

1 Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation

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Differentiation in the European Area of Freedom, Security and Justice

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1. Introduction

In the European Union of the twenty-first century, already composed of nearly thirty Member States with a remarkable degree of heterogeneity, the possibilities for progress, for extension or increase of integration into new areas, require greater flexibility. Since not all states always want to move forward together or at the same speed, it has become imperative to formulate mechanisms to allow a significant group of them, under certain conditions, to advance if they wish. Those countries that are outside (“out” countries) are not involved in the progression but do not block it; those countries that do participate in the advance (“in” countries or the vanguard) enhance or extend their degree of integration, leaving the door open to future incorporation of the “out” countries. With a wide variety of formulas - all subsumed under the category of differentiation, multi-speed Europe or differentiated integration - these techniques have become a characteristic feature of the European Union, especially in recent decades, and are seen as being key to its future development. The recognition of this importance and the interest in controlling its development has led to its institutionalization in the Treaties through the so-called enhanced cooperation clauses. Incorporated for the first time in the Treaty of Amsterdam, they have been substantially amended by the Nice Treaty and the Treaty of Lisbon. To understand current and future leeway for differentiated integration will require us to mainly analyze in depth these clauses and their evolution, not forgetting any other experiences or techniques inside or outside the EU framework that may be relevant.

The area of freedom, security and justice (AFSJ) has been a particularly favourable field for differentiated integration. The affected areas (immigration, terrorism, police, judicial, penal cooperation etc), closely linked to national sovereignty and therefore very sensitive, have in the past given rise to some of the most striking and successful cases of differentiation, with the Schengen area being the most significant example. The complexity of the AFSJ, with areas that traditionally belonged not only to the Community pillar but also to the intergovernmental pillar, and the peculiarities arising from the Schengen communitarisation led to an equally complex institutionalization of the possibilities of enhanced cooperation in Amsterdam and the subsequent Treaties. Added to the general enhanced cooperation clauses of the first and third pillars were the privileged and predetermined enhanced cooperation clauses of Schengen and the protocols with special rules for the UK, Ireland and Denmark; multiple doorways to a differentiated integration that had already been revealed as essential and useful in this area. This is a particularly rich and interesting landscape to explore, as it includes cooperation outside the EU framework (the initial Schengen cooperation) and within it (enhanced cooperation clauses of the Treaties), at the EU level (first pillar) and intergovernmental level (third pillar), enhanced cooperation leaving out only one or two States (opt-out clauses of the United Kingdom and Ireland or of Denmark) and others that would allow a much more limited group of states to move forward, including less than ten (general provisions for enhanced cooperation), enhanced and authorized in advance cooperation (privileged enhanced cooperation clause of Schengen) and others that require prior authorization (general enhanced cooperation clauses). Effective application and usefulness, complexity and richness of formulas and models of differentiated integration are the key features of differentiated integration in the AFSJ, features that inevitably increase the interest and potential of this study.

We will look at this area from a historical perspective because in this case, as in many others, it is necessary to consider the past in order to properly understand the current regulations and their potential future application. We will, however, pay particular attention to the regulation of Lisbon, to its current design and its developments related to Nice, to the real possibilities of using the various integration methods provided for in the AFSJ, their advantages and possible risks. We will finish by drawing some overall conclusions about the differentiation in the AFSJ, past, present and future.

2. A historical perspective

As THYM¹⁹⁴ states, the AFSJ is probably the area that most clearly demonstrates that “supranational differentiation is not simply an abstract concept but a political reality.” It is therefore very important to focus on the historical analysis, to see how it worked and ultimately assess its results.

This study of the historical evolution has been divided into two periods: in the first, the pre-Nice period is analysed, which will pay special attention to the Schengen experience and the first institutionalization of mechanisms for enhanced cooperation in this area by the Amsterdam Treaty; in the second, primarily the innovations that led to the Nice Treaty and its implementation will be studied.

2.1. Pre-Nice differentiation

2.1.1. Experience acquired up to Amsterdam, especially Schengen

Many of the areas included in the AFSJ have traditionally been subject to bilateral or multilateral international cooperation between European states, especially between neighbouring states. Significant, for example, is the cooperation on the movement of people and border control in Benelux, the Nordic countries (Nordic Passport Union) or Anglo-Saxon Europe (British-Irish Common Travel Area).

In the same area, and also in its infancy outside of the EU framework, one of the most important and successful examples of cooperation emerged: the creation of the Schengen area. Based on an initial 1985 agreement signed only by France, Germany and the Benelux countries, it was subsequently firmed up and expanded by the same States in the early 90s. Unlike previous examples of cooperation and despite being in these early days purely intergovernmental, Schengen was born with close ties to the European integration process and to the achievement of one of its new objectives given form in the ‘80s: a Europe without internal borders. Thus it was born from the outset with a clear vocation to open itself to other Member States and to be communitarized. It was born intergovernmentally, outside of the EU Treaties and among few states, given the impossibility of any other more ambitious way, but with the aim of serving as successful field testing and thus convince the other Member States of the European Union to join the project and incorporate to the *acquis communautaire* as soon as possible¹⁹⁵. Over the years, both aspirations have been met: on the one hand, the rest of the Member States of the European Union (except the UK and Ireland) have been gradually joining; and on the other hand, since Amsterdam, the Schengen *acquis* began to incorporate the EU Treaties.

Thus, Schengen has become a clear example of the success of differentiated integration. A partnership initiated by only 5 States and with an intergovernmental nature has ended up communitarised and covering virtually all of the States of the Union. It has enabled leading countries to progress, demonstrating the benefits of integration in this field and the control of risks, thus serving a very useful role for the European project.

¹⁹⁴ THYM, D.: “Europa a varias velocidades: las cooperaciones reforzadas”, in BENEYTO, J.M (Dir.), MAILLO, J. and BECERRIL, B. (Coords.), *Tratado de Derecho y Políticas de la Unión Europea, Tomo I (Desarrollo histórico y caracteres básicos de la Unión Europea. Naturaleza, valores, principios y competencias)*, Aranzadi Thomson Reuters, Navarra, 2009, p. 571-633, and particularly p. 602.

¹⁹⁵ The failure was not a legal one because intergovernmental cooperation would have been possible within the framework of the then so-called “political cooperation”. In fact, the States had begun to work on issues of justice and home affairs from 1975 and the Single European Act – SEA - institutionalized such mechanisms of cooperation and put on record the intention of the Member States to work together in this field. See in particular the Declaration of the Governments of Member States concerning the free movement of persons, the final act of the SEA, OJ L 169, 1987, p. 26. The Maastricht Treaty gave new opportunities from 1993 onwards to include in primary law a third pillar dedicated to cooperation in justice and home affairs. However, Schengen continued outside of the Treaties until the mid 90’s when in Amsterdam it was incorporated into the EU framework.

Although less relevant to our study than the Schengen experience, one can also mention other forms of differentiation in the material areas currently framed within the AFSJ, either based on certain provisions of the post-Maastricht Treaties or on secondary legislation: this includes, for example, differentiations relating to the jurisdiction of the ECJ to interpret and adjudicate on matters relating to the Conventions of the third pillar¹⁹⁶, to the open possibility of some of these conventions of overcoming the commonly agreed minimum harmonization agreed on a bilateral or multilateral basis by some of the participating States, or of entry into force of the conventions only for some of the signatory states or even differentiation in their obligations as a result of individual reservations¹⁹⁷.

2.1.2. The institutionalization of enhanced cooperation in Amsterdam

The entry into force of the Treaty of Amsterdam led to two very significant changes compared to the previous situation: on the one hand, it involved the constitutionalization of enhanced cooperation mechanisms in the field of the AFSJ; on the other hand, it increased the complexity of differentiated integration when providing for a “multi-channel” design for initiating or developing closer cooperation in this field.

Indeed, the Treaty of Amsterdam included in primary law the following enhanced cooperation mechanisms applicable to a greater or lesser extent to the AFSJ:

- Firstly, a general clause on enhanced cooperation for Community pillar affairs (applicable, in relation to the case in hand, to Title IV of this first pillar dedicated to “visas, asylum, immigration and other policies related to free movement of persons”)¹⁹⁸;

- Secondly, an enhanced cooperation clause specific to third pillar issues, in particular Title VI on police and judicial cooperation¹⁹⁹. Naturally, this mechanism was much more intergovernmental than the first pillar, giving a greater role to Member States and the Council and a purely residual role to the Commission and European Parliament²⁰⁰;

- Thirdly, the Schengen mechanism of enhanced cooperation, a special and privileged mechanism inasmuch as the enhanced cooperation was already authorized in advance. It allowed the establishment or development, now within the framework of the European Union, of closer cooperation in all matters relating to the Schengen acquis²⁰¹;

- Fourthly, the concession of an opt-out to Britain and Ireland which allowed these countries to not participate in the adoption thereof and to not be bound if they still wanted, either by measures adopted on the basis of Title IV or by those relating to the Schengen acquis. It reveals an objection in principle and in practice of the United Kingdom to cooperation and the sharing of sovereignty in this field²⁰²;

- Fifthly, the granting of an opt-out to Denmark seeking primarily to maintain the intergovernmental nature of its obligations in the field of the AFSJ. Unlike the previous opt-out, it applies not so much to the content of the obligation or the desire to cooperate but the form and nature of the rule that reflects the agreement reached²⁰³.

¹⁹⁶ See also the then Art. K.3 (2) c of the EU Treaty.

¹⁹⁷ For a detailed analysis of these differentiations see PAPAGIANNI, G.: “Flexibility in Justice and Home Affairs: An Old Phenomenon taking new forms”, en DE WITTE, B.; HONE, D. & VOS, E. (eds), *The Many Faces of Differentiation in European Union Law*, Intersentia, Antwerpen-Oxford-New York, 2001.

¹⁹⁸ See Articles 43-45 of the EU Treaty and Article 11 of the EC Treaty in their post-Amsterdam versions.

¹⁹⁹ See again Articles 43-45 of the EU Treaty and Article 40 of the same Treaty.

²⁰⁰ Not only did the authorization decision rest with the Council and was adopted unanimously (emergency veto of a single State), but the initiative, the application for approval, also rested with the governments and not the Commission. The European Parliament, meanwhile, was simply informed. Both data mark the differences with the approval procedure in the first pillar in which the Commission had the initiative and the European Parliament had to be consulted in advance. See Articles 40.2 TEU and 11.2 TEC.

²⁰¹ See the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Amsterdam Treaty.

²⁰² See the following Protocols annexed to the Amsterdam Treaty: the Protocol on the position of the United Kingdom and Ireland, the Protocol on the application of certain aspects of Article 14 EC Treaty to the United Kingdom and Ireland and Articles 4 and 5 of the Protocol integrating the Schengen acquis into the framework of the European Union.

²⁰³ See the Protocol on the position of Denmark and Article 3 of the Protocol integrating the Schengen acquis within the European Union framework, both annexed to the Amsterdam Treaty.

This complex multi-channel articulation of enhanced cooperation in this field is the reflection of the complexity and richness of the AFSJ, a space in construction falling somewhere between intergovernmental and supranational, as well as the difficult political compromises required to move the already-existing Schengen route into the EU construct.

On one hand, this involves a further clear recognition of the need for differentiated integration in the area and a first attempt to establish, at a primary law level, mechanisms for enhanced cooperation applicable throughout the AFSJ. It also involves a commitment to consolidate cooperation already under way (mainly Schengen) and channel it through procedures and institutions. It is domesticated and channelled but without hampering its continuity and development: in fact, the Schengen cooperation has a privileged status and is deemed agreed beforehand²⁰⁴. Additionally, a new boost is given and there is a speeding up due to the possibility of using the legal and institutional framework of the EU in the future. At the same time the greatest possible unity is sought: on incorporating the Schengen to the EU acquis, this obliges countries acceding subsequently to accept the existing position as another part of the *acquis communautaire*²⁰⁵.

Moreover, one can perceive the latent distrust and caution with regard to some of the innovations and certain tradeoffs to pay for progress. Thus one has to understand, for example, the granting of opt-outs to Britain and Ireland and to a lesser extent also to Denmark. It was not conceivable to pass Schengen to the EU and boost the activities of the AFSJ of the Community pillar without at the same time agreeing to a UK opt-out allowing it to avoid any obligation under Schengen (or the areas of the AFSJ of the first pillar) not voluntarily and individually accepted. The initial beginnings of an indefinite differentiation over time are therefore accepted as a small price to pay. Also as an indication of mistrust, one has to explain the enormous obstacles that were originally imposed in relation to use of the general enhanced cooperation clauses of the first and third pillar: the strict conditions laid down, mainly the need for a majority of States to want to participate in enhanced cooperation, and the possibility of an emergency veto by a single State, made the use of these clauses very difficult in practice.

If we also bear in mind that the scope of application of both general clauses was residual in relation to the special Schengen mechanism²⁰⁶, it is not surprising that no such general clauses were used. In practice, therefore, differentiated integration in the AFSJ in this pre-Nice period was a continuation of previous Schengen cooperation outside the EU framework, and was based mainly on the Schengen incorporation Protocol and the specific exceptions for UK, Ireland and Denmark. It is therefore a model of differentiated integration in which the vast majority are moving together and just 2 or 3 states slip through. In this model, two new dilemmas make their appearance: if the “out” countries communicate their willingness to participate in some of the measures proposed or already taken, we must consider, first, how to decide whether such specific participation is possible and when to refuse consent for it, due to it breaking the coherence of the system and, second, how to avoid undue delays or obstructions in the adoption of Schengen developments caused by these “out” countries (without in addition having secured their participation in the end). It is clear that cooperation should remain open to “out” countries and it is desirable to encourage them to join the process in the future, but it is also desirable to be able to avoid unfair behaviour of the “out” countries and excessive privileges. We will have an opportunity to discuss these challenges later. It is enough for now to note their appearance.

2.2. The post-Nice scenario

The Nice Treaty did not alter the complex AFSJ-related multi-channel structuring of enhanced cooperation: the two general enhanced cooperation clauses for the first and third pillar, the specific Schengen mechanism and the opt-outs of Denmark, United Kingdom and Ireland remained available. Yet there were, however, substantial changes in regulation and approval procedures for the two general enhanced cooperation clauses. In addition to a more systematic approach and improved drafting of general and specific requirements, three substantive changes deserve to be highlighted:

²⁰⁴ See Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union. The Schengen countries are authorized by the Protocol itself to initiate cooperation in all matters relating to the Schengen acquis. The very restrictive conditions of the other general provisions for enhanced cooperation do not operate here.

²⁰⁵ See in this respect the clarity of Article 8 of the Protocol integrating the Schengen acquis within the framework of the European Union. Thus, the Schengen cooperation of 13 of 15 established the basis for cooperation between 25 of 27 with the following accessions.

²⁰⁶ See Article 43.1 (i) of the EU Treaty.

- Firstly, the reduction to 8 Member States of the minimum number of States required to establish enhanced cooperation²⁰⁷. This reduction was very significant taking into account that the EU enlargement to 25 (and then, 27 States) was close. In this new context, the new minimum was supposed to substantially lower the bar: more than half the States to less than a third. It made life much easier with regard to the possibility of enabling new enhanced cooperation;

- Secondly, the abolition of the emergency veto and its replacement by a mere delay or emergency brake. Both in the first and third pillar, authorizations for enhanced cooperation are adopted by qualified majority in the Council without the possibility - as occurred in the Amsterdam version - of a State vetoing such approval. Now all that is envisaged is that a State may refer the matter to the European Council for consideration, after which it will return to the Council which will take the final decision by qualified majority²⁰⁸. There is no veto but rather a delay in authorization at the most. Again, this removed a major obstacle to the use of these clauses;

- Thirdly, the European Commission and European Parliament reinforced their roles in both mechanisms. Regarding the first pillar, the European Parliament's opinion went from mere prior consultation to assent when the enhanced cooperation referred to an area governed by the codecision procedure²⁰⁹. Regarding the third pillar, the Commission was entrusted with the authorization request but not in absolute terms since it was anticipated that, on a subsidiary basis vis-à-vis the Commission, eight States could also take it to the Council²¹⁰. The European Parliament now had to be consulted in advance. Thus the supranational basis of the consent procedure was increased.

The first two amendments undoubtedly substantially expanded the possibilities for new enhanced cooperation relating to the AFSJ. The third meant an increase in the controls of the Commission and European Parliament regarding the same authorizations. In any event, one must not forget that both cooperation mechanisms remained residual in relation to the specific and privileged Schengen mechanism. In both cases, the Schengen mechanism offered substantial advantages in that the enhanced cooperation already had authorization beforehand. In practice, perhaps for the reasons mentioned above, the general clauses for enhanced cooperation of the first and third pillars were not used. The derived differentiated integration of Schengen and the specific opt-outs for Denmark, the UK and Ireland continued to dominate AFSJ differentiation.

It is also noteworthy that during this post-Nice period, there was once again resort to a method of differentiated integration outside of the EU framework as was done in Schengen previously. Indeed, on 27 May 2005, seven Member States signed the so-called Treaty of Prüm on deepening cross-border cooperation, particularly in combating terrorism, cross border crime and illegal migration²¹¹. Instead of using the enhanced cooperation mechanisms now found in the Treaty itself - and this is the big difference with Schengen - these states preferred the route of an international treaty to strengthen their cooperation in matters governed by the EU Treaties. Cooperation was always kept open to all other Member States and from the beginning it was conceived as a pilot project which ought to help to convince the others of the appropriateness of this enhanced cooperation and that it should eventually be transferred into the Community framework²¹². However, and irrespective of the substantial progress made, the chosen methodology has been severely and rightly criticized: the channels for this purpose in the Community Treaties should have been used, in accordance with their requirements and formal procedures, including the minimum threshold of States required and participation of the institutions in the implementation and development of the cooperation²¹³.

²⁰⁷ See the new wording of Article 43.1, g) of the post-Nice TEU.

²⁰⁸ See the new wording of Article 11.2 EC Treaty, in respect of the community pillar clause, and 40A, 2 EU Treaty regarding that of the third pillar.

²⁰⁹ See Article 11.2 EC Treaty.

²¹⁰ See Article 40A, 2 EU Treaty.

²¹¹ Ratified by Spain on 18 July 2006 and published in the Official State Gazette 307, of 25 December 2006, p. 45524-45534.

²¹² See in this regard, Article 1.2 and 1.4 of the Prüm Treaty. Indeed, this is actually redirecting towards the Community framework: see 2008/615/JAI Council Decision of 23 June 2008, on deepening cross-border cooperation, particularly in the fight against terrorism and transborder crime, OJEU L 210 of 6 August 2008, p. 1, and 2008/616/JAI Council Decision of 23 June 2008, implementing the above, OJEU L 210 of 6 August 2008, p. 12.

²¹³ See in this regard, among others, ZILLER, J.: "Le Traite de Prüm. Une vraie-fausse coopération renforcée dans l'Espace de sécurité, de liberté et de justice", *EUI Working Papers, LAW N° 2006/32*; GUILD, E. and GEYER, F., "Getting local : Schengen, Prüm and the dancing procession of Echternach. Three paces forward and two back for EU police and judicial cooperation in criminal matters", *Journal of European Criminal Law*, 3rd issue, 2006; BALZACQ, T., *The Treaty of Prüm And the Principle of Loyalty (Art. 10 TEC)*, European Parliament, DG Internal Policies of the Union, Directorate C-Citizen's Rights and Constitutional Affairs, Briefing Paper, 13 January 2006, IP/C/LIBE/FWC/2005-08; HOUSE OF LORDS-EU COMMITTEE, *Prüm: an effective weapon against terrorism and crime?*, Report with Evidence, 18th Report of Session 2006-07, especially section 22.

3. The current situation after Lisbon: more communitarisation and coexistence of old and new instruments

3.1. The new overview

The Lisbon Treaty is heir, in this as in many other issues, to the failed Constitutional Treaty²¹⁴. If the regulation on enhanced cooperation is structured by the latter in a general provision in Part One (I-44) and detailed rules developed in Part III (Articles III-416 to 423), the Lisbon Treaty has also imposed a general provision in the new EU Treaty (Article 20) and implementing provisions in the Treaty on the Functioning of the European Union (Articles 326-334 TFEU)²¹⁵. Although there has been criticism of the unclear separation between principle and implementing rules²¹⁶, it is an evident and commendable effort, likened to the Constitutional Treaty, to define the essence of the mechanism of differentiated integration and its conception in the basic provisions of the TEU with reference to the second level of development for other issues.

From a reading of Article 20 TEU it is clear that enhanced cooperation is conceived as:

- A pro-integration tool (“...shall aim to further the objectives of the Union, protect its interests and reinforce its integration process”);
- Of last resort (to be used when “the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole”);
- Useable by a sufficiently large pool of States that want to move forward (“at least nine Member States”);
- Always open to new entrants from “out” countries (“shall be open at any time to all Member States”), whether they are already members of the European Union or are potential future members (“acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union”);
- And operating within the legal and institutional framework of the Union (“within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties”).

There are few new developments in this Article 20 TEU with regard to the basic provisions in force until the entry into force of the Lisbon Treaty (Articles 43-45 of the former Treaty). The only noteworthy aspect is the new minimum threshold of participating Member States that, as mentioned, becomes 9 States, instead of the 8 of Nice. It is therefore slightly more demanding than in Nice but will eventually be less than what was planned for the Constitutional Treaty²¹⁷. They are not, in any case, differences that will have a strong impact.

With regard to enhanced cooperation applicable to the AFSJ, the first thing to note is that the elimination of the pillar structure operated by the Lisbon Treaty is reflected in the disappearance of the specific provision for enhanced cooperation that existed prior to the third pillar. There is now only one general clause on enhanced cooperation applicable to the AFSJ (compared to the previous two). The new general mechanism, as we shall see in a moment, shows some substantial changes with respect to the above and with regard to the AFSJ significantly enhances the communitarisation of the instrument of enhanced cooperation that had already been given impetus in Nice. However, the preestablished and privileged Schengen cooperation and the opt-outs of Denmark, United Kingdom and Ireland survive, albeit with some non-negligible modifications. Finally, to

²¹⁴ On the regulation of enhanced cooperation in the Lisbon Treaty, see FERNÁNDEZ LIESA, C. and ALCOCEBA GALLEGU, A.: “La cooperación reforzada en la Constitución Europea” in ÁLVAREZ CONDE, E. y GARRIDO MAYOL, V. (Dirs.), *Comentarios a la Constitución Europea*, Tirant lo Blanch, 2005, p. 490; URREA CORRES, M.: “La cooperación reforzada en el proyecto de Constitución Europea”, *Boletín Europeo de la Universidad de la Rioja*, nº 12-13, 2004, p. 27-49.

²¹⁵ On the Lisbon regulation see, among others, PONS RAFOLS, X.: “Las potencialidades de las cooperaciones reforzadas en la Unión”, in MARTÍN Y PÉREZ DE NANCLARES, J. (Coord.): *El Tratado de Lisboa. La salida de la crisis constitucional*, Iustel-AEPDIRI, Madrid, 2008, p. 627-660; ALCOCEBA GALLEGU, A.: “La integración diferenciada en el Tratado de Lisboa o la ampliación de la Europea a la Carta” in FERNÁNDEZ LIESA, C. and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, Madrid, 2008, p. 313; URREA CORRES, M.: “Mecanismos de integración y (des)integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa”, *Cuadernos Europeos de Deusto*, nº 39, 2008, p. 178; BECERRIL ATIENZA, B.: “La regulación de la cooperación reforzada: un instrumento necesario en la Unión Europea del siglo XXI”, here above.

²¹⁶ See PONS RAFOLS, X.: “Las potencialidades de las cooperaciones reforzadas...”, op. cit. p. 641.

²¹⁷ The Constitutional Treaty had set the threshold at one third of the Member States. In the current EU of 27, the two thresholds coincide in practice but with future enlargements the figure of 9 states is more favourable.

complete this overview one must mention four newly created instruments of enhanced cooperation applicable to specific areas of the AFSJ, including the following: mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters (Article 82.3 TFEU), minimum standards regarding the definition of criminal offences and criminal sanctions in the areas that are particularly serious and have a cross border dimension (Article 83. 3 TFEU)²¹⁸, a European Public Prosecutor's Office based on Eurojust (Article 86.1 TFEU) and, finally, police cooperation, including police, customs and other law enforcement services specializing in the prevention and detection and investigation of crime (Article 87.3 TFEU). These four new instruments are characterized, as we will see below, by evasion of the general procedure for authorization of enhanced cooperation by providing for automatic approval with virtually the only requirement being the participation of at least 9 Member States. These are again new privileged mechanisms (as was Schengen) which significantly facilitate the implementation of differentiated integration. Unlike Schengen, the number of State participants may be much smaller (9 is sufficient, while in principle all participate in Schengen except the United Kingdom and Ireland), which probably boosts new paradigms of differentiated integration in the AFSJ which were hitherto merely theoretical.

As can be seen from this first approximation, the picture remains complex. It is true that the removal of the pillars has meant some simplification by removing one of the two general conditions previously applicable to the AFSJ but equally true is that the rest of the special mechanisms and opt-outs have been maintained and in some ways this has complicated regulation. The appearance of four new specific clauses makes the system more complex, a complexity that begins with the difficulty of clearly distinguishing the scope of application of these various clauses. One cannot avoid having the feeling that simplification is again an unresolved issue and again a good opportunity has been lost to deal with it seriously.

Having given this overview, I will go on to examine in detail each of the mechanisms currently provided for (highlighting the Lisbon changes where necessary), before extracting a number of general conclusions about the Lisbon innovations and the application that can be expected from current possibilities.

3.2. The general enhanced cooperation clause

Comparing the previous general regulation (with the two clauses applicable to what were matters of the first and third pillars) with the new general clause currently imposed by Lisbon, we can identify the following features of the reform: uniqueness, same design and similar field of application, further communitarisation and supranationality, a slightly easier implementation of the enhanced cooperation and of any subsequent integration of "out" countries and finally new possibilities for developing already authorized enhanced cooperation. Each of these features will be discussed below.

- *Uniqueness* in relation to the two previous general clauses give way to a single general clause applicable, in principle, and among other areas, to all matters of the AFSJ. It reflects the logic of removing the pillar structure which made a nonsense of the maintenance of the previous specific clause for matters of police and judicial cooperation.

- *Same design* inasmuch as the guiding principles for enhanced cooperation mechanism remain, as we have seen, unchanged. A pro-integration purpose, in the nature of a last resort, permanent opening to "out" countries and operating within the EU framework and under the control of its institutions; these are still the keys to understanding the model. Respect for the community framework requires, among other limitations, not to undermine the internal market nor economic, social and territorial cohesion and not to be an obstacle to or discrimination in trade between Member States or a cause of distortions in competition between them²¹⁹.

- *Similar scope of application* because, first, it is still applicable only to the scope of non-exclusive competences of the Union, and second, we understand that it will remain a residual mechanism in relation to the Schengen mechanism.

²¹⁸ The trans-border dimension can be derived from the nature or impact of such offences or from a particular need to combat them using common criteria. According to Article 83.1, the areas of crime affected are: terrorism, human trafficking and sexual exploitation of women and children, illicit drug and arms smuggling, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. The list could be extended by unanimous vote of the Council after approval from the European Parliament.

²¹⁹ See Article 326 of the TFEU. This reproduces the previous paragraphs e) and f) of Article 43.1 EU Treaty after Nice. It now adds an explicit reference to 'territorial' cohesion which we understand to mean not providing a substantive change given that it could be understood as implicit in the policy of economic and social cohesion in general.

Regarding the first limitation it is worth noting that the new Lisbon version uses a more open formula than the previous one of Nice. Indeed, while the former Article 43.1, d) TEU required that enhanced cooperation remain “within the limits of the powers of the Union” without referring to the areas of exclusive competence thereof, the Treaty of Lisbon appears to be drafted less rigidly in that it discusses the possibility of enhanced cooperation “in one of the areas covered by the Treaties, with the exception of fields of exclusive competence ...”²²⁰. In short, there is a commitment in principle to open up possibilities for enhanced cooperation provided that they promote the objectives of the Union, strengthen the integration process and respect the rest of the boundaries. In addition, the new details provided by Lisbon as regards the delimitation of Union competences and the exclusive, shared or complementary and supportive or additional²²¹ nature thereof, provide greater clarity regarding the areas excluded²²² and some of those included²²³.

As regards the residual nature of this general mechanism as compared to the specific Schengen mechanism, the question was very clear in the wording of Nice given that Article 43 (i) required that enhanced cooperation did “not affect the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union”. The regulation after Lisbon removes such reference but it is our understanding, in any event, that de facto the general mechanism will continue to be residual in that the specific Schengen mechanism is privileged and does not require authorization. The general clause will be used when the material cannot rationally fit within Schengen and/or when the States involved do not coincide (participation only of some Schengen States, with or without the participation of other non-Schengen States).

The substantive scope of application will not be identical since the emergence of the new specific privileged mechanisms of Articles 82-83 and 86-87 of the TFEU will make the general mechanism even more residual, if this is possible²²⁴.

- *Increased communitarisation and supranational nature* because, firstly, the previous general clause of the third pillar disappears and the new general clause complies with the EU model and not the intergovernmental model, and secondly, in line with the above, both the Commission and the European Parliament are seeing their role substantially increased.

The Commission now holds the monopoly of the proposal for authorisation. Member States may ask the Commission to present it, but the Commission is not required to do so, although in this case it must communicate its reasons to the States concerned²²⁵. This is applicable throughout the entire scope of application of the general clause; as regards what concerns us in this chapter, in principle in all areas of the space of freedom, security and justice, not just for ‘visas, asylum, immigration and other policies related to free movement of persons’ as in Nice²²⁶. The Commission also now has a fundamental role in the incorporation of an “out” country into enhanced cooperation. Indeed, the Commission is now called upon to confirm the adhesion of the requesting State and to establish the necessary transitional measures for the implementation of the acts already adopted within the framework of enhanced cooperation²²⁷. It is true that, unlike what was specified in Nice, if the Commission refuses, the requesting State could now end up raising it directly with the Council for the latter to take this final decision²²⁸.

²²⁰ See Article 329.1 of the TFEU.

²²¹ See Articles 3-6 of the TFEU.

²²² Article 3 of the TFEU mentions the Customs Union, the establishment of competition rules necessary for the functioning of the internal market, monetary policy of the Member States whose currency is the euro, the conservation of marine biological resources under the Common Fisheries Policy and the common trade policy.

²²³ Among the areas mentioned in Articles 4-6 of the TFEU, we would wish to highlight in this chapter those relating to freedom, security and justice - point j) of Article 4.2 TFEU - as well as civil protection and administrative cooperation - points f) and g) of Article 6 TFEU-.

²²⁴ For a more detailed analysis of these mechanisms, see *infra* section 3.3.2.

²²⁵ Article 329 of the TFEU that regulates the authorization procedure specifically provides that “the Commission may submit a proposal to the Council” , making clear that it is not obliged to do so. It is also our understanding that the Commission’s reasoning may be not only legal (failure to meet certain conditions or requirements for enhanced cooperation) but also of political expediency. This provides very significant leeway to the Commission.

²²⁶ It is worth remembering that in Nice, all other parts of the area of freedom, security and justice corresponded to the third pillar and the enhanced cooperation mechanism envisaged for it constituted a joint initiative between the Commission and Member States. In particular, Article 40A EU Treaty stated that if the Commission did not present the proposal, the States could themselves propose it to the Council.

²²⁷ See Article 331 of the TFEU. In Nice, the Commission only had such power in areas of the first pillar - Article 11A EC Treaty – it being the Council that took the decision in the areas of the third pillar - Article 40B EU Treaty - .

²²⁸ This was not possible in Nice regarding the first pillar: see Article 11A of the EC Treaty.

The European Parliament, meanwhile, also significantly increases its power. After Lisbon, its prior approval is essential for the Council to authorize enhanced cooperation²²⁹.

Thus, the two most supranational institutions, with the most European perspective, gain power and influence. This serves de facto to strengthen the pro-integration spirit of enhanced cooperation.

- Lisbon also involves a *slightly greater ease both for the implementation of enhanced cooperation and for the subsequent integration of the “out” countries*.

The implementation of enhanced cooperation will be easier because the so-called brake mechanism or emergency delay is removed. According to the wording of Nice, before the Council authorizes the enhanced cooperation by qualified majority, any Member State could request that the matter be referred to the European Council for consideration²³⁰. Unlike the regulation of Amsterdam, such a referral was not a block or a veto, but constituted only a delay because, after discussion of the matter in the European Council, it would be returned to the Council to be decided by qualified majority. The decision was delayed but not blocked. With Lisbon, the possibility of delay disappears²³¹ and this thereby makes it difficult for a single Member State or a minority of States to manoeuvre politically to oppose the implementation of enhanced cooperation. From this perspective, this facilitates approval, albeit slightly. Moreover, other aspects of the reform could be going in opposite directions: we should not forget that Lisbon raises the threshold of participating Member States to 9 compared with 8 of Nice and now the increased control of the European Parliament and the Commission has to be overcome. The latter could hinder or delay the implementation of some enhanced cooperation but also promote others that such institutions consider more in line with European interests.

Regarding subsequent accession of the “out” countries, Article 331 TFEU also introduces a modified procedure which emphasizes the desire for opening of cooperation with “out” countries. It is said that in principle the Commission “will confirm” the participation of the requesting Member State within four months and a new provision is established that if the Commission maintains its opposition, the requested State may refer the matter directly to the Council. It would ultimately be the Council of the cooperation, by qualified majority, which would have the final word²³².

- Finally, there is incorporation of *new potential for developing closer cooperation already authorized*. In effect, Article 333 of the TFEU opens two gateways that will enable the Council of the enhanced cooperation unanimously, first, to replace unanimity for subsequent decisions by qualified majority (Article 333.1 TFEU), and second, to replace, after consulting the Parliament, a special legislative procedure for the ordinary procedure (Article 333.2 TFEU). Although the European experience tells us that this type of gateway is not always used, we believe that on this occasion it presents enormous potential. It is true that unanimity to use the gateway is difficult to achieve but it is also true that, unlike previous occasions, this time it is the Council of the enhanced cooperation and not the Council that must decide. There is no need therefore for the consent of all Member States, but only those who already participate in the enhanced cooperation and logically have a greater interest in promoting results and progress.

3.3. Privileged enhanced cooperation

Added to the general mechanism for enhanced cooperation that we have discussed, in the area of freedom, security and justice, are other specific and privileged arrangements for enhanced cooperation. They have in common the fact of not being subject to the limits of the procedure for general implementation. They are privileged primarily because to a greater or lesser extent enhanced cooperation is already authorized in advance by the primary law itself. The Schengen mechanism introduced in Amsterdam and which survives with some modifications in Lisbon is the prototypical example but not the only one. Lisbon has added four new instruments with a similar format.

²²⁹ See Article 329.1, second paragraph. In Nice, prior approval was only necessary when the enhanced cooperation referred to an ambit that was governed by the codecision procedure. In the rest of the areas, only prior consultation was required, but its opinion was not binding - see Article 11.2 EC Treaty and Article 40A.2 -.

²³⁰ See again Articles 11.2 EC Treaty and 40A.2 in their post-Nice wording.

²³¹ See Article 329.1 of the TFEU.

²³² With the regulation of Nice, this second instance was not possible in the Community pillar: the Commission had the final say under Article 11A. In the third pillar, the opposite was the case, as it was the enhanced cooperation Council that decided, on the recommendation of the Commission: under Article 40B, the accession would be deemed approved unless the Council of the cooperation opted by qualified majority to leave it in abeyance.

3.3.1. The Schengen mechanism

Since Amsterdam, this is enshrined in the Protocol integrating the Schengen acquis within the European Union. This Protocol was the basic mechanism for the Schengen cooperation, born between only five Member States and outside of the EU framework, to end up within the Union framework.

Its main difference from the general mechanism lies in not requiring the traditional authority. It is the primary law itself, specifically Article 1 of the Protocol, which directly authorises the enhanced cooperation, identifies in principle the participating countries (25 of the 27 States of the Union, all but Ireland and the UK)²³³ and the scope of application consisting of the so-called “Schengen acquis”²³⁴.

A second difference would be the provision of specific procedures of incorporation for “out” countries. Specifically, the Protocol specifies a mechanism for developing the Schengen acquis in the future, with or without the participation of one of the “out” countries (ex ante opting-in procedure), and a process of subsequent incorporation (and withdrawal or regression) of “out” countries (ex post opting-in-out).

The ex ante opting-in procedure is set out in Article 5.1 of the Protocol. It is confirmed that the enhanced cooperation is automatically authorized between the 25 countries. However, if Ireland and the UK notify of a desire to participate, the enhanced cooperation could be of 26 or even of the 27, thus returning to unity. The notification must be made by the State which wishes to use this possibility of opting-in (UK or Ireland, or both), in writing, to the President of the Council and in a reasonable time after submission to the Council of a proposal for development of the Schengen acquis. The lack of precision in the deadline could be problematic because it makes it difficult to know at what time the enhanced cooperation must be considered authorized²³⁵. A ‘reasonable’ deadline is too vague an expression that should have been replaced by a precise period in order to provide security both to the “out” countries and especially the “in” countries. For example, a three-month period as set out in Article 3 of the Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice could have been established. In fact, the analogical application of the said period of three months could be defended since, although they are examples of different enhanced cooperation, in both cases the deadline serves the same purpose (to give a limited and reasonable opportunity to join ex ante to the “out” countries). Three months seems a reasonable time. Another possible problem could be that, after notification is made and accepted and therefore the “out” country is accepted in the decision-making process, such State could make the decision significantly more difficult or even decide to veto it (which would be possible if the decision were to be taken unanimously by the Council of cooperation). In countries could be forced either to give in and not to adopt the new measure or to reduce very substantially the progress they wanted. In some ways the “out” country could thus control the process and block the development of the Schengen acquis. The Schengen Protocol does not provide a solution to this situation, trusting in the political game coming up trumps, and in the due respect among the “in” and “out” countries. It would undoubtedly have been desirable to incorporate a provision similar to that contained in Article 3.2 of the Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice which provided for similar situations that “if after a reasonable period of time, a measure ... cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure ... without the participation of the United Kingdom or Ireland”. After Lisbon, we might ask whether such Article 3.2 is applicable also in the framework of the Schengen Protocol given that the measures of development of the Schengen acquis underpin all of Title V, Part III of the TFEU (area of freedom, security and justice) and therefore the scope of application in the end coincides. Support to this position would also be given by a purposive interpretation of the rule: to facilitate and promote the participation of “out” countries if they really want to join but, if it is proved that such is not the case, to free the “in” countries so they can move forward. However, there seems to be a difficulty in this interpretation, namely the provision of Article 7 of the Protocol on the position of the United Kingdom and Ireland which insists that the above-mentioned Article 3 shall be deemed ‘without prejudice’ to the Schengen Protocol.

²³³ This is without prejudice to any transitional situations arising from the latest accessions: see in this regard Article 2 of the Protocol. Denmark was a Schengen signatory state but maintains a special position which enables it, in practice, to continue to be linked to Schengen but to maintain the mandatory nature of public international law: see the Protocol on the position of Denmark, and see also below section 3.4. Some non-EU Member States such as Iceland and Norway are also associated with the Schengen area: see Article 6 of the Protocol.

²³⁴ An annex to the Protocol basically determined that it was “Schengen acquis”. In the so-called “ventilation or allocation process”, its content was more clearly defined: see Commission Decision 1999/435/EC of 20 May 1999, OJ L 176 of 10/07/1999, p. 1-16.

²³⁵ In this same connection, URREA CORRES, M.; *La cooperación reforzada en la Unión Europea*, Colex, Madrid, 2002, p. 286.

On the ex post accession process, this is included in Article 4 of the Schengen Protocol that allows the UK or Ireland to request at any time to participate in all or part of the Schengen acquis. These are measures already taken by “in” countries within the framework of Schengen cooperation and without the participation of the United Kingdom and Ireland. In this case, the Council of the cooperation (plus the applicant Government representative) must decide unanimously. Any of the “in” countries could then veto the participation requested. This solution contrasts starkly with the mechanism provided for in the general mechanism²³⁶.

Finally, it is also appropriate to discuss the main innovation of Lisbon in the Schengen Protocol, the regulation of a recall/expulsion procedure for the UK or Ireland that could end up disconnected from a measure of the Schengen acquis to which initially they had been committed (which we might call an ex post opting out or regression procedure). With a cumbersome drafting that is frankly capable of being improved, this possibility is reflected in Article 5, paragraphs 2-5 of the Schengen Protocol. The decoupling can occur only upon initiating of the process of modifying a Schengen measure that links the UK and Ireland²³⁷. In this case, either of these two countries may notify the Council it does not want to participate in this process. Such process will then be suspended in order to agree in advance to what extent the existing act (which bound the UK or Ireland) would cease to have effect. The decision will in principle be taken by the Council of the cooperation, at the Commission’s proposal, and by qualified majority, trying to reconcile as much as possible the following criteria: first, it will seek to retain the maximum possible participation of the affected State and furthermore respect the operation in practice of the Schengen acquis and its coherence. If the Council does not reach a decision within four months, the matter could be taken to the European Council and if this also does not reach a decision at its first meeting, the suspended process of reform of the Schengen measure could be resumed²³⁸. When the reform comes into force, the affected State would be disconnected to the extent and with the conditions decided by the Commission. The procedure reflects well the potential complexity and conflict that could be generated by enhanced cooperation and the necessary search for an acceptable balance between the maximum opening up of cooperation to the “out” countries but within the limits of operability and coherence of the acquis. It is the “out” country that starts the process (notification that it does not want to participate in the reform) but it is the Council of the cooperation, the European Council or the Commission that will finally determine the scope of the resulting decoupling in order to preserve coherence. The “out” country is thus guaranteed a right not to continue forward (it even has in its possession a mechanism to force decoupling from prior commitments: regression in the integration), but at the same time, the “in” countries preserve their right to go ahead and to again set aside the State that does not want to go forward with them. The innovation seems realistic in that it is filling a gap and explicitly provides a solution to a latent conflict (between the “out” country having said yes to progress but that does not want to go further in reform and the “in” countries that do not want to see new possible advances blocked or harmed by the “out” country’s position). This could favour the participation of the United Kingdom or Ireland in the Schengen measures because they know for sure that they are linked to a specific measure but not necessarily to subsequent reforms and advances. It ensures that enhanced cooperation can move forward without further limitations than before. It is true that it involves explicitly recognizing for the first time a return or regression mechanism (in the degree of linkage of the State concerned). But it is also true that it is recognized in order to avoid hampering the progress of enhanced cooperation and that it is the European Institutions (Council, European Council and/or Commission) which in the end control the regression, depending on the need to preserve the coherence of the system.

A third and final difference relates to the consideration of the Schengen acquis as an *acquis communautaire* for the purpose of further accessions. In fact, Article 7 of the Schengen Protocol is unequivocal: “... the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission.” This position contrasts sharply with the general

²³⁶ See Article 331 of the TFEU and explanations about the same above, section 3.2, 5th indent. The Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice, in its Article 4 also forwarded the reader to the mechanism of Article 331 TFEU. On this occasion the Schengen Protocol and the Protocol on the position of the UK and Ireland have irreconcilable positions.

²³⁷ The literal wording of Article 5.2 of the Protocol is not clear about this but a comprehensive interpretation of the whole procedure (Article 5, paragraphs 2 to 5) does indeed support this interpretation. The simultaneous introduction in Lisbon of a similar mechanism in Article 4a of the Protocol on the position of the United Kingdom and Ireland, with a clearer drafting, also supports the same interpretation.

²³⁸ It does not appear essential, although it does seem likely, that it will be taken to the European Council. Article 5.4 of the Protocol provides that any State “may” take it to the European Council and Article 5.5 appears to allow reinitiation of the procedure not only if the European Council has not decided but also if the Council has not decided and no State has raised the matter with the European Council.

position under the enhanced cooperation clause of Article 20 TEU: “Acts adopted in the framework of enhanced cooperation ... shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.” So once again the Schengen cooperation has a privileged regime that seeks to maintain (and enforce) the involvement of as many Member States as possible. The positive effects of this provision have already been shown with the latest two accessions in 2004 and 2007.

3.3.2. The four new specific clauses introduced by Lisbon

Lisbon provides for four newly drafted clauses on enhanced cooperation on specific matters relating to the AFSJ within the chapters of judicial cooperation in criminal matters and police cooperation. Specifically, the material scope of these clauses is: mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters (Article 82.3 TFEU), minimum standards regarding the definition of criminal offences and penalties in areas of crime that are particularly serious and that have a cross border dimension (Article 83.3 TFEU)²³⁹, a European Public Prosecutor’s Office based on Eurojust (Article 86.1 TFEU) and police cooperation, including police, customs and other law enforcement services specializing in the prevention and detection and investigation of crime (Article 87.3 TFEU).

The four new instruments are characterized by circumventing the general procedure for authorization of enhanced cooperation, by providing for automatic approval with virtually the only requirement being the participation of at least 9 States. These are therefore new privileged mechanisms (as was Schengen) which significantly facilitate the implementation of differentiated integration.

Specifically, this provides in the cases of Article 82.3 and 83.3 TFEU that when one member of the Council considers that the draft directive affects “fundamental aspects of its criminal justice system” it may request that the matter be referred to the European Council for deliberation. The legislative procedure is suspended for a maximum of 4 months. If within that time consensus is reached, the suspension is lifted and the matter is referred back to the Council for its continuation. Otherwise, a minimum of 9 Member States may establish enhanced cooperation on the project, meaning it is authorized. It is noteworthy that unity should be the rule here given that enhanced cooperation would be proposed only where a Member State – understood to be on an exceptional basis – sees “fundamental aspects of the criminal justice system” endangered, and only if the European Council has not managed to regain the necessary consensus guaranteeing if necessary the appropriate warnings to the affected State. We are aware, in any event, that if a State insists on not participating due to this ‘essential interest’, jurisdictional control is virtually impossible (unless the invocation is manifestly and clearly an abuse) and political control in the Council and European Council is more adequate but limited in scope. In a way, this regulation involves a possibility of *ex ante* opting out (before the passage of the act) open to any Member State. Probably this is the compensation required in exchange for the communitarisation of the legislative process for such judicial cooperation in criminal matters (ordinary legislative procedure, qualified majority and final act in the form of a directive). One should also highlight and welcome the establishment of a clear deadline which is also quite short, so that any block has its days numbered. Perhaps it would have been desirable also to provide for a clear time limit for the invocation of fundamental interest, since the project was first presented to the Council and unless there were substantial changes to the proposal that could affect the fundamental interest. This lack of foresight leaves open the possibility of the State (or States) participating in - and even conditioning - the discussion throughout the entire procedure with no guarantees that it will eventually be bound by the final measure.

As regards the implementation of enhanced cooperation in the case of Articles 86.1 and 87.3 of the TFEU, the procedure is very similar. The two most significant differences are: first, in both cases the European Council referral is made by at least 9 Member States wishing to advance, once there is the realization that they cannot reach the unanimity required to adopt the act. This difference is more apparent than substantive given that it is always part of an auto-exclusion of at least one of the Member States (either by invoking the fundamental interest or by voting against it on the Council); secondly, in these cases, there is no limited reason that can be invoked for this auto-exclusion. In these two cases of Articles 86.1 and 87.3 TFEU, the enhanced cooperation

²³⁹ The cross-border dimension can be derived from the nature or impact of such offences or of a special need to combat them on a common basis. According to Article 83.1, the areas of crime affected are: terrorism, human trafficking and sexual exploitation of women and children, illicit drug and arms smuggling, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. The list could be extended by unanimity by the Council with approval of the European Parliament.

clause seems to be articulated as the compensation required by the countries most eager to promote the maintenance of unanimity.

In these four clauses and unlike Schengen the number of participating States may be much smaller (9 is sufficient, while in principle in Schengen all participate except the United Kingdom and Ireland). This difference is very significant because it could provide new paradigms for differentiated integration in the AFSJ that were hitherto merely theoretical: multiple enhanced cooperation between a small number of countries, groups that also vary from one example of enhanced cooperation to another (not like up to now in which we only had one example of enhanced cooperation in practice, Schengen, and with a very large group of participating States - 25 of 27 – which is always uniform). In these areas there is a significant increase in the likelihood of enhanced cooperation and also the potential for highly variable and complex geometries.

Finally it is worth mentioning that the clauses do not envisage other specialties, referring as regards the rest to general regulations. The procedure for incorporation of the “out” countries is therefore the general clause provided for in the above analysis²⁴⁰. Also, unlike Schengen, the countries that join the EU in the future would not necessarily have to consider the fruits of these four enhanced cooperation as *acquis*, thereby increasing the risks of fragmentation and their extension over time.

3.4. The opt-out clauses for specific States

The Lisbon Treaty has left standing - incorporating some modifications - the opt-out schemes introduced in Amsterdam. This is, firstly, the Danish case, and secondly, that of the British and the Irish. Besides the special regime enjoyed by these States with regard to Schengen which has already been discussed above²⁴¹, several annexed Protocols consolidate special arrangements for these States as regards the other measures relating to AFSJ.

3.4.1. The British and Irish opt-out

The regulation is contained mainly in the Protocol on the position of the United Kingdom and Ireland²⁴². The pillars of this particular regulation can be summarized as follows:

- *In principle, neither involvement with or connection of the UK and Ireland to the measures taken on the basis of Title V of the TFEU (AFSJ)*. In fact, Article 1 of the Protocol on the position of the UK and Ireland provides that, as a general rule, both States will not participate in the adoption of such measures and Article 2 emphasizes the same idea by saying that those that do not adopt them will not be bound by them. Viewed from the opposite perspective, one assumes that as a general rule enhanced cooperation of 25 out of 27 is established;

- *regulation of a specific procedure for ex ante incorporation*. Both the UK and Ireland may indicate their desire to participate in the adoption of a measure relating to AFSJ. It is noteworthy that they have a finite and defined period to make this request in writing to the President of the Council, namely 3 months from submission of the proposal to the Council. This provision is a wise move to give greater legal certainty²⁴³. Also of note is that the notification within the deadline automatically opens the participation to them, without in principle the European institutions or the other Member States being able to oppose it. Article 3.1 of the Protocol is unequivocal saying in this respect that after expressing its desire to participate, “said State shall be entitled to do so.” We understand, however, that to preserve the coherence of the system, the Institutions themselves may condition their participation to the requesting State committing itself to other measures inherently bound or linked together to the measure at issue²⁴⁴. An explicit provision to that effect would have been desirable. Logically, if the UK and/or Ireland take part in the adoption, they are bound by such measure (whether or not they have voted for it within the Council). Quite rightly, it is further provided that if after a reasonable time, it has not been possible to adopt the measure with the UK and/or Ireland, it may be adopted without

²⁴⁰ See above section 3.2.

²⁴¹ See above section 3.3.1.

²⁴² In all matters relating to internal border controls, see the Schengen Protocol and the Protocol on the application of certain aspects of Article 26 of the TFEU to the UK and Ireland.

²⁴³ The Schengen Protocol only talks of a “reasonable period”. See above section 3.3.1.

²⁴⁴ They base this position on a purposive interpretation and a combined reading of Article 3 and 4 of the Protocol and Article 331 of the TFEU, to which the said Article 4 forwards the reader.

their participation²⁴⁵. In the absence of a more explicit provision it is our understanding that it will be for the Council to decide if a reasonable period of time has passed and one could/should do without the participation of the United Kingdom and/or Ireland. In any case, the provision clearly facilitates enhanced cooperation and progress;

- *referral to the general procedure for ex post incorporation*. Article 4 of the Protocol refers to the procedure of Article 331.1 TFEU in order to consider the ex post applications for incorporation, which are therefore subject to the same rules as any other ex post incorporation in other areas²⁴⁶;

- *as a novelty in Lisbon and similar to what happened in the Schengen mechanism, a kind of ex post opting out is included (regression or reversal in state involvement)*. This is enshrined in Article 4a of the Protocol. It is applicable only when the reform process is initiated from an act relating to the AFSJ which is already binding on the United Kingdom or Ireland, these countries do not wish to participate/adopt the reform and the Council, on receipt of a proposal from the Commission, does not see it operationally possible to maintain the pre-existing act. In this case, unless the UK or Ireland changes its opinion and decides to join the reform, the existing measure would cease to take effect²⁴⁷. Unlike the provisions of the Schengen mechanism, it is not expected that the European institutions would determine the extent to which the existing act would cease to have effect or specify the criteria that must be borne in mind. The regulation provided for in the Schengen mechanism in this respect seems more satisfactory. The innovation appears realistic in that it explicitly does nothing but expressly provide a way out of a potential conflict and may even promote the participation of the United Kingdom and/or Ireland in AFSJ-related measures while at the same time ensuring the other countries can move forward without them. It is true that it involves explicitly recognizing for the first time a regression mechanism (in the degree of linkage of the State concerned), but it is also true that it recognizes it in order not to hamper further progress. It should have been provided for, however, that the European institutions might limit the extent of the regression in light of the circumstances of the case concerned, as provided for in the Schengen mechanism²⁴⁸.

In conclusion, this opting out is substantial: it involves reversing the established order and establishing, as a general rule, the exclusion of the United Kingdom and Ireland from the AFSJ. Progress to 25 becomes the rule and incorporating ex ante or ex post of one or two “out” countries is the exception. The new mechanism for opting out ex post introduced in Lisbon extends the possibilities of self-exclusion/expulsion, with a deficient regulation. In any case, opting out is still the sine qua non for communitarisation of the AFSJ, for the application of the ordinary legislative procedure and qualified majority voting in many of its fields. Without these clauses, there could hardly have been a very significant advance in the integration of this area in the Lisbon Treaty. The practical implementation of such opt-outs has so far proved less problematic than was initially expected (although one has to take care to maintain coherence and balance between obligations and rights of the various States in the AFSJ) and of course has allowed very significant advances

3.4.2. The Danish case

At the moment the Danish exception is remarkably different from the British-Irish example. In the Danish case, there is an objection not of substance but of form or nature of the obligation. Denmark has not been politically opposed to the abolition of checks at internal borders between Member States nor the taking of all additional measures required to achieve this, including those that ensure at the same time a high level of security in the internal space. Indeed, it participated in Schengen and has continued to be linked to the development efforts thereof to date. Its objections arose with the communitarisation given that it wished to maintain only an intergovernmental or international law connection and deemed it necessary to respect the commitment agreed following the Danish rejection of the Maastricht Treaty²⁴⁹. Consistent with this view, Denmark has remained with the vanguard in all aspects that generate commitments under international law

²⁴⁵ See Article 3.2 of the Protocol. Such provision does not exist in other cases such as for example the Schengen mechanism: see above section 3.3.1.

²⁴⁶ For a discussion of this procedure and its variations in Lisbon, see above section 3.2. One must recall that the Schengen Protocol itself provided for a special and priority procedure: see in this respect Article 7 of the Protocol on the position of the UK and Ireland.

²⁴⁷ Either within two months from the decision of the Council, or from the date the reform enters into force, whichever is later.

²⁴⁸ All these arguments and this evaluation are set out in greater detail above in section 3.3.1.

²⁴⁹ THYM, D.: “Europa a varias velocidades...”, cit.supra, p. 606.

and has not participated in communitarised areas²⁵⁰ although various ways have been sought to link these measures also on an intergovernmental basis²⁵¹. Up to now it has been more of a “methodological” rather than an “ideological” objection²⁵².

The new version after the Lisbon Protocol on the position of Denmark retains, for the most part and for the moment, the prior basic principles, adapting them to the new circumstances. Since all the AFSJ has been communitarised, Denmark will not participate in the adoption by the Council of measures on the AFSJ, not being in principle bound by the actions taken (general opt-out of Articles 1 and 2 of the Protocol)²⁵³, but it may incorporate these measures into national law within 6 months from the date the act is adopted, thus creating an obligation of international law (ex post opt-in regarding the developmental measures of Schengen provided for in Article 4 of the Protocol)²⁵⁴.

However, and as a novelty in comparison with the pre-Lisbon situation, it is expected that the current Danish arrangement for opt outs in the AFSJ could be replaced by a new system equivalent to that provided for in Lisbon for the United Kingdom and Ireland. In fact, Article 8 of the Protocol allows for this possibility after a Danish decision in accordance with its constitutional rules, explaining in an annex the new system that would be applicable (essentially identical to that provided for the UK and Ireland). The first consequence of such decision would be to change the nature of Denmark's obligations relating to the AFSJ: all its obligations under international law (both existing and future) would then be in the nature of European Union law. It would retain control over its participation in new commitments (generic opt-out of Articles 1 and 2 of the Annex and ex ante and ex post opt-in of Articles 3 and 4 of the annex) or the modification of previous commitments (Article 5 of the annex reproduces the possibility of regression which was already analyzed when studying the British case). In our view, it would be desirable for the Danish decision sought to be adopted. It would provide improvements on several fronts: first, it would reduce the regulatory complexity of opt outs relating to the AFSJ by practically unifying the framework applicable to the British-Irish and Danish cases; secondly, it would extend to the Danish case a more complete regime, allowing greater participation of Denmark in the AFSJ while still ensuring for the other Member States that the Danish position would not block progress; thirdly, it would standardize the nature of the link in the case of opt-in: all obligations would be of European Union law, with the benefits that would result from the standpoint of uniformity of Community Law and its effects. That the framework was essentially the same for UK, Ireland and Denmark would not in any event imply a uniformity of their opt-outs, as the exercise of those rights might vary from one State to another. As we have already seen, the increased political will on the part of Denmark would presumably continue, with a substantial difference in the degree of involvement in the AFSJ of the Danes and the British and Irish.

4. Conclusions

One.- The AFSJ has been a particularly favourable field for differentiated integration. Affected areas (immigration, terrorism, police cooperation, judicial, criminal, etc), closely linked to national sovereignty and therefore very sensitive, in the past have caused some of the most striking and successful cases of differentiation, with the Schengen area being the most significant example. Both now and in the future it will no doubt continue to be fertile ground for the implementation of enhanced cooperation.

²⁵⁰ With the exception of the measures relating to a uniform visa and those that determine those third-country nationals who require visas when crossing the external border. See Article 4 of the Protocol on the position of Denmark before the Lisbon Treaty, now Article 6.

²⁵¹ For example, incorporating the action taken by the Council in internal law - see in this respect Article 5 of the Protocol on the position of Denmark before Lisbon, now Article 4 -, which would imply the creation of an “international law obligation” between Denmark and the rest of the Member States concerned, or by concluding international agreements with the Community relating to some of the regulations or directives adopted by the EU institutions in areas of Community competence under the AFSJ - see for example the agreement on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (OJEU 2005 L 299/61) -.

²⁵² See HEDEMANN-ROBINSON, M., “The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The Opt-in Opt-outs under the Treaty of Amsterdam”, in O'KEEFE and TWONEY (eds.), *Legal Issues of the Maastricht Treaty*, Chancery Law Publishing, 1994, pp. 189-302, specifically p. 297.

²⁵³ The exception, however, remains of the measures relating to a uniform visa and those determining which third-country nationals require visas when crossing the external border. See Article 6 of the Protocol.

²⁵⁴ It is noteworthy that the opt-in is limited to Schengen measures and not more generally to all AFSJ measures as, in our view, would have been desirable.

Two.- The inherent complexity of the AFSJ and its stormy progress in communitarisation has also generated a reflected complexity in differentiated integration mechanisms in this area. It has provided a particularly rich and interesting panorama, because it includes cooperation within and outside the Community framework, at the intergovernmental and community level, enhanced cooperation which leaves out only one or two States and others that would allow advances with a much more limited group of states - even less than ten -, enhanced cooperation that requires prior authorization and others privileged insofar as they are authorized in advance. The key features of differentiated integration in the AFSJ could well be summarized as follows: effective application and usefulness, complexity and richness of forms and patterns of differentiation. It is worth noting that cooperation both within the framework of the EU and beyond it has been fruitful, and that even quite radical forms such as the opt-outs have ended up encouraging appropriate progress in integration of the AFSJ (fewer problems than initially expected, and by now fairly good risk control).

Three.- In the pre-Lisbon scenario, the evolution of enhanced cooperation in the AFSJ has been marked by the pre-eminent use of the special or privileged mechanisms and not of the general clauses of enhanced cooperation of the first and third pillar. Thus, in practice, enhanced cooperation has been imposed among the vast majority of Member States (25 of the 27 Member States in the current paradigm), always a uniform group, either via the Schengen privileged cooperation or by application of the opt-outs of the UK and Ireland. Although the general clauses of the first and third pillar also enable progress among a much smaller group of states, these possibilities have remained unexplored, even after the substantial progress of Nice in relation to Amsterdam (significant reduction of the minimum threshold of States required for implementation and elimination of the veto, together with a significant strengthening of the powers of the Commission and European Parliament).

Four.- With respect to evaluation of the Lisbon reform and the potential/likely future of differentiated integration in the AFSJ, we can conclude the following:

a) The design of enhanced cooperation in the AFSJ remains excessively complex. It is true that the removal of the pillars has meant some simplifying effect, by removing one of the two general clauses applicable prior to the AFSJ, but it is equally true that the rest of the special mechanisms and opt outs have been maintained and in some ways this has complicated their regulation. The appearance of four new kinds of specific clauses adds complexity to the system. One cannot help having the feeling that the simplification is again an unresolved issue and once again a good opportunity to deal with it seriously has been lost;

b) In connection with the new general clause on enhanced cooperation, a comparison with the previous general regulation (with the two clauses, applicable to what were matters of the first and third pillar) reveals that the features of the reform are: uniqueness, the same design and similar scope of application, greater communitarisation and supranational character, slightly greater ease both in the implementation of enhanced cooperation and in the subsequent integration of "out" countries and finally new potentiality for enhanced cooperation already authorised (the so-called gateways). The new design makes it more likely for the clause to be used and for subsequent development of authorized cooperation. However, we believe that its implementation will remain residual as opposed to the privileged and previously authorized cooperation (Schengen, the four new privileged mechanisms introduced by Lisbon and the opt-outs of the UK, Ireland and Denmark). In any case, an alternative route for enhanced cooperation of smaller groups of states is enabled.

c) As regards the Schengen privileged mechanism, the main innovation is the explicit regulation of the possibility of regression or reversal in the degree of involvement of the affected State (ex post opt-out). Although in certain circumstances this allows a step back on the part of the so-called "out" country, in our opinion it should receive a positive evaluation. The innovation seems to us to be realistic, in that it is filling a gap and explicitly provides for a solution to a latent conflict (between the "out" country saying yes to progress but not wanting to go further in the reform and the "in" countries that do not want to see new possible advances blocked or harmed by the "out" country's position). This is recognized in order to avoid hampering the progress of enhanced cooperation and it is the European institutions which will in the end control the regression, depending on the needs to preserve the coherence of the system. We also believe that the opportunity should have been taken to make other improvements to the wording and design of the mechanism (among others, to specify what is a reasonable time for the "out" country to seek its participation, or expressly regulate the possibilities of the other States to exclude it if it is the main reason for failure to adopt the act). Schengen will remain a mechanism widely used post-Lisbon. Its design and the fact that its development involves the community *acquis*, mandatory for candidates for the European Union, contributes greatly to an almost unitary progress of the AFSJ.

d) Regarding the four new privileged enhanced cooperation examples introduced by Lisbon, these have enormous potential and may also facilitate the emergence of a new model of differentiated integration in the AFSJ. As in Schengen, these are privileged because, in their limited material fields of application, cooperation is agreed beforehand with virtually the sole condition that nine States are willing to participate. Unlike Schengen, cooperation could be developed with only nine States. This difference is very significant because it could provide new paradigms of differentiated integration in the AFSJ that are hitherto merely theoretical: multiple examples of enhanced cooperation among a small number of countries, groups that can also vary from one example of enhanced cooperation to another (not as up to now, when we only had one type of enhanced cooperation in practice with a very large group of participating States - 25 of 27 - almost always uniform). In the affected areas, Lisbon significantly increases the likelihood of enhanced cooperation and also the potential for highly variable and complex geometries. It is certainly an interesting field of monitoring and future study.

e) As regards the opt-outs for individual States, there are various final assessments which would like to highlight: firstly, one must never forget that without these clauses, there could hardly have been such a very significant advance in the AFSJ. In fact, the practical implementation of such opt-outs has so far proved less problematic than was initially expected, although we must remain vigilant about preserving the overall coherence and balance of the AFSJ and the balance of obligations and rights of the various States. Secondly, we must distinguish the Danish case, which for now has been more of a methodological than ideological opt-out, from the British-Irish case, a more profound opt-out with higher risks involved. Thirdly, it would have been desirable to simplify the exceptional individual schemes (we have kept separate the Schengen opt outs, of the UK and Ireland, from Denmark, with different regulations, rather than taking advantage of this to create a common basic core for "out" countries throughout the AFSJ). However, Lisbon has opened up the possibility that, after the Danish decision in accordance with its constitutional requirements, the current Danish opt-out regime in the AFSJ could be replaced by a new British-Irish equivalent. This appears to us to be appropriate and should be carried out. Fourthly, the regulation of these Protocols for individual countries (especially British-Irish) seems to us to be more complete and precise than that of the Schengen Protocol, with the exception of the provisions relating to the new regression mechanism. In the latter, the regulation is deficient: in particular, it should have allowed, as provided for in the Schengen facility, for the European Institutions to be able limit the extent of the regression in light of the circumstances of the case.

f) Finally, it would be desirable for there to be no new cooperation in matters covered by the Treaties outside the Community framework as happened with the Treaty of Prüm. The multiple mechanisms for enhanced cooperation provided for in this area should be used, taking full advantage of the potential thereof: to go through other routes than those provided improperly sidesteps formal procedures and requirements, including the support of a minimum threshold of States and the participation of the European Institutions.