUTIONAL INFRASTRUCTURE."

It is remarkable that a **qualified majority** is sufficient for the Council's decision to establish PESCO, since the strongly intergovernmental CSDP is normally explicitly excluded from majority decisions (Art. 31 (4) and Art. 42 (4) TEU). Enhanced Cooperation in CFSP, by contrast, requires unanimity to be established (Art. 329 (2) subpara 2 TFEU). Cooperation on the basis of these two instruments has the advantage of being able to rely on the EU's institutional infrastructure and provides an incentive for incorporating such cooperation into the EU system and not establishing cooperation outside the treaty framework.

50. Marquardt/Gaedtke in: von der Groeben/Schwarze/Hatje, Art. 46 TEU n. 2.

TABLE 2 ► Overview of Enhanced Cooperation and PESCO

	ENHANCED COOPERATION			PERMANENT STRUCTURED COOPERATION (PESCO)
LEGAL BASIS	Art. 20 TEU Art. 326-334 TFEU			Art. 42 (6) TEU Art. 46 TEU Protocol No. 10
SCOPE OF APPLICATION	All policy fields of non-exclusive competence (except from those covered by the more specific PESCO)			Common Security and Defence Policy (CSDP)
OBJECTIVE	"further the objectives of the Union, protect its interests and reinforce its integration process" (Art. 20 (1), subpara. 2, phrase 1 TEU)			"to ensure that the Union is capable of fully assuming its responsibilities within the international community [...] RECOGNISING that the strengthening of the security and defence policy will require efforts by member states in the area of capabilities" (Preamble of Protocol No. 10)
PRECONDITIONS	- No exclusive EU competence, Art. 20 (1) subpara 1 TEU - Ultima ratio, Art. 20 (2), phrase 1 TEU - Correspondent to the Union's objectives (notably unitary integration in a long-term perspective), Art. 20 (1) subpara 1, phrase 1 TEU, Art. 326 TFEU			- Conditions of Protocol No. 10; - Multilateral Agreement on more binding commitments and request to the Council
MINIMUM NUMBER OF PARTICIPANTS	9 member states, Art. 20 (2) phrase 1 TEU			No minimum number
PROCEDURE OF ESTABLISHMENT	all other policies (Art. 329 (1) TFEU)	CFSP (Art. 329 (2) TFEU)	PJCC (Art. 82 (3) subpara 2, Art. 83 (3) subpara 2, Art. 86 (1) subpara 3, Art. 87 (3) subpara 3 TFEU)	CSDP (Art. 46 (1) and (2) TEU)
member states (MS)	Request to the COM specifying the scope and objectives of the Enhanced Cooperation proposed	Request to the Council submitting to HR/VP, COM and EP	Notification to EP, Council and COM	Notification to the Council and the HR/VP and Request to the Council (can be one act)
High Representative (HR/VP)	---	To be consulted by the Council; Opinion on whether the Enhanced Cooperation is consistent with the Union's CFSP	---	To be informed by the MS (can prepare the request and represent the MS); To be consulted by the Council: Opinion on whether the PESCO proposed is consistent with the Union's CFSP and the criteria are fulfilled (non-binding)
Commission (COM)	Proposal to the Council (If not, the COM shall inform the MS concerned why not submitting a proposal to the Council.)	Opinion on whether the Enhanced Cooperation proposed is consistent with other Union policies	To be informed	---
European Parliament (EP)	Consent	To be informed	To be informed	---
Council (Members of all EU member states)	Decision qualified majority, Art. 16 (3) TEU	Decision Unanimously, Art. 329 (2) subpara 2 TFEU	To be informed	Decision Naming the PESCO and listing participating MS qualified majority (3 months)
OPT-IN	Obligation to fulfil the establishment criteria and to accept all decisions and legal acts already met during the cooperation, Art. 328 (1) phrase 2 TFEU; Council decision following the procedure of Art. 331 TFEU (only participating MS)			Council decision by qualified majority (55 % of the PESCO-participating MS and 65 % of the population of the participating MS), Art. 46 (3) TEU and Art. 238 (3) lit. a) TFEU
DURING THE COOPERATION	Council decisions by unanimity and by qualified majority defined in 238 (3) TFEU (only participating MS decide, but non-participants can take part on the consultation, Art. 20 (3) TEU and Art. 330 TFEU)			Council decisions by unanimity (only participating MS), Art. 46 (6) TEU
OPT-OUT				
suspension	Not possible (arg. ex Art. 7 TEU)			Council decision by qualified majority (55 % of the PESCO-participating MS without the suspending MS and 65 % of the population of the participating MS), if a participant no longer fulfils the criteria or is not able to meet the commitments, Art. 46 (4) TEU and 238 (3) lit. a) TFEU
withdrawal	Possibility is controversial			Notification of the rescinding MS to the Council, Art. 46 (5) TEU
ENDING				
full integration	Transition of the "Cooperation law" in general EU law			Transition of the "PESCO law" in general EU law
dissolution	Following the provisions of establishment or decision of Council of participating MS			Following the provisions of establishment or decision of Council of participating MS

To sum up, it is important to stress that Enhanced Cooperation and PESCO are based on a constructive opt-in mechanism. They follow the EU Treaties' objective of unitary integration in a long-term perspective and use its infrastructure and power of legislation. They prevent destabilisation and allow for the flexibility tool to function in a constructive manner within the EU's legal system.

3. Challenges after agreeing and adopting EPPO and PESCO

Based on the EU Treaties, as the previous analysis of the legal provisions has shown, **flexibility seems to have become the new mantra of European integration**. Even though differentiated integration is already a reality in the EU, certain challenges after the agreement and adoption of EPPO and PESCO (as the EU's two most recent cases of relying on its flexibility tool) must be taken into consideration: On the one hand, the institutional structure of EPPO is the product of an inter-institutional compromise which will have to prove its viability and the European Commission has already announced its intention to prepare a proposal for an expansion of EPPO's tasks to combating terrorism (3.1). On the other hand, there is a risk of "Executive federalism" in EU defence, if national governments commit themselves to certain armament and defence projects, if their spending plans are monitored and decision-making procedures for the deployment of armed forces are revisited, as it is foreseen in the Joint Declaration of 13 November 2017 (3.2).

3.1. A preliminary evaluation of EPPO

EPPO's goal is to **fight against fraud** that, for instance, affects the regional and agricultural funds of the EU budget. In July 2017, the directive on the fight against fraud to the Union's financial interest by means of criminal law (the "PIF Directive"⁵¹) defined the crimes that EPPO is entitled to prosecute. The new body establishes an equal level of protection of the EU's financial interests among the 20 member states participating in the Enhanced Cooperation. EPPO will need to cooperate with the EU's Anti-Fraud Office (OLAF) and Eurojust.

» EPPO CAN BE SEEN AS AN IMPORTANT ACHIEVEMENT IN THE AREA OF CRIMINAL JUSTICE"

The **vertical and integrated form of cooperation between national authorities** in EPPO can be seen as an important achievement in the area of criminal justice. In the end, EPPO has become less hierarchical than foreseen in the European Commission's draft Regulation of July 2013, because the Council advocated a "**college structure**" for EPPO which directly involves all participating member states. Even though the European Parliament had backed the Commission, it accepted the new approach and gave its consent after it had sought clarifications on the implications of the "college structure".⁵²

Most recently, in his State of the Union speech on 13 September 2017, Jean-Claude Juncker declared that he saw "a strong case for tasking the new European Public Prosecutor with prosecuting cross-border terrorist crimes."⁵³ In his Letter of Intent of 13 September 2017, among the "Initiatives with a 2025 perspective", the Commission President announced a Communication on a possible **extension of EPPO's tasks to include the fight against terrorism**.⁵⁴ According to the EU Treaties, any extension of EPPO's mandate, for instance to cover the prosecution of cross-border terrorist crimes, requires a unanimous decision of the European Council after obtaining the consent of the European Parliament and after consulting the European Commission.⁵⁵ This indicates that the institutional development of EPPO is likely to continue.

51. European Union directive on the fight against fraud to the Union's financial interest by means of criminal law.

52. European Parliamentary Research Service, Establishing the European Public Prosecutor, At a glance: Plenary October 2017.

53. European Commission, President Juncker's "State of the Union" speech, 13 September 2017.

54. European Commission, State of the Union 2017. Letter of Intent to President Antonio Tajani and to Prime Minister Jüri Ratas, p. 9.

55. Art. 86 (4) TFEU provides for the possibility to expand EPPO's competences.

3.2. “Executive federalism” in European defence?

It is clear that PESCO constitutes the political pillar of the EU’s latest defence package. In establishing stronger and more coherent defence capabilities, **intergovernmental logics** (decision-making in the Council in a PESCO-format) and **communitarian logics** (the EDA is the EU’s agency “in the field of defence capabilities development, research, acquisition and armaments”⁵⁶) could potentially clash. **If PESCO is effective** (i.e., all actors manage to work together and are able to reconcile the two logics and if everyone plays its role in line with his tasks and responsibilities), **another risk arises: The risk of executive federalism in European defence.**

” NATIONAL
PARLIAMENTS’ POWER
OF THE PURSE BECOMES
CONSTRAINED UNDER
PESCO ”

Obviously, defence policy is among the executive’s prerogatives in most countries, but if defence spending becomes closely coordinated and monitored at the EU level (either in the Council or in more communitarian mechanisms), one possible problem is that national parliaments’ **power of the purse** becomes constrained under PESCO, as governments signed up to “[s]uccessive medium-term increase[s] in defence investment expenditure to 20% of total defence spending”⁵⁷ and could become pre-committed to certain armament projects. Parliamentary influence would then be reduced. Until now, the budget and defence committees of national parliaments exercise a close scrutiny of defence and armament spending. They should therefore establish **ex-ante scrutiny of governments’ commitments in CSDP and PESCO**. If member states had to consult their national parliaments, however, decision-making within PESCO would become more cumbersome. Another issue is what would happen “if a change in government in a signatory country prompts a reversal of policy”?⁵⁸

With respect to the availability and deployability of forces, Annex II of the Joint Notification of 13 November 2017 also foresees that “participating member states are committed to [...] [a]iming for fast-tracked political commitment at national level, including possibly reviewing their national decision-making procedures.”⁵⁹ In countries where parliamentary approval for military missions is a constitutional requirement, this provision might prove difficult to implement.⁶⁰

Another problem is that additional funding sources in the form of the EDF (to kick-start joint initiatives) could indeed be beneficial, but need to be **subject to the same level of budgetary scrutiny** as national spending. In that respect, the European Parliament should consider reinforcing its scrutiny of CSDP⁶¹ and national parliaments should again closely scrutinise the activities of their national governments in the field of CSDP and PESCO. The Interparliamentary conference for CSFP and CSDP, which was established in 2013 and succeeded the Parliamentary Assembly of the West European Union (WEU), is a suitable venue for the exchange of best practices, hearing decision-makers and even exercising joint scrutiny.⁶²

56. European Defence Agency, *Intervention by Chief Executive Jorge Dómecq before the Security and Defence Committee of the European Parliament*, 25 September 2017, p. 8.

57. Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017, Annex II - List of ambitious and more binding common commitments in the five areas set out by Article 2 of Protocol No 10, p. 3, point 2.

58. Fiott Daniel, Missiroli Antonio and Tardy Thierry, *Permanent Structured Cooperation: What’s in a name?*, Chaillot Paper No. 142, European Union Institute for Security Studies: November 2017, p. 53.

59. Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017, Annex II - List of ambitious and more binding common commitments in the five areas set out by Article 2 of Protocol No 10, p. 4, point 12.

60. See, for the German Bundestag, the analysis of a commission to scrutinize and safeguard the Parliament’s rights, BT-Drs. 18/5000.

61. Currently, security and defence policy are treated in a sub-committee of the Foreign Affairs Committee of the European Parliament.

62. See Stavridis Stelios, *The new Inter-Parliamentary Conference on the CFSP/CSDP*, Miami-Florida European Union Center of Excellence, Vol. 14 No. 12, July 2014; Wouters Jan and Raube Kolja, *The Interparliamentary Conference on Common Foreign and Security Policy: A Quest for Democratic Accountability in EU Security Governance*, in: Lupo Nicola and Fasone Cristina, *Interparliamentary Cooperation in the Composite European Constitution*, Oxford, Hart Publishing, 2016, p. 227-246.

CONCLUSION

This Policy Paper revisited the possibility to **pursue integration as a sub-group of EU member states** that is offered by certain flexibility tools in the EU Treaties. Two flexibility tools have been used in 2017: Enhanced Cooperation for the European Public Prosecutor's Office (EPPO) and Permanent Structured Cooperation (PESCO).

Enhanced Cooperation can only be established by a Council decision as an ultima ratio in policy fields where the EU has no exclusive competence, whereas PESCO is an instrument limited to cooperation in defence matters and its preconditions are precisely described in the EU Treaties. Both flexibility tools keep the possibility open to opt-in later and aim for unitary integration in a long-term perspective.

But the establishment of each previous case of Enhanced Cooperation and of EPPO in 2017 was politically difficult – more than one would expect after reading the legal provisions. For the purpose of PESCO, an agreement could be achieved quickly after years of inactivity that prompted the Commission President to call PESCO a “sleeping beauty”⁶³. The effort is accompanied by additional steps for strengthening CSDP – also concerning the financing of common research on defence capabilities – and has been supported by the widespread political desire for more (effective) defence capabilities in Europe.

” THE GOVERNANCE OF THESE TWO TOOLS WILL NEED TO BUILD SOLID BRIDGES TO THE EU'S POLITICAL SYSTEM ”

Interestingly, flexibility tools have now been used in the areas of internal security (EPPO) and external security (PESCO) which are two **areas in which member states have traditionally been reluctant to cede national sovereignty**. The institutional framework that is being established for the governance of these two tools will need to build solid bridges to the EU's political system. The legal basis for Enhanced Cooperation and PESCO were specifically drafted in a way to allow this, but the **articulation with EU agencies and EU instruments** such as Eurojust, OLAF, the EDA, CARD and the EDF **will still require careful institutional engineering**. It is also an important development that the EU budget, via the EDF, provides a financial incentive for member states to join PESCO.

This Policy Paper has illustrated that apart from the benefits of flexibility tools, there are also significant institutional challenges related to EPPO and PESCO, including with respect to the **democratic legitimacy and parliamentary scrutiny** of decisions and coordination mechanisms. Nevertheless, these flexibility tools have been used in policy fields that characterised by gridlock and European integration might well see such “EU20+ formats” more often in the coming years.

63. European Commission, *Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe*. Prague, 9 June 2017.

BIBLIOGRAPHY

- Billon-Galland Alice and Quencez Martin, Can France and Germany Make PESCO Work as a Process Toward EU Defense?, German Marshall Fund of the United States, Policy Brief No. 033, 2017.
- Calliess Christian and Ruffert Matthias (eds.), EUV/AEUV, 5th Edn (2016).
- Council of the EU, European Public Prosecutor's Office: Council takes first step towards a possible enhanced cooperation, Press Release 48/17, 7 February 2017.
- Dawson Mark and De Witte Floris, Self-Determination in the Constitutional Future of the EU, *European Law Journal* 21(3), 2015, pp. 371-383.
- Deutscher Bundestag, Unterrichtung durch die Kommission zur Überprüfung und Sicherung der Parlamentsrechte bei der Mandatierung von Auslandseinsätzen der Bundeswehr, BT-Drs. 18/5000.
- European Commission, Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe. Prague, 9 June 2017.
- European Commission, President Juncker's "State of the Union" speech, 13 September 2017.
- European Commission, State of the Union 2017. Letter of Intent to President Antonio Tajani and to Prime Minister Jüri Ratas, 13 September 2017.
- European Defence Agency, Intervention by Chief Executive Jorge Domecq before the Security and Defence Committee of the European Parliament, 25 September 2017.
- European External Action Service, Permanent Structured Cooperation (PESCO) – Factsheet, 19 October 2017.
- European Parliamentary Research Service, Establishing the European Public Prosecutor, At a glance: Plenary October 2017.
- European Union, Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, 13 November 2017.
- Fabbrini Federico, Enhanced cooperation under scrutiny: Revisiting the law and practice of multi-speed integration in light of the first involvement of the EU judiciary, *Legal Issues of Economic Integration* 40(3), 2013, pp. 197-224.
- Fabry Elvire, Koenig Nicole and Pellerin-Carlin Thomas, Strengthening European Defence, Jacques Delors Institute, 20 October 2017.
- Fiott Daniel, Missiroli Antonio and Tardy Thierry, Permanent Structured Cooperation: What's in a name?, Chaillot Paper No. 142, European Union Institute for Security Studies: November 2017.
- Fromage Diane, The second yellow card on the EPP0 proposal: An encouraging development for Member State parliaments? *Yearbook of European Law* 35 (1), 2016, pp. 5-27.
- Gnath Katharina, Drin heißt drin: wenig Spielraum für Flexibilität in der Europäischen Wirtschafts- und Währungsunion, *integration*, 3/2017, pp. 226-30.
- Grabitz Eberhard, Hilf Meinhard and Nettesheim Martin (eds.), EUV/AEUV, latest update: supp 60 (October 2016).
- Graf v. Kielmansegg Sebastian, *Die Verteidigungspolitik der Europäischen Union* (Stuttgart) 2005.
- Graf v. Kielmansegg Sebastian, The Common Foreign and Security Policy – A Pool of Flexibility Models, in: Giegerich et al. (eds.), *Flexibility in the EU and Beyond*, p. 139 ff.
- Grant Charles, Besch Sophia, Bond Ian, Gostyńska-Jakubowska Agata, Mortera-Martinez Camino, Odendahl Christian, Springford John, Tilford Simon, *Relaunching the EU*, Centre for European Reform, November 2017.
- von der Groeben Hans, Schwarze Jürgen and Hatje Armin (eds.), *Europäisches Unionsrecht* 7th Edn (2015).
- IPEX platform for EU Interparliamentary Exchange, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM/2013/0534 (Yellow card).
- Koenig Nicole, Walter-Franke Marie, France and Germany: Spearheading a European Security and Defence Union? Jacques Delors Institut – Berlin, Policy Paper No. 202, 19 July 2017.
- Koenig Nicole, A differentiated view of differentiated integration, Policy Paper n°140, Jacques Delors Institute, July 2015.
- Kreiling Valentin, A Proposal to use Enhanced Cooperation in the Refugee Crisis, Jacques Delors Institut – Berlin, September 2015.
- Lupo Nicola and Fasone Cristina, *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing, 2016.
- Rozenberg Olivier, *The Role of the National Parliaments after Lisbon: Potentialities and Challenges*, Brussels: European Parliament, 2017.
- Stavridis Stelios, The new Inter-Parliamentary Conference on the CFSP/CSDP, Miami-Florida European Union Center of Excellence, Vol. 14 No. 12, July 2014.
- Streinz (ed.), EUV/AEUV, 2nd Edn (2012).

Thym Daniel, Ungleichzeitigkeit und europäisches Verfassungsrecht, Die Einbettung der verstärkten Zusammenarbeit, des Schengener Rechts und anderer Formen von Ungleichzeitigkeit in den einheitlichen rechtlichen und institutionellen Rahmen der Europäischen Union (Baden-Baden) 2004.

Thym Daniel, Flexible Integration: Garant oder Gefahr für die Einheit und die Legitimation des Unionsrechts?, Europarecht Beiheft (2013) p. 23 ff.

Toaldo Mattia, Don't close borders, manage them: how to improve EU policy on migration through Libya, European Council on Foreign Relations, June 2017.

Walter-Franke Marie, The missing reflection paper on asylum policy, Jacques Delors Institut – Berlin, July 2017.

Wouters Jan and Raube Kolja, The Interparliamentary Conference on Common Foreign and Security Policy: A Quest for Democratic Accountability in EU Security Governance, in: Lupo Nicola and Fasone Cristina, Interparliamentary Cooperation in the Composite European Constitution, Oxford: Hart Publishing, 2016, p. 227-246.

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