

Enhanced cooperation as a form of differentiated integration in the European Union

A case study of the Rome III and Unitary Patent Regulation

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I, Emma Smit, hereby declare that I have worked on this thesis, “Enhanced cooperation as a form of differentiated integration in the European Union: a case study of the Rome III and Unitary Patent Regulation”, independently and it is entirely my own work. It has not been taken from the work of others save to the extent that such work has been cited and acknowledged within the text of my work. All sources of information and references used in this thesis are listed at the end of the work.

Utrecht, 24th of July, 2015

Signature:

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Introduction

The European Council of June 2014 concluded that the concept of an ever closer Union would allow different paths of integration for member states. Differentiation in the European Union is perhaps most visible in the euro area where 19 out of 28 member states have joined. Other examples of differentiation can be found in the area of Schengen. Differentiated paths of integration are a relatively new concept that still deserves further investigation. In particular enhanced cooperation, which is also a form of differentiated integration in the European Union. Enhanced cooperation can be typed as the first pre-determined form of flexibility in the Treaties. Based on a two-tier approach, combining political science and legal perspectives, this thesis will view enhanced cooperation as a form of differentiation in European integration and European Union law.

In this study, differentiated integration is defined as the ‘differential validity of formal EU rules across countries’ (Schimmelfennig and Winzen, 2014). Differentiation in European integration is not a new phenomenon. However, differentiated integration as a field of research is rather new. Leuffen, Rittberger and Schimmelfennig (2013) perceive the EU as a system of differentiation. In their study they have focused on differentiation in four main policy areas on the level of primary law. Holzinger and Schimmelfennig (2012) stated in their research agenda that there is not much known on differentiated integration in secondary law. Moreover: “mainstream integration needs to pay more attention to differentiation as an integration outcome” (Holzinger and Schimmelfennig, 2012: 302). Therefore this thesis aims at explaining differentiation in integration on the level of secondary law, to be more specific the provisions on enhanced cooperation.¹ Enhanced cooperation is a procedure that can be launched by a Council’s request of at least nine member states who want to ‘further the objectives of the Union’.

What firstly makes this study unique is that there were not many studies conducted on enhanced cooperation as a form of differentiated integration in light of European integration theories. The second unique feature of this thesis is that not only differentiation in integration will be researched, but also the legal implications of differentiation. A more in depth study towards this first pre-determined form of flexibility in the Treaties will contribute to our understanding of this particular form of differentiation.

The overall research question that will lie at the core of this thesis is:

How can enhanced cooperation, as a form of differentiated integration, best be viewed in light of European integration theories (1) and what are the possible implications of enhanced cooperation on the unity of EU law and the principle of equality of the member states (2)?

This research question will be separated into two different research sub-questions that will illustrate the two-tier approach of this thesis. Based on a case-study approach, the establishment of the Rome III Regulation² and the Unitary Patent Regulation³ via the enhanced cooperation procedure will be analysed in this study. The Rome III regulation concerning the law applicable to divorce is the first successfully established case of enhanced cooperation that now counts sixteen participating member states. The Unitary Patent regulation concerns the establishment of a patent with EU wide effect, adopted by twenty-six member states.

The first research sub-question will focus on enhanced cooperation as a form of differentiation in European integration. Two different integration theories dominant in political science will lie at the basis of answering the following sub-question (1):

How can enhanced cooperation, as a form of differentiated integration, best be viewed in light of European integration theories?

The two main integration theories that were used to analyse enhanced cooperation as a form of differentiated integration were neofunctionalism (supranationalism) and (liberal)

¹ Article 20 Treaty on the European Union

² COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10.

³ REGULATIONS 1) REGULATION (EU) No 1257/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361/1 and 2) COUNCIL REGULATION (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements OJ L 361/89.

intergovernmentalism theory. In neofunctionalism theory differentiated integration is perceived as a second best option (Leuffen et al., 2013). From an intergovernmental point of view differentiated integration is perceived as an opportunity for member states to possess distinctive rights and responsibilities with respect to various common policy areas of the European Union (Moravcsik, 1993, 1998). These and other theoretical assumptions on integration and differentiation will be analysed in light of the Rome III and unitary patent regulation. Results of this study implicate the following conclusions: the way enhanced cooperation can be perceived has shown that both neofunctionalism (supranationalism) and (liberal) intergovernmentalism provide explanatory power for differentiated integration. Both cases show strong similarities with theoretical assumptions derived from the two integration theories. Nevertheless, as will become clear in this thesis, neofunctionalism (supranationalism) seems to provide a little more explanatory power in the end than (liberal) intergovernmentalism.

The second research sub-question that will be researched in this thesis will focus on the legal aspects of enhanced cooperation that result from Article 20 Treaty on the European Union and Articles 326 – 334 Treaty on the Functioning of the European Union that lay down the provisions for this procedure. As stated in Article 20 TEU, enhanced cooperation is open to all Member states of the Union; therefore no state can be excluded. Furthermore, any form of enhanced cooperation should comply with the Treaties and EU law.⁴

The enhanced cooperation procedure and the possible implications on the unity of EU law and the principle of equality of the member states result in the following research sub-question (2):

What are the possible implications of enhanced cooperation on the unity of EU law and equality of the member states?

The main results of this thesis show that the two regulations established by the enhanced cooperation procedure have not resulted in the EU functioning as a disconnected and fragmented legal order. With only two established regulations via enhanced cooperation, these two measures will not add up to an incoherent legal framework of the European Union. Although differentiation from a legal perspective is not desirable, it is better than member state cooperation outside the Treaty framework, isolated from the EU *acquis*. The Rome III and the unitary patent regulation are both a pinprick in the uniformity of EU law, compared to all the existing opt-outs and differentiation in the monetary union and defence area.

As regards the principle of equality of the member states findings in both cases have shown that especially in the case of the unitary patent legal reality seems to exhibit some contradictions, especially when it concerns *de facto* equality. Enhanced cooperation might not have had a *de jure* implication on this principle since the Treaties seem to safeguard equality by keeping enhanced cooperation open to any member state at all time. One must however take a cautious approach on the *de facto* inequality.

This thesis is structured as follows: chapter one will give an overview of differentiated integration and its concepts. Chapter two will describe the enhanced cooperation procedure. Chapter three will describe the existing integration theories and their relation to differentiation. Chapter four will focus on the legal provisions concerning differentiation, meaning the unity of EU law and the principle of equality of the member states. Chapter five will focus on the used methods for this study. Chapter six will display the results on the first case: the Rome III regulation. Chapter seven will demonstrate the

⁴ TFEU Article 326

findings on the Unitary Patent regulation. Chapter eight will discuss this study by comparing both cases and chapter nine will focus on the conclusions.

1) Introducing the topic of differentiated integration

1.1 Defining differentiation

In European integration theory, differentiation has been characterised as an opportunity for member states to possess distinctive rights and responsibilities with respect to various common policy areas of the European Union. Differentiation is often described as ‘flexibility’ and vice versa. Differentiation is separated in several categories and shaped in many models and concepts that will be described later on paragraph 1.3.

In this thesis the most common definition of differentiated integration will be maintained. As defined by Schimmelfennig and Winzen (2014: 356) differentiated integration is the ‘differential validity of formal EU rules across countries’. In general, these formal rules are legal rules: an announcement in a legally binding and commonly applicable act that creates conditions on behaviour to the receivers of this act. As defined by the European Court of Justice, a law has common application if the standard it includes has an abstract and common (meaning normative) character (Lenaerts and Van Nuffel, 2005:

571 in Schimmelfennig and Winzen, 2014: 356). The whole of EU legal rules comprises the group of formal responsibilities that come with an EU membership. In principle, each EU rule must be considered to be legitimate for all member states. This defines uniform integration. In practice, however, one or several member states are freed from the responsibilities of such legal rule. We can speak of a case of differentiated integration (or: DI) when at least one member state is excluded from a rule for at least one year. The following figure gives a valuable overview on the development of DI by Treaty Articles in effect.

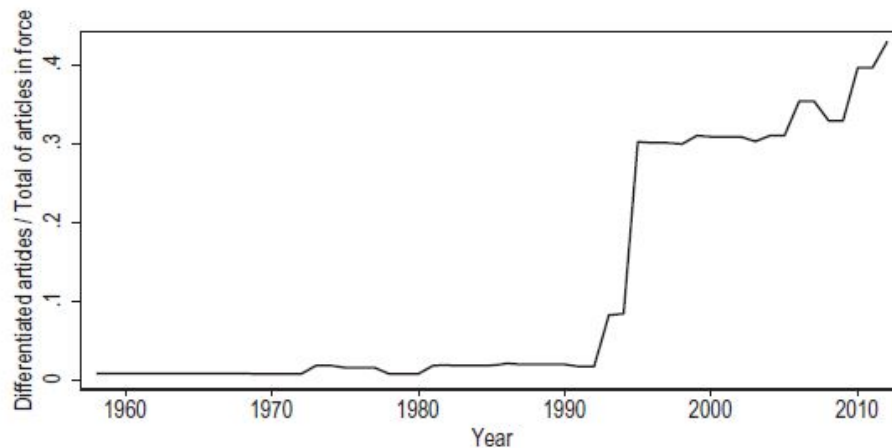


Figure 1: development of Differentiated integration in the EU

This overview does not include the treaties on the European Coal and Steel Community and the European Atomic Energy Community (Source: Schimmelfennig and Winzen, 2014: 358)

Schimmelfennig and Winzen (2014) distinguish two logics of differentiation in European integration. Their argument is derived from the integration theory of intergovernmentalism that considers integration outcomes, and thus differentiation, as the outcome of Member state preferences and intergovernmental bargaining (Moravcsik, 1998 in Schimmelfennig and Winzen, 2014: 361). Intergovernmentalism and other integration theories will be defined in more detail in chapter three. The first logic of differentiation can be typed as instrumental differentiation that generally develops from accession negotiations between the EU and membership candidates. The accession candidate has been demanded to accept the entire EU *acquis communautaire* (EU rules), and the newest member state is to be expected to follow these rules from the first day of membership. However: transitional arrangements between the EU and candidate countries can be made.

The second logic of differentiation can be typed as constitutional differentiation. This type of differentiation is the effect of intergovernmental bargaining on treaty revisions that enhance the supranational policy competences and abilities of the Union. From this intergovernmental point of view DI can provide a way out of gridlock if a constitutional disagreement appears. Member states that oppose further integration can opt out and the other who want to pursue the deepening of integration to carry on (Schimmelfennig and Winzen, 2014: 362). In this thesis, constitutional differentiation will be researched since enhanced cooperation by its Treaty provisions ‘shall not affect the EU *acquis*’. Although this division of the logics of differentiation in integration has been set out, the intergovernmentalist approach of differentiation will not lead the way. As been described above, other theories on differentiation will be discussed later.

1.2 Many concepts

The European Union is an interesting topic of research. Former President of the Commission, Jacques Delors once named the EU an Unidentified Political Object (UPO). It is evident that the EU can

neither be labelled as a state nor a political organisation. On the road to an ever closer Union, member states took differentiated paths. A clear example of differentiation in primary law is the Economic and Monetary Union that consists of 19 out of 28 member states. Although the EU is nearly involved in all policy areas, the nature and extent of integration in those fields differs considerably (Leuffen et al., 2013: 8). Differentiated integration occurs in many forms in the European Union. As indicated by Holzinger and Schimmelfennig in their study on differentiated integration in the European Union, there exists plenty work on political concepts of differentiated integration (DI). Over 30 different concepts of DI can be found. In their study, Schimmelfennig and Holzinger distinguish 10 different models of DI. To illustrate a few of those existing concepts: Multi-speed Europe or two-speed Europe is a concept widely used in politics on European integration. In theory, this concept fits the most to the current situation in the EU where differences between Member states on integration are temporary. In 2012, Chancellor Merkel declared her case for a two-speed Europe on economic integration in the Eurozone. According to the German Chancellor “we should not stay still because one or other [member state] does not yet want to join in” (Mahony, 2012). This concept of a multi- or two-speed Europe is focused purely on Member states and these temporal differences exist inside the treaties. A second concept that can be distinguished in differentiated integration is a Union where a clear distinction between ‘core’ and ‘periphery’ is made. This concept of an ‘avant-garde’ Europe states that each Member state is a fixed member of one of the two groups. A third concept revolves around the idea of flexible integration, also named as ‘variable geometry’ which is sector-specific differentiation. Alike the other two concepts flexible integration involves member states only. A fourth concept to DI presents the European Union as Europe à la carte. This concept is in a way similar towards flexible integration where sector-specific regimes are created, but the decision-making process is entirely intergovernmental. There is no condition needed for membership and cooperation originates outside the treaties (Holzinger and Schimmelfennig, 2012: 294). This ‘pick and choose’ Europe is perhaps most distanced from the current EU. Still, this concept is perhaps most related to David Cameron’s speech in January 2013 when he held his opt-in opt-out speech (Cameron, 2013). All four named concepts make a clear division between the ‘upper’ EU level and ‘lower’ EU level. This overview gave a short introduction on the topic of differentiated integration and in which forms it can occur in the EU.

1.3 Scarce theory

Holzinger and Schimmelfennig (2012) pointed out that there is only limited information to be found on differentiated integration in secondary law (p. 292). Therefore this thesis will study differentiation in the field of secondary law. To be more specific: this type of differentiation is derived from the principle of enhanced cooperation set out in Article 20 Treaty on the European Union. This instrument of enhanced cooperation was introduced in the Amsterdam Treaty for the first time. In the Treaty of Lisbon, enhanced cooperation can be reached when a minimum of nine member states in accordance with the Commission, Parliament and approval of the Council by a qualified majority (Leuffen, 2013:15). It would be of added value to study and explain how differentiated integration on the level of secondary law is being shaped in the European Union.

In 2013, Leuffen, Rittberger and Schimmelfennig made a valuable contribution by theorising the EU as a system of differentiated integration in primary law. Therefore, their study will lie at the basis of this thesis which will study not differentiation in primary but in secondary law. By viewing differentiation out of different perspectives (see: chapter 3) they (Leuffen et al., 2013) made a valuable contribution to the study of differentiation while connecting the islands of theorising into a synthesis with a common ground and scope conditions. Up until now, the enhanced cooperation principle has

established two regulations: The Rome III Regulation⁵ and the Unitary Patent Regulation⁶. Since this thesis is based on a two-tier approach the objectives on enhanced cooperation set out in the Treaties will also be viewed out of a legal perspective, where the principle of equality of the Member states and uniformity of EU law will be analysed.

2) Enhanced cooperation as a form of differentiated integration

This chapter focuses on the phenomenon of enhanced cooperation and its legal provisions in the Treaties. Furthermore it briefly touches upon the two successfully adopted cases of enhanced cooperation: Rome III and the case of the unitary patent.

2.1 Enhanced cooperation: from Amsterdam to Lisbon

The provision on enhanced cooperation (‘closer cooperation’ until the Treaty of Nice) was introduced in the Amsterdam Treaty, signed in 1997 (Fabbrini, 2012: 5 and Tuytschaever, 1999). Although opt ins, opt outs and other paths of differentiation already existed in the European Union, enhanced cooperation marked the first pre-determined form of flexibility (Walker, 1998: 367). The Treaty of Amsterdam specified general rules for the approval of enhanced cooperation, which were perceived as strict. Enhanced cooperation only could be used as a ‘last resort’, a majority of member states had to join the process and any measure established should not affect the EU *acquis*. The Treaty of Nice amended the rules on enhanced cooperation (Lamping, 2013). The amended rules were moderated resulting in enhanced cooperation with a lower threshold of participating member states (eight), a swift of powers to the European Parliament that was now able to give their consent on the authorisation and a change in substantive circumstances.⁷ The latter resulted in enhanced cooperation that has to respect the *acquis* rather than ‘affect it’ as stated in the Amsterdam Treaty (Peers, 2010: 342). Although the procedure already had been introduced in the Treaty of Amsterdam, and Nice amended the rules softening the conditions, after the Lisbon Treaty the procedure has been used for the first time (Kroll and Leuffen, 2014: 354). In the Treaty on the European Union general terms for enhanced cooperation are outlined.

⁵ See supra note 2.

⁶ See supra note 3.

⁷ For a comparison of both Treaties, see Amsterdam Treaty Article 43 and Article 43 Treaty of Nice.

Article 20 TEU establishes that enhanced cooperation facilitates the objectives of the Union, preserves its interests and strengthens its integration process (Fiorini, 2010: 1149). Enhanced cooperation “*shall be adopted by the Council as a last resort when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole*”.⁸ This implicates the principle of conferral (Art. 5 (1) and (2) TEU) (Lamping, 2011: 20). This paragraph will mainly focus on the procedure of enhanced cooperation that is specified in Articles 326-334 Treaty on the Functioning of the European Union (TFEU). In general, the procedure can be divided in three different phases: initiation, authorisation and implementation (Kroll and Leuffen, 2014: 354).

In order to start an enhanced cooperation procedure, a minimum of nine member states is required (Kroll and Leuffen, 2014). Enhanced cooperation is open to all member states and it should aim to ‘*further the objectives of the Union*’.⁹ Together with the principle of transparency, the principle of openness forms an important pillar of the enhanced cooperation procedure (Cantore, 2011: 9). Legislation adopted under the principle of enhanced cooperation is only binding for the participating member states (Cantore, 2011: 7). If a new member state wants to participate in the enhanced cooperation procedure it shall notify its intention to the Council and the Commission (Tuytschaever, 1999: 69). Within four months the Commission will review the request. The Commission may either confirm participation if the conditions are fulfilled. If not, the Commission will give an overview on the conditions that need to be addressed. Furthermore, the Commission sets a deadline when it will consider the request again. If the Commission decides that the conditions still have not been met, the interested member state can pass on the request to the Council where the participating member states will vote (Fabbrini, 2012: 7, Peers, 2011: 249).

The initiative to start a procedure of enhanced cooperation thus rests with the member states (Fiorini, 2010: 1154). Article 329 TFEU specifies that member states shall address a request for enhanced cooperation to the Commission. States can choose to cooperate in one of the areas covered by the Treaties, except in the fields where the EU has exclusive competence and the common foreign and security policy (CFSP). If states wish to establish cooperation in the field of the CFSP, the High Representative of the Union for Foreign Affairs and Security Policy should be consulted.¹⁰ If the proposal for enhanced cooperation is accepted by the Commission, it will be presented to the Council, which marks the second stage of authorisation.

As described in Article 20 (2) TEU: ‘*The decision authorising enhanced cooperation shall be adopted by the Council as a last resort (ultima ratio), when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine member states participate in it*’ (Thym, 2005: 1735, Peers, 2011: 248). We see that after the Treaty of Nice the threshold has been amended. The conclusion to authorise the proposal thus lies with the Council, after the European Parliament has been consulted (Gaja, 1998). The reason for this authorisation process is the exchange of political opinions of the participating states (Thym, 2005: 1740). The adoption of an enhanced cooperation measure shall be established in the Council on the basis of a qualified majority.¹¹

The third phase of implementation is reached after the Commission received the authorisation decision of the Council. The Commission offers an implementing proposal. Only the participating member states can vote for this proposal in the Council. Although the non-participating member states cannot vote, they are involved in the discussions which emphasises transparency and openness in the process (Cantore, 2011: 9). If a measure for enhanced cooperation derived from a provision in the Treaty

⁸ Article 20 TEU

⁹ Ibid.

¹⁰ Article 329 (2) TFEU

¹¹ Article 330 TFEU

requires unanimity voting of the Council, the Council may adopt a decision that provides qualified majority voting (Art. 333 (1) TFEU). Furthermore, Article 333 (2) contains that a special legislative procedure can be changed into an ordinary legislative procedure. In this regard, the decision making process can be quickened by means of a “*pasarelle clause*”. Since the procedure has a legal review the European Court of Justice is involved as well. The Council procedure that authorises enhanced cooperation can be subject to judicial review before the Court (Fabbrini, 2012: 6). Tekin and Wessels (2008) made a clear overview of the procedure:

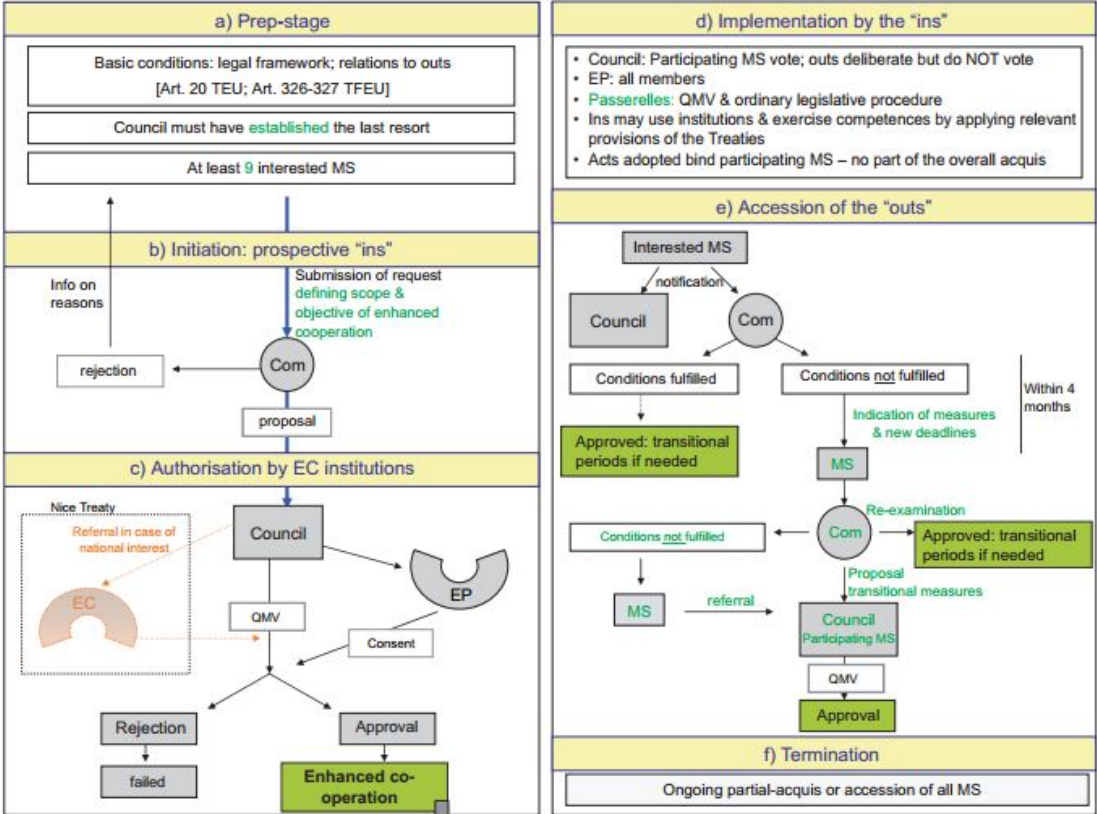


Figure 3 the Enhanced Cooperation procedure (Tekin and Wessels, 2008: 28).

Up until now, the enhanced cooperation procedure has been rarely used (Kroll and Leuffen, 2014). As mentioned before, the enhanced cooperation has been used for the first time under the Lisbon Treaty. Currently there are two examples of well-established forms of enhanced cooperation. The first example concerns the Rome III regulation on divorce law. The second example is enhanced cooperation on the Unitary Patent (Kroll and Leuffen, 2014:357). A third case on financial transaction tax is in progress since the implementing proposal is still being negotiated (Kroll and Leuffen, 2014: 362).

3) Differentiated integration and integration theories

As indicated in chapter 1, this thesis will be based on a two-tier approach. Enhanced cooperation as a form of differentiation in integration and the legal implications will be viewed from a political science and legal perspective. This chapter will focus on explaining differentiation out of two integration theories. Later on in this chapter two hypotheses will be formulated that will serve as a basis for answering research sub-question 1:

How can enhanced cooperation, as a form of differentiated integration, best be viewed in light of European integration theories?

In a study by Leuffen, Rittberger and Schimmelfennig these three scholars analysed the EU as a system of differentiated integration. By focusing on differentiation in primary law, they have studied the four main policy areas of the EU: 1) the single market 2) the Economic and Monetary Union 3) the security and defence area 4) and the area of freedom, security and justice. This thesis will not focus on differentiation in primary law but in secondary law: measures that have been established under the principle of enhanced cooperation. As indicated by Holzinger and Schimmelfennig (2012) in their study “we know close to nothing about differentiated integration in ordinary Community legislation and the EU’s secondary law” (p.302). Moreover: “mainstream integration needs to pay more attention to differentiation as an integration outcome” (Holzinger and Schimmelfennig, 2012: 302). Therefore this research sub-question will analyse the realisation of Rome III and the Unitary Patent regulation by viewing them out of two different integration theories: neofunctionalism (supranationalism) and (liberal) intergovernmentalism.

In European integration theory, these approaches became dominant during the 1980s when integration in the European Union was conceptualised and theorised. Neofunctionalism (later: supranationalism) and (liberal) intergovernmentalism became dominant in the debate of integration theory (Diez and Wiener, 2004). Therefore, this thesis will apply these two theories. Each theory will formulate a hypothesis that will be tested in this thesis. The aim of this research sub-question is to find an answer on which integration theory suits the process of enhanced cooperation as a form of differentiated and the two established regulations best. This theoretical overview will introduce the two integration theories and their propositions on differentiated integration. Lastly, two hypotheses derived from these two integration theories will be formulated.

3.1 Neofunctionalism: supranational governance theory

The theory of neofunctionalism, developed by Ernst B. Haas and other scholars like Leon Lindberg and Phillippe Schmitter has been the leading theory on European integration till the mid-1960s (Rosamond, 2000 and Pollack, 2005). Neofunctionalism was the main integration theory in the early

beginning of theorising integration (1950s-1970s). Neofunctionalism theory can best be described as a regional integration theory that pays great attention to the role of non-governmental actors, such as the European Commission and the European Court of Justice in supporting the process for further integration. The role of member states as actors remains important since they arrange the conditions of the integration process, but they do not completely regulate the course and extent of the following change (Schmitter, 2004: 46). Neofunctionalist reasoning is based on a framework for integration where two countries decide to cooperate and reach integration in a given sector. To succeed in this assignment successfully, a supranational authority is appointed by both countries in order to supervise the assignment thereby making the integration project more effective. As a consequence, the supranational authority becomes a key figure in the integration process (Rosamond, 2000: 58). According to neofunctionalist scholar Lindberg, integration can only occur when central authorities and policies are present (Lindberg, 1963 in Rosamond, 2000: 59). Another prominent feature in the theory of neofunctionalism is the concept of 'spill-over'. As described by Haas (1963) the creation and deepening of integration in one sector would create forces that will lead to further integration in and beyond that sector (Haas, 1968). Neofunctionalism distinguished three types of spill-overs: a functional, political or cultivated spill-over.

A functional spill-over has a technical character and is based on the understanding that the full advantages of integration can only be accomplished if further steps in other areas are made. A political spill-over refers to a situation where integration will be taken a step further due to pressure exercised by national interests. The third type, cultivated spill-over, involves the role of supranational actors such as the European Commission, the European Parliament and the European Court of Justice. In this concept supranational actors play a greater role than implementing and administrating arrangements made between member states. The European Commission for instance acts as a policy entrepreneur thereby influencing decisions made by member states by expertly mobilising support, coalition building and suggesting resolutions in the direction of an end result that suits its own preferences (Lelieveldt and Princen, 2011: 35-36). Neofunctionalism pursued to explain the European Union as a final stage of a federal state with a *finalité* or end goal of the integration project.

Supranationalism theory or supranational governance, that is originated from neofunctionalism started to develop in the late 1990s when scholars such as Stone Sweet and Sandholtz separated themselves from the neofunctionalist vision on the European integration project with a clear end goal. A leading clarification of supranationalism has been made in the late 1990s by scholars such as Alec Stone Sweet and Wayne Sandholtz who constructed the theory of supranationalism. Stone Sweet and Sandholtz (1997) claim that supranationalism aids the interests of "those individuals, groups, and firms who transact across borders and those who are advantaged by European rules and disadvantaged by national rules in specific policy areas" (p. 299). Similar to neofunctionalism theory the scholars argue that member states can only manage steps of integration to a limited extent. Once integration in a policy area has been set in motion, supranational actors such as the European Court of Justice have an influence on integration by their rulings which cannot be reserved by member states (Lelieveldt and Princen, 2011: 37). Furthermore, supranationalism extended the scope of matters to be studied. Where neofunctionalists initially focused on 'spill-over' effects in the economic policy sectors to analyse the extension of integration in other policy areas, supranationalism also focuses on development and deviations towards vertical integration (centralisation) (Leuffen et al., 2013: 62- 63, Stone Sweet and Sandholtz, 1997: 309, Rosamond, 2000: 59).

In relation to differentiation, Leuffen, Rittberger and Schimmelfennig (2013: 77) assume that transnational and supranational actors would favour uniform integration over differentiation.

Supranational actors will try to maximise their own competences and domain by obtaining high levels of centralisation in a variety of policy areas of the Union. In the sphere of horizontal and vertical differentiation defined by the authors, supranational actors tend to minimise vertical differentiation and prevent the occurrence of horizontal differentiation. Vertical differentiation is defined as the variation in the level of centralisation across policies and horizontal differentiation is the variety in territorial extension across policies (Leuffen et al., 2013: 22). In relation to supranationalism and differentiation, supranational actors foresee complexities in European governance when horizontal differentiation would increase. Decision-making and monitoring could become unmanageable. Transnational actors are expected to be satisfied with an increase of vertical differentiation and to a lesser extent with horizontal differentiation. International trade unions for instance strive for the creation of a 'level playing field' in order to combat negative externalities such as social dumping. Preferences on horizontal differentiation are for the most part fixed in national government interests (Leuffen et al., 2013: 77-78). The central factors of differentiated integration in supranationalism theory are the scope and intensity of transnational exchanges, along with the desires and capacity of supranational actors (Leuffen et al., 2013: 81-82).

Enhanced cooperation as a form of differentiated integration is listed in Article 20 TEU. As stated in Article 20 (2) Treaty on the European Union: *'The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member states participate in it'*. As demonstrated in the study of Leuffen, Rittberger and Schimmelfennig the central aspects driving differentiated integration in supranationalism are the scope and force of transnational exchanges, along with capacity and preferences of supranational actors (European Parliament, Commission, CJEU) that favour uniform integration over differentiation (Leuffen et al., 2013: 82). Therefore, the following hypothesis, based on neofunctionalism and supranationalism theory will be formulated and tested:

If differentiation as a result of enhanced cooperation is temporary, the end goal remains uniform integration, and the supranational actors are the driving force behind the integration process, then enhanced cooperation is best explained by supranationalism theory.

3.2 Intergovernmentalism: (liberal) intergovernmentalism theory

Intergovernmentalism theory came into existence as a counterpart of the neofunctionalist theory in the mid-1960s. The 'empty chair crisis' under the Presidency of Charles de Gaulle where France declined to attend any meetings as a result of a conflict regarding the financing of the Common Agricultural Policy, seemed to demonstrate the restrictions of supranational integration. Academics such as Stanley Hoffmann, Alan Milward and Andrew Moravcsik developed the theory of (liberal) intergovernmentalism (Moravcsik, 1993, 1998). Hoffman contributed to the development of intergovernmentalism in his works (1966, 1982) where he explained that neofunctionalist scholars neglected the identity and autonomy of the nation state. Their way of thinking on the European integration project revolves around the general assumption that states are, and will continue to be the leading actors in the development of European integration (Jupille et al., 2003: 9, Lelieveldt and Princen, 2011: 37).

Liberal intergovernmentalism can be seen as the spin-off of intergovernmentalism in the early nineties. As defined by Moravcsik (1993), who developed the theory on liberal intergovernmentalism to explain the integration projects in the 1990s, the essence of this theory is threefold: the expectation of rational behaviour of states, formation based on national preferences and an intergovernmentalist reasoning of domestic negotiation (p.480). Domestic interest and goals determine the course of integration and

European integration is bounded by state autonomy. State sovereignty remains at the heart of intergovernmentalism therefore resulting in integration on topics bounded to 'low politics' and the economic sector (Pollack, 2005). Policy sectors of 'high politics' such as internal and external security will remain in the hands of the nation state. From the perspective of intergovernmentalists, supranational influences during negotiation processes are minimal though not completely missing (Lelieveldt and Princen, 2011: 38). They do not possess the knowledge, resources and help to expend their power at the cost of the member states (Leuffen et al., 2013: 41).

The difference between supranationalism and intergovernmentalism is first of all that supranationalism prolongs the list of actors. Supranationalists, include besides states and powerful domestic interest groups (intergovernmentalism), transnational and supranational actors as well. These transnational actors are multinational companies and transnational interest groups that behave independently from the states. The supranational actors are the EU institutions such as the European Commission and the Court of Justice of the EU that are perceived as actors that act on their own, instead of being agents of the member states. The second difference between supranationalism and intergovernmentalism can be found in the rational institutionalist assumption that assumes that states can map institutions to operate effectively and trustworthy in line with their state preferences. This presumption is declined by the theorists of supranationalism and scholars of historical institutionalism (Leuffen et al., 2013: 64-65). With relation to the European integration, the difference between supranationalism and intergovernmentalism only started to appear when the supranational institutions were created and started to perform (Leuffen et al., 2013: 69). What intergovernmentalists and supranationalists do have in common is that both theories acquire rational actors. As stated by Haas: 'societal actors, in seeking to realise their value-driven interests, will choose whatever means are made available by the prevailing democratic order' (Haas, 2004: 15 in Leuffen et al., 2013: 64).

In light of European integration and differentiation, the theory of intergovernmentalism believes in the preservation of the nation state and expanding autonomy, authority and security of the state (Philippart and Sie Dhian Ho, 2000: 309). In relation to the European Union, integration will be likely to occur if state autonomy is protected. Larger member states of the Union are less integration friendly since their autonomy and security are less threatened than smaller member states that are more dependent on international cooperation (Leuffen et al., 2013: 46-47).

How does differentiated integration fit in this picture? With differentiated integration not present at the EU level, the limits of integration would be defined by the member state with the most powerful bargaining power. From an intergovernmental perspective, the most dominant state would then block any form of vertical (degree of centralisation) or horizontal (territorial expansion) integration that is not beneficial to its state. Trade-offs would be a prominent feature of the EU. Further horizontal integration (enlargement) might cost centralisation in order to contain the state autonomy of less friendly integration states. This is also known as the widening versus deepening dilemma of the Union. Differentiated integration can solve these dilemmas by formulating an effective strategy for facilitating international variety and preventing deadlock when intergovernmental agreement is necessary. By facilitating cooperation opportunities on different levels of centralisation, for different groups at the level of integration that states favour, diversity can be preserved. Intergovernmentalists define differentiated integration by distinctions in interdependence and participation complications, state choices, bargaining power, national ratification restraints, and under the circumstances of rational institutionalism, the costs and benefits of state sovereignty (Leuffen et al., 2013: 53-54).

In sum, in the intergovernmentalist theory, integration is bounded by state autonomy. State sovereignty remains at the heart of intergovernmentalism therefore resulting in integration on topics bounded to 'low politics' and the economic sector (Leuffen et al., 2013). Member states are perceived

as rational actors that will participate in further integration when the benefits exceed the costs. The central aspects driving integration in intergovernmentalism are compliance issues, interdependence and preference homogeneity, often combined with the costs of autonomy. When it comes down to differentiation, transaction costs and externalities are important too. In relation to enhanced cooperation as a form of differentiated integration following hypothesis will be tested:

If differentiation as a result of enhanced cooperation is the outcome of member states' preferences in intergovernmental bargaining, bounded by topics on low politics and the economic sector, while preserving state autonomy and identity, then enhanced cooperation is best explained by (liberal) intergovernmentalism theory.

4) Unity of European Union law and the principle of equality of the member states

As stated in the previous chapters, this thesis focuses on differentiation from a political science and legal perspective. Article 20 TEU and Articles 326 – 334 TFEU that lay down the legal basis for enhanced cooperation will be the subject of the second research sub-question. According to Article 20 TEU enhanced cooperation is open to all member states of the Union; therefore no state can be excluded. Furthermore, the unity of EU law has been the norm in the EU discourse for a long time.

The principle of enhanced cooperation and the possible implications on the unity of EU law and the equality of the member states have resulted in the following second research sub-question:

What are the possible implications of enhanced cooperation on the unity of EU law and equality of the member states?

This research sub-question will be answered by testing two hypotheses. The first hypothesis will focus on the unity of EU law and the second hypothesis will focus on the non-exclusiveness of enhanced cooperation. The two hypotheses will be captured in the following two paragraphs.

4.1 Unity of European Union law

The common concept of European integration stems from the idea of unity, meaning the creation of uniform rules that are applicable in all the member states of the Union (Lamping, 2011: 2). The Preamble of Treaty on the European Union seems to declare the intentions of the inner six states to “continue the process of creating an ever closer union among the peoples of Europe” and “view further steps to be taken in order to advance European integration”.¹² The principle of enhanced cooperation has been introduced in the Amsterdam Treaty. Although flexibility was not a new phenomenon in the European Union, the Amsterdam Treaty did open up the way to flexibility for the member states by introducing a principle that differs from old approach of unity and uniformity of Community law (Gaja, 1998). The uniform application of EU law has dominated the EU debate for a long time (Thym, 2005). As ruled by the ECJ in the *Costa vs. E.N.E.L* case “the executive force of Community law cannot vary from one member state to another (...) without endangering the attainments of the objectives of the Treaties”.¹³ A lot has changed since the 1960s. As seen in chapter one, differentiation in primary and secondary law have characterised the European legal order since the 1990s. From opt outs and specific cooperation measures (EMU and Common Foreign and Security Policy): differentiated integration has been widely applied.

The principle of enhanced cooperation fits within this differentiation scheme. When the principle of enhanced cooperation was introduced in the Treaty of Amsterdam, some observers described it as a “Copernican Revolution” that welcomed the flexibility clause as a remedy to the deepening versus widening dilemma in order to enhance the EU from within (Thym, 2005: 1734). Others feared “constitutional chaos” (Curtin, 1993 in Thym, 2005: 1734) that would be in “natural contradiction with” (Constantinesco, *supra* note 13, at 758 in Thym, 2005: 1734) the uniform application of EU law. According to Fiorini (2010: 1146), enhanced cooperation can be challenged from a legal perspective. The opponents feared that the enhanced cooperation scheme would be hard to combine with the principles of unity of the common internal market and the uniformity of EU law (Fiorini, 2010: 1146). These dangers can be eased as long as the enhanced cooperation framework cannot affect the functioning of the internal market, neither change the *acquis*, will be used when integration among all member states can be reached and focus on advancing the same goals (Fiorini, 2010: 1146). According to Lamping (2011: 12) ‘differentiation constitutes an exception from the unity of EU law’.

As listed in Article 326 TFEU: ‘any form of enhanced cooperation shall comply with the Treaties and EU law’. Thus, enhanced cooperation is a principle that accommodates political diversity between member states in integration projects but guards the existing institutional and legal order of the European Union (Thym, 2005: 1734 and Lamping, 2011: 21). It implies that enhanced cooperation shall not affect the *acquis* or the principles that have been established by the Treaties (being the principles of non-discrimination, subsidiarity, proportionality etc.) (Fiorini, 2010: 1152). The

¹² Preamble, Consolidated Version of the Treaty on the European Union, 2012.

¹³ Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1251.

regulations adopted under the scheme of enhanced cooperation are thus only binding for the participating Member states (Cantore, 2011: 7). As perceived by Barents and Brinkhorst (2012: 56) differentiation affects the effectiveness and comprehensibility of Union law. However, from a legal perspective they argue that enhanced cooperation continues to be an exception of EU common law.

To conclude, according to Article 326 TFEU that lays down the general provisions of enhanced cooperation; “*Any enhanced cooperation shall comply with the Treaties and Union law*”. This Treaty Article thus forms the basis of the first hypothesis to answer the second research sub-question:

Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law.

4.2 The principle of equality of the member states

As observed by Hallstein more than forty years ago: ‘equality results in unity’. That was the leading motive behind the Treaty of Rome in 1957 (Thym, 2005: 1742). The Treaty of Rome signed in 1957, which established the European Economic Community was built on the equal rights doctrine where all members shared the same obligations. This traditional principle has been questioned since the Treaty on the European Union (1991) brought in elements of legal differentiation on a broader scale (Kölliker, 2001: 127). The principle of equality or non-discrimination is interwoven in the Treaties by various provisions (Tuyschaever, 1999: 105). Article 4 TEU sets out that ‘*the Union shall respect the equality of Member States before the Treaties as well as their national identities (...)*’. Equality cannot be defined by a singular definition in every dimension of the Union. It seems that we can view equality nowadays with different appearances and functions in EU law (Wouters, 2001: 304).

In this thesis, equality in relation to enhanced cooperation is addressed as follows. The principle of equality in enhanced cooperation can be typed as form of equality that acts as a constitutional principle of EU law (Wouters, 2001: 315). Equality of member states as a principle of EU law is related to the basic principle of sovereign equality of states in the law of international organisations and common international law (Wouters, 2001: 316). We see this principle reflected in the structure of the EU institutions. Each member state is represented in the Commission by a Commissioner. Moreover, each member state is represented in the Council of the EU.¹⁴ In addition, the unique rotating system of the presidency of the Council reflects that there exists equality between all member states. The Council procedures are built on equal voting rights, the equal availability to use the right of veto when decisions have to be made on the basis of unanimity, and the equal rights of standing of all member states before the EU Courts (Wouters, 2001: 316).

As stated earlier in this paragraph, the principle of sovereign equality of the member states is rooted in the common international law: the United Nations Charter and the Helsinki Final Act. The sovereign equality of states prevents any hierarchical order between states. However in reality and in relation to differentiation, member states do not have to consider each other equal in a way that they can, and will engage in treaty partnerships with particular states if they are not obliged to do so (by treaty force) (Wouters, 2001: 320). Here, differentiation between states is shaped. Differentiation however should not be compared with discrimination as the latter is inadmissible in international law (Yearbook of the International Law Commission, 1961 in Wouters, 2001). Furthermore, the principle of equality as a fundamental human right or linked to the principles of democracy and the rule of law, are another important source for equality. They way that equality is anchored in States national constitutional

¹⁴ The Council uses two different voting mechanisms: qualified majority voting (QMV) and unanimity. These voting powers do differ, but both are based on equality and equal representation of the member state. As from November 2014 a qualified majority can only be reached under two conditions: 1) 55% of the Member states vote in favour. 2) The proposal is supported by Member states representing at least 65% of the total EU population (www.consilium.europa.eu).

rules, determines the level of leeway a State has to commit itself on an international level (Wouters, 2001: 323).

The principle of equality can be related to the structure of enhanced cooperation in several ways. Firstly, enhanced cooperation aims at *'furthering the objectives of the Union and cooperation shall be open to all Member States at all times'*.¹⁵ As we have seen equality takes a prominent place in the EU Treaties. Secondly, *'decisions on enhanced cooperation shall not be regarded as part of the acquis which has to be accepted by candidate States for accession'*.¹⁶ Thus equality between the states is safeguarded. Thirdly, as laid down in Article 326 TFEU, *'any form of cooperation shall comply with the Treaties and Union law. A form of enhanced cooperation shall 'not undermine the internal market or economic, social and territorial cohesion'*. Therefore, enhanced cooperation should respect the 'market-unifying' role (More, 1999 in Wouters, 2001: 310). Equality here functions as a minimum guarantee for fair competition and openness of the markets.

Fourthly, Article 327 TFEU secures the rights of member states who do not participate in any form of enhanced cooperation (Lamping, 2011: 21). However, *'those Member States shall not impede its implementation by the participating Member States'*. Equality as a constitutional principle of EU law seems to fall under the 'rights' of member states in Article 327. In addition, sovereign equality of states in international law seems protected by this Article. Lastly, the most straightforward principle of equality can be found in Article 328 (1) TFEU. *'When enhanced cooperation is being established, it shall be open to all Member States'*. Thus, enhanced cooperation is non-exclusive to the member states of the Union (Lamping, 2011: 21).

To conclude, this overview of the provisions on enhanced cooperation in the Treaties make clear that the principle of equality shapes the use of the mechanism of enhanced cooperation in different ways. The conditions of the Treaty Articles are comprehensive enough to include the different interpretations of equality in EU and international law. The jurisdiction of the European Court of Justice (ECJ) should guarantee the respect thereof (Wouters, 2001: 342).

As noted before, the measure of enhanced cooperation is open to every member state that wants to join. Therefore, states cannot be excluded. Article 327 states that the *"cooperation does not affect the competences, rights, obligations of those member states who do not participate in an enhanced cooperation measure. Those member states shall not impede its implementation by the participating member states"*. We should then assume that enhanced cooperation does not affect member states that did not participated in the enhanced cooperation procedure and thus the legal equality of States is preserved. It is interesting to test whether this provision is empirically substantiated in practice and if indeed the equality of Member states is maintained. Especially in light of the recent development on cases C-146/13 and C-147-/13 (the Court's dismissal on Spain's appeal) the principle of equality and thus non-discrimination in enhanced cooperation can be analysed by its legal reality. Therefore, the following hypothesis can be formulated and tested:

The mechanism of enhanced cooperation is a threat to the principle of equality of the member states.

Thus, for testing this hypothesis, equality will only be perceived out of the perspective of the member states during the process of enhanced cooperation. Besides legal procedural requirements, equality will also be viewed from a substantive perspective.

To conclude, the previous two chapters outlined the two research sub-questions that need to be answered in order to elaborate on the main question that focus on the potential, restraints and implication of enhanced cooperation as a form of differentiated integration. The next chapter will be

¹⁵ Article 20 (1) TEU.

¹⁶ Article 20 (4) TEU.

devoted to the research design of this thesis. This chapter will outline the methods that will be used in order to test the hypotheses and answer the research questions.

5) Methodology: research design

As stated in chapter three and four, this thesis will test four different hypotheses. Since this thesis is based on a two tier approach, it is of importance to explain in this section how the research procedure will be carried out. The overall aim of this research is to find out which integration theory is best applicable during the process of enhanced cooperation and what the possible implications of enhanced cooperation are on the unity of EU law and the principle of equality of the member states. Since this thesis makes a distinction between a political science and legal perspective, this research design is based on a twofold approach. In this chapter, the following topics will be discussed: research methods, research procedure and research strategy.

5.1 Research methods: qualitative research

In social sciences a distinction can be made between quantitative and qualitative schools of thought. Where quantitative research methods focuses on an amount of an object, quality refers to ‘the what, how, when, and where if an objects core and environment’ (Berg, 2004: 3). Thus, qualitative analysis concerns the characteristics, meanings, and definitions of things, whereas quantitative analysis is aimed at measuring and counting objects. Since the aim of this thesis is to find out the narrative of enhanced cooperation in light of integration theories, unity of EU law and the principle of equality, qualitative research methods seem the best fit. Qualitative research methods consist of many facets and can vary widely: from participant observation to group observations, from single interview to group

interviews, from open interviews to semi-structured interviews and from content analysis to process tracing (Berg, 2004). It is therefore of importance to determine which qualitative research method fits the objects of research best. What became clear from the literature review in this thesis is that there exists room for research on differentiated integration in secondary law.¹⁷ The principle of enhanced cooperation that was established under the Treaty of Amsterdam established two regulations¹⁸: one in 2012 and one in 2013. In order to find out which integration theory can explain and describe the realisation of enhanced cooperation and the two regulations best, the two established regulations will lie at the basis of this research. Combined with the legal perspective, that focuses on the unity of EU law and the equality of the Member states, the possible implications of the establishment of these two cases must be considered. The following paragraph will go into detail on which research procedure can be used.

5.2 Research procedure: case studies and process tracing

Since the research question of this thesis focuses on enhanced cooperation as a form of differentiated integration, viewed from two integration theories and a legal perspective, it is of importance to understand the process of enhanced cooperation and its outcomes. First it is important to notice that in this thesis the *enhanced cooperation procedure* is defined as the process towards the formal request of the member states to start the enhanced cooperation and the moment it [enhanced cooperation] started in practice. Thus this includes the authorisation of the Commission to launch the enhanced cooperation procedure and the thereby coming discussions in the Council on the new proposal that will be eventually adopted by the participating member states.

As has been stated in chapter two, enhanced cooperation produced two regulations. These two regulations therefore will lie at the basis of this research. By analysing these two regulations this thesis thus opt for a case study approach. The definition of a case study method or approach that will be followed in this thesis is defined by John Gerring: a case study is ‘an intensive study of a single unit for the purpose of understanding a larger class of (similar) units’ (Gerring, 2004: 342). A unit implies a spatially limited phenomenon, in is in this thesis enhanced cooperation. As regards selecting cases a researcher should prevent to be biased and therefore select their cases carefully (Seawright and Gerring, 2008). Since the enhanced cooperation principle has only produced two successful cases, it is therefore that these are the cases to be selected in this thesis. The first step concerning the research procedure has been made. The case study approach focuses as a first layer of qualitative methods used in this thesis.

In order to find answers on the proposed research question, this study will use the qualitative method of process tracing. Process tracing can be seen as the second layer in research methods used in this thesis. In general process tracing can be defined as “the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator” (Collier, 2011: 823). Process tracing as a qualitative research method can be “applied as a method to evaluate hypotheses about the causes of a specific outcome in a particular case” (Mahoney, 2012: 571). Process tracing is often used by scholars who execute a case analysis and where the aim is to combine previous generalisations with particular observations derived from a single case to form causal assumptions about that case (Mahoney, 2012: 570). In process tracing, a careful description and analysis of the process is key. The method of process tracing can contribute to different research objectives such as describing new political and social developments by systematically defining them or testing explanatory hypotheses and uncover new ones (Collier, 2011: 824). Since process tracing

¹⁷ See paragraph 3.3 Relevance of this study.

¹⁸ The Rome II Regulation which entered into force in 2012 and the Unitary Patent Regulation that entered into force in 2013.

calls for identifying diagnostic evidence that forms the basis for descriptive and causal assumptions, this method will be applied on the two cases.

5.3 Research strategy research sub-question 1: data collection

Process tracing as a qualitative research methods makes use of “causal process observations” (or: CPOs). CPOs can best be typed as the evidence on which process tracing focuses (Collier, Brady and Seawright, 2010a). According to Mahoney (2010) a CPO is “an insight or piece of data that provides information about the context, process or mechanism, and that contributes distinctive leverage in causal inferences” (p. 124). In relation to this study on enhanced cooperation and the two accompanying cases, the following CPOs will be used:

- Primary data: official EU documents and press releases of the Council, the Commission and the member states during processes where the two measures on enhanced cooperation were established.
- Secondary literature that is of use to analyse the establishment of the enhanced cooperation measures. These are relevant academic and non-academic literature such as newspaper articles.
- Expert interviews. In addition to the gathering and use of primary and secondary data nine expert interviews will be held. The data retrieved from these interviews will be analysed and processed in order to answer the first research sub-question on enhanced cooperation and integration theories. The added value of interviewing is that it gives the researcher more information and deeper insights in the process and context on the two cases that are being studied.

The interviews that will be held are semi-structured.¹⁹ In order to get insight in the enhanced cooperation procedure and the process and establishment of the two regulations it is of added value to interview respondents²⁰ who were either involved during the process or can be typed as an expert. Since this thesis is about enhanced cooperation and the realisation of the two regulations, it would be of added value to speak to at least two persons working at one of the EU institutions (Parliament, Council, and Commission) and three persons who were involved in the process from a member state perspective. These expert interviews will give the researcher, combined with the primary and secondary data, an integral overview on the study of enhanced cooperation as a form of differentiation in the EU. It must be noted that the insights of the experts of the EU institutions will not be linked to the theory of neofunctionalism and intergovernmentalism in such way that a respondent of the Commission will be automatically a representative of neofunctionalism. To the same extent, a respondent from the Council will not be typed as a representative of intergovernmentalism. The information gathered from the interviews will be used to create larger context on the two theoretical strands on integration and differentiation. Statements by the various respondents will be categorised by the researcher into the two main categories of integration theories.

In chapter three, the two main integration theories were analysed. In order to analyse enhanced cooperation as a form of differentiated integration out of these two integration theories, data has to be presented. The findings on the two main integration theories are for the largest part derived from the interviews held with nine experts. The theoretical strands in the literature on neofunctionalism (supranationalism) and (liberal) intergovernmentalism formed a basis for a research design.²¹ This

¹⁹ See Appendix B for the semi-structured interview topic list.

²⁰ See Appendix C for the interview transcripts.

²¹ See Appendix A for the research design on the two main European integration theories.

research design served as a basis for the semi-structured interviews that were held.²² After the interviews were conducted (nine in total), the research design was used in order to code and classify the interviews.²³ The interviews were subdivided in different topics, connected to the theoretical assumptions on the integration theories. These subdivisions in topics will be used in chapter six and seven in order to answer the first sub-research question.

5.4 Research strategy research sub-question 2: data collection

Research sub-question 2 will try to answer the possible implications of enhanced cooperation on the unity of EU law and equality of member states. Since this thesis is based on a two-tier approach, the operationalisation of the second research sub-question differs from research sub-question 1. In order to test the two hypotheses on the unity of EU law and equality of the member states during the process and establishment of the two enhanced cooperation cases, the central focus in operationalising those hypotheses is comparison of legal provisions with legal practice. The following two paragraphs elaborate more on the operationalisation and research strategy of research sub-question 2.

The hypothesis on the unity on EU law is stated as follows: *‘Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law’*. In order to operationalise this hypothesis and to test whether enhanced cooperation has implications on the unity of EU law the following Treaty Article will be prevailing. As listed in Article 326 TFEU *‘any form of enhanced cooperation shall comply with the Treaties and EU law’*. Article 326 TFEU will therefore be considered as the minimum requirement for testing the unity of EU law in the two established cases of enhanced cooperation.

The central hypothesis on equality of the member states is stated as follows: *‘the mechanism of enhanced cooperation is a threat to the principle of equality of the member states’*. In paragraph 4.2, based on the analysis of Wouters (2001) the legal provisions of enhanced cooperation were connected to equality on five points. These include the following Treaty Articles:

- * Article 20 (1) TEU²⁴
- * Article 20 (4) TEU²⁵
- * Article 326 TFEU²⁶
- * Article 327 TFEU²⁷
- * Article 328 (1) TFEU²⁸

In order to test the hypothesis on the equality of the member states in the enhanced cooperation procedure, these are the five Treaty provisions that will serve as the criteria that will determine whether the hypothesis on equality will be accepted or not.

²² See supra note 14.

²³ See Appendix D for the classification of the conducted interviews on enhanced cooperation.

²⁴ Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

²⁵ 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.

²⁶ Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation 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.

²⁷ Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

²⁸ When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

6) The Rome III Regulation

This chapter will tell the narrative of the realisation of the Rome III Regulation. Since the aim of this thesis is enhanced cooperation as a form of differentiation and the implications of this differentiation on the unity of EU law and equality of the member states, this paragraph will only focus on the run-up towards the enhanced cooperation procedure and the adoption of the Commission's proposal. After the first paragraph, where the realisation of the Rome III Regulation under the enhanced cooperation principle has been discussed, the following two paragraphs will focus on the results of the first sub-research question. This question focuses on how enhanced cooperation, as a form of differentiated integration, can best be viewed in light of European integration theories. The fourth and fifth paragraphs of this chapter will focus on the second sub-research question that will try to answer what the possible implications of enhanced cooperation are on the unity of EU law and equality of the member states.

6.1 The realisation of the Rome III regulation: enhanced cooperation in the field of divorce law

The first authorised case on enhanced cooperation is the Rome III regulation that entered into force in July 2012. Before the realisation of this regulation, the European Union established its first measure on divorce law in 1998: the Brussels II Convention.²⁹ This regulation was renewed by the Brussels II Regulation in 2000 and amended in 2003.³⁰ These matters on divorce are listed under chapter 'Title IV' in the Treaty that deals with immigration, asylum and civil judicial cooperation rules (the area of freedom, security and justice). It is of importance to mention that Denmark has a complete opt out concerning all the issues related in this field and that the United Kingdom and Ireland have to decide whether they want to opt in (Peers, 2010: 344-346). In 2006 the Commission introduced a proposal to regulate the issue of divorce law, based on a Green Paper that had been published in 2005.³¹ The Commission located a trend which indicated that the number of international couples was increasing. As reported by the Commission, 13 per cent of the 122 million marriages in the Union are international (Kroll and Leuffen, 2014: 358). Figures showed that in 2007 13 per cent of all divorces

²⁹ Official Journal 1998 C 221/1.

³⁰ Regulation 1347/2000, Official Journal 2003, L338/1.

³¹ Applicable law and jurisdiction in divorce matters (Green Paper), COM(2005) 82, 14 March 2005.

in the member states had a transnational component.³² For almost 10 years the question on which law was applicable on divorce was on the agenda of the Commission (Fiorini, 2010: 1143). Until the proposed regulation there did not exist EU rules on how to regulate the matter of conflicting laws and jurisdictions rules during divorce disputes (Cantore, 2011). According to the Commission that situation would lead to legal uncertainty and unpredictability since each member state would apply its own conflict of law rules (Kroll and Leuffen, 2014: 359). Within the EU and on the member state level, there was support to establish uniform conflict of law rules in the area of cross-border divorce (Fabbrini, 2012: 14). The proposed regulation did not lead to uniform acceptance by the member states (Boele-Woelki, 2008: 780 and Peers, 2010). First, Denmark did not opt in since the country has a complete opt out on issues concerning “immigration, asylum and civil judicial cooperation”. Second, the UK and Ireland did not opt in (Fiorini, 2010: 1144).³³ Third, Sweden wanted to stick to the *lex fori*³⁴ approach (Boele-Woelki, 2008: 784) and did not want to recognise EU divorce rules that would be less liberal than its own rules (Fiorini, 2010: 1144). According to the Commission, one member state perceived the divorce law regulation as more restrictive than its own divorce law.³⁵ Although a majority of the member states seemed in favour of the establishment of the Regulation, the differences in their legal traditions and positions on divorce seemed divergent. In Poland and Malta for instance, a divorce is only allowed under very strict conditions and liberal states such as Sweden and Finland do not require any specific rules on getting a divorce. These divergent perspectives among the member states were hard to overcome and since the proposed Regulation required unanimity, final agreement could not be reached.

As a result the Council on Justice and Home Affairs concluded in 2008 that uniform integration on this issue could not be reached within a reasonable period of time (Fiorini, 2010: 1144).³⁶ Ministers concluded that ‘there was no unanimity to go ahead with the proposed Regulation and that insurmountable difficulties existed, making a decision requiring unanimity impossible now and in the foreseeable future’.³⁷ Nonetheless, a group of nine member states wanted to pursue cooperation on divorce law by following the rules of enhanced cooperation. As a response, the Commission declared that it would welcome a formal request on enhanced cooperation and stated ‘not wanting to know beforehand what the content of the proposal might be’ and underlining that ‘it would consider the request in light of the political, legal and practical aspects of a proposal of this nature’.³⁸ In 2008, Greece, Spain, Italy, Hungary, Luxembourg, Austria, France, Romania and Slovenia submitted a proposal for enhanced cooperation to the Commission (Boele-Woelki, 2008: 787). In a later stage (2010), Greece withdrew its request and Bulgaria and France joined (Bulgaria 2008, France 2009) (Fiorini, 2010: 1145). For over 18 months, the Commission did not respond to the proposal of the member states. When the Barosso Commission was established in 2009, Commissioner for Justice Viviane Reding formally launched the request of the Member states on enhanced cooperation in divorce law (Fiorini, 2010: 1145).

³² European Commission proposal Rome III regulation EC 2010a, 104 final.

³³ According to Article 1 and 3 of the Protocol on the Position of the United Kingdom and Ireland, annexed to the Treaty of Amsterdam, it is stated that both countries shall not participate measures introduced by the Council that relate to title IV of the EC Treaty unless they inform the Council within three months that they have decided to opt-in.

³⁴ *Lex fori* (Latin for law of the forum) refers to the law of the court in which the action is brought. In a case of conflict of laws, the court must consider which law (national or international) is applicable to the case. See the European Commission, DG Justice Glossary available at http://ec.europa.eu/justice/glossary/lex-fori_en.htm.

³⁵ COM(2010) 104 final 2010/0066 (APP).

³⁶ Council doc. 9985/08 JUSTCIV 111.

³⁷ COM(2010) 104 final 2010/0066 (APP), p.2-3. As a result of this conclusion the Council established that uniform agreement could not be obtained within a reasonable period of time therefore complying with the Treaties (Art. 20). Document 10383/08 PV/CONS 36 JAI 311 of 10 July 2008.

³⁸ 2887th Council Meeting Justice and Home Affairs, Brussels, 24-25 July 2008, C/08/205/11653/08 p. 23 (Presse 205)23).

The proposal of the European Commission was formally presented to the Justice and Home Affairs (JHA) Council on the 16th of April 2010 that agreed³⁹ to authorise the enhanced cooperation procedure on the 12th of July 2010 after receiving the consent of the European Parliament (Cantore, 2011, Fabbrini, 2012: 14, Peers, 2010: 347).⁴⁰ After the authorisation of the enhanced cooperation procedure by the Commission, Belgium, Germany, Latvia, Malta and Portugal joined the other member states resulting in a total of fourteen participation states in June 2010.⁴¹ Denmark, Poland and Sweden did not vote against the decision to authorise enhanced cooperation but abstained while Finland published a declaration.⁴² In this declaration is stated that: *'Finland considers that enhanced cooperation is a better alternative than cooperation of unofficial groups outside the institutional system of the European Union. However, Finland regrets that the enhanced cooperation is about to be launched for the first time in the field of family law which is closely connected with fundamental values and traditions of Member States'*.⁴³

The first part of the Commission's proposal included a Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.⁴⁴ The second part contained a request for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.⁴⁵ Shortly after, the European Parliament gave its approval in June and the Council expressed its final agreement in July 2010. In December 2010, the regulation was approved by the Council. The regulation on divorce law, named the Rome III regulation⁴⁶, entered into force in July 2012 (Fabbrini, 2012: 15). The aim of this regulation is to prevent forum shopping at different courts and costly court cases (Cantore, 2011). As a result of the regulation, international couples can now choose which law should apply to their divorce when they are getting married. After the entry into force of the Regulation, other member states decided they wanted to join the Regulation. Lithuania, which decided not to participate in the initial proposal of enhanced cooperation, decided to join in November 2012.⁴⁷ In 2014, Greece became the 16th country participating in the enhanced cooperation procedure.⁴⁸ The Rome III Regulation now applies in 16 member states (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia, Lithuania and Greece).

6.2 Enhanced cooperation as a form of differentiated integration in neofunctionalism (supranationalism) theory

6.2.1 *European integration outcomes*

As seen in chapter three, the main assumption of neofunctionalism (supranationalism) on European integration outcomes is that member states can only manage some steps in the integration process. Once integration has been set in motion, the influence of supranational actors such as the European

³⁹ Legal Affairs Committee of the European Parliament (JURI), EP 2010/0066 (NLE).

⁴⁰ Council of the European Union document, 15836/10, 8 November 2010.

⁴¹ The member states joined the enhanced cooperation on the Rome III Regulation respectively 15 April 2010 (Germany), 22 April 2010 (Belgium), 17 May 2010 (Latvia), 31 May 2010 (Malta) and Portugal during the JHA Council meeting of 4 June 2010. Council document 11809/10, Brussels, 2 July 2010.

⁴² Council of the European Union document, 11809/3/10 (9), 9 July 2010.

⁴³ Council of the European Union document, 11429/1, 5 July 2010.

⁴⁴ (COM(2010)) 104 final.

⁴⁵ (COM(2010)) 105 final.

⁴⁶ Council Regulation No. 1259/2010.

⁴⁷ European Commission Press Release. Lithuania is the 15th EU Member State to sign up to enhanced cooperation rules to help international couples. Brussels, 20 November 2012.

⁴⁸ European Commission Press Release. Greece is Member State No. 16 to sign up to EU rules helping international couples. Brussels, 27 January 2014.

Commission, the European Parliament and the European Court of Justice have their influence on integration that cannot be steered by the member states (Lelieveldt and Princen, 2011).

What became clear from an interview with a respondent⁴⁹ from the European Parliament (Parliament 1, Appendix C), is that the member states were unable to find a solution on the existing problems in their member states as regards divorce law. Many member states were in favour of the Rome III regulation, especially Germany and France who dealt with a lot of cross-border marriages. According to the respondent “*there was a need for certain member states to have some kind of solution*” (Parliament, 1 Appendix C). The Commission who came up with the Rome III proposal provided that solution.

6.2.2 *Neofunctionalism (supranationalism) view on differentiation in European integration*

According to the theory, the view of neofunctionalism (supranationalism) on differentiation in European integration is that it is perceived as a second best option (Leuffen, Rittberger and Schimmelfennig, 2013). In general, neofunctionalist scholars favour uniform integration over differentiation. Thus, differentiation is perceived as an alternative. EU institutions and member states should aim to avoid resorting to alternative routes of integration. Findings that fit with these theoretical assumptions are present. One respondent of the European Commission made a clear division between what is desirable and what is practice. He described uniform integration as the ideal type, where all member state agrees with one another on a uniform basis. The Rome III proposal was a regulation that could only be adopted by unanimity in the Council. Reality has shown that with an EU of 28 member states, uniformity is sometimes hard to reach. Different legal and cultural traditions of member states make it more and more complex to reach uniform agreement (Commission, 2: Appendix C). Although differentiation is not desirable and in fact a second best option, it has proven to be the only alternative to establish a regulation. The only alternative that remains is keeping the *status quo* which results in the dismissal of the proposal that could have resulted in integration. Perhaps not for all member states but at least for a group of them. According to a respondent of the Council “*we should avoid more differentiation. If we want to have one Europe we should have consistency on the way that institutions work*” (Council, 1: Appendix C).

6.2.3 *The function of the enhanced cooperation procedure*

What became clear from the data retrieved from the interviews is that most respondents view enhanced cooperation as the ‘last resort’. This fits with the Treaty provisions made in Article 20 TEU.⁵⁰ Enhanced cooperation allows a group of member states to go off with furthering the objectives of the European Union and thus deepen integration while other member states join later. These assumptions fit the theoretical assumption of neofunctionalism that favours uniform integration. According to a respondent of the Council enhanced cooperation has been developed and adopted in the Treaties in order to let a few member states go ahead, while other will catch up in the (near) future (Council, 1: Appendix C). Enhanced cooperation as a form of differentiation is therefore seen as temporary.

⁴⁹ See Chapter 5, para 5.3: It must be noted that the insights of the experts of the EU institutions will not be linked to the theory of neofunctionalism and intergovernmentalism in such way that a respondent of the Commission will be automatically a representative of neofunctionalism. To the same extent, a respondent from the Council will not be typed as a representative of intergovernmentalism. The information gathered from the interviews will be used to create larger context on the two theoretical strands on integration and differentiation. Statements by the various respondents will be categorised by the researcher into the two main categories of integration theories.

⁵⁰ Article 20 TEU (1): Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union. Article 20 TEU (2) The decision authorising enhanced cooperation shall be adopted by the Council as a last resort (...).

Member states who are not participating in the enhanced cooperation process will still be able to adopt the established regulation. According to the respondent that is a “*very important issue*” (Council, 1: Appendix C).

Another respondent from the Commission agreed with the fact that the initial idea of enhanced cooperation was “*originally intended to allow some groups of countries to go off and do something completely new*”. But, according to this respondent, it has been used to avoid complete blockage when member states are working in the area of unanimity (Commission, 1: Appendix C). Furthermore, enhanced cooperation is perceived by the respondent as a “*complete mess. It should only be resorted to as a last resort. That is what it says in the Treaty*”.

What became clear from the data retrieved while conducting the interviews is that the enhanced cooperation procedure should not be used too often. The aim is to produce a regulation that is acceptable for all member states therefore making it possible for them to participate in the (near future). However there are no provisions in the Treaty who safeguard this principle. It is therefore not ruled out that a proposal will be adopted by a group of member states that is tailor cut for a certain group of member states. This results in risks that will exclude the others (Parliament, 1: Appendix C).

6.2.4 *The role of the European Commission in the enhanced cooperation procedure*

In European integration theory on neofunctionalism (supranationalism), the role of the European Commission is key (Rosamond, 2000). The Commission suggests solutions of an end result that fits its own preferences (Lelieveldt and Princen, 2011). In the realisation of the Rome III regulation, the European Commission’s role is indeed of great importance in the (differentiated) integration process.

As stated in Article 20 TEU, the enhanced cooperation procedure can be set in motion once the Council has established that uniform agreement within a reasonable period of time cannot be reached.⁵¹ According to the Commission, unanimity on the initial Rome III regulation could not be reached.⁵² It is of importance to notice that the original proposal on the Rome III regulation was made by the Commission. Furthermore, according to Article 329 (1) the Commission may submit a proposal to the Council to authorise enhanced cooperation. In other words, according to the Treaties, the Commission is not obliged to formally respond with an approval on the authorisation process. What became clear from the realisation of the first enhanced cooperation procedure that resulted in Rome III was that the Commission did not respond to the Council’s request to authorise enhanced cooperation for 18 months. According to the several respondents this had to do with the fact that enhanced cooperation had never been used before. The Commission wanted to take a careful approach and follow the procedures in a delicate way, making sure no mistakes were made (Council, 1, Commission, 1, Permanent Representative, 2: Appendix C). After the appointment of the new Barosso Commission, Commissioner Reding took the lead. In a European Parliament hearing in 2010, the Parliament asked Ms. Reding which specific legislative and non-legislative initiatives she wanted to put forward and according to what timetable. First, she told the Parliament she wanted to make progress on a European contract law. Her second priority was stated as follows:

‘I want to make fast progress on the pending proposal on the applicable law in matrimonial matters (“Rome III”). I am a firm believer in participation of all Member States in all EU policies. However, I am also convinced that the human dimension of this proposal – which could remove substantial legal uncertainty for children and their parents in often conflicting bi-national situations – does not allow us to wait any longer. If there is no other solution, I am ready to present a proposal for enhanced

⁵¹ Treaty on the European Union, Article 20.

⁵² European Commission, COM(2010) 104 final, 24 March 2010.

*cooperation on “Rome III” within the first months of my mandate. Enhanced cooperation in this matter will send a strong signal to all Member States. Of course, I sincerely hope that a sound proposal from the Commission, supported by many Member States, would soon attract all Member States to join*⁵³.

This process shows that the Commission has indeed great influence on the differentiated integration process of the Rome III regulation. However, it is of importance to notice that the member states also greatly influenced this process by submitting the proposal for enhanced cooperation to the Commission in the first place.

6.2.5 *The role of non-governmental actors*

In neofunctionalism (supranationalism) theory, there are roles to play for other non-governmental actors besides the European Commission. According to the theoretical assumptions, supranational actors will try to expand their competences (Leuffen, Rittberger and Schimmelfennig, 2013). The role of member states continues to be important, but they do not fully regulate the course of the integration process (Schmitter, 2004). Lastly, supranational actors support the interest of those groups and individuals who operate or live on a transnational level and are thus advantaged by the establishment of European rules (Stone Sweet and Sandholtz, 1997).

If we view the role of supranational actors other than the European Commission, according to Article 329 (1) the role of the Parliament is to give its consent to start the enhanced cooperation procedure after Council approval and Commission proposal. Although the role of the Parliament seems rather small, it should not be underestimated. The consent procedure of the Parliament gives it the power to accept or reject the given proposal on the legal basis of TFEU article 329 (2).⁵⁴ As regards to the Rome III proposal the Parliament accepted the proposal of the regulation. This is due to the fact that the Parliament agreed in an earlier stage with the original Rome III proposal before the enhanced cooperation procedure was established (Peers, 2010: 354).

During the interviews that were held, the respondents were asked why member states should make use of the EU institutions via the enhanced cooperation procedure, while there always exists the possibility to cooperate via intergovernmental ways. One respondent answered by stating that *“it is very difficult to start working between the member states alone without the institutions in the areas that potentially are typically areas for the European Union”* (Council, 1: Appendix C). The provisions in the Treaty that make a division in competences between the EU and the member states, listed the area of freedom, security and justice as an area of shared competences (Art. 4 (2) TFEU). For this reason, the member states are dependent on the EU institutions in the integration process, and therefore also the differentiated integration process under enhanced cooperation.

The third theoretical assumption derived from neofunctionalism (supranationalism) theory describes the role of supranational actors as those who aid groups or individuals who move or reside on a transnational level. In the case of the Rome III regulation which is the law applicable to divorce, the aim of the regulation is to advantage those transnational couples who are seeking divorce in a member state where they are not originated from. This might explain why a Polish member of the European Parliament, became the rapporteur on this file, while divorce is only allowed under very strict rules in

⁵³ European Parliament, Hearing with Commissioner Viviane Reding, 7 January 2010, CM\800797EN.doc, p.6.

⁵⁴ TFEU Article 329 (2). The consent procedure implicates that the Council has to require the Parliament's consent before important decisions are taken. In case of the enhanced cooperation procedure, the consent procedure is based on a single reading by the Parliament. The Parliament can either accept or reject this proposal but it is not in the position to amend it. See http://europa.eu/legislation_summaries/glossary/assent_procedure_en.htm.

Poland and his national political party⁵⁵ opposes same-sex marriages. This Polish member of the European Parliament is a member of the Group of the European People's Party (Christian democrats). According to the respondent who was the assistant of the rapporteur that time, Poland decided to take the file because they felt that they had to aid those groups or individuals who would benefit from the Rome III regulation despite the fact that Poland as a country did not support divorce. According to the respondent: “generally I wouldn’t risk to say that the European Parliament is more European than the Council but many MEPs who are here for already like two three terms of course they feel very much connected to their regions but they also see after so many years how many benefits the Union is still giving” (European Parliament, 1: Appendix C).

6.2.6 Conclusion: hypothesis on neofunctionalism (supranationalism) theory

In chapter three, the following hypothesis derived from the neofunctionalism (supranationalism) theory was formulated:

H1: If differentiation as a result of enhanced cooperation is temporary, the end goal remains uniform integration, and the supranational actors are the driving force behind the integration process, then enhanced cooperation is best explained by supranationalism theory.

What can be concluded on the findings and results on the Rome III regulation as the first case of enhanced cooperation is that there indeed can be found elements of neofunctionalism (supranationalism) theory in the differentiated integration process. Viewing divorce as an area of European integration from a supranationalist perspective, it can be noted that according to scholars such as Stone Sweet and Sandholtz (1997) supranationalism aids the interests of those individuals who in their daily life get to deal with issues across EU borders. According to supranationalism more European integration in the field of divorce will result in more beneficial rules for EU citizens than the existing national rules. This will eventually lead to spill-over effects in not only the area of divorce but also in other policy areas of the European Union. Although the latter is hard to predict, since enhanced cooperation has been only used twice, neofunctionalism explains integration in the area of divorce to a large extent. Integration in the area of divorce was not supported by all member states, but the member states that were in favour of the realisation of the regulation all wanted to aid the interests of the EU citizens by creating European rules that would strengthen their position on divorce in another member state. Furthermore, the Treaties are quite specific on the fact that enhanced cooperation should be used as a last resort. This implies on enhanced cooperation being the ultimate alternative and thus a second best solution. Thirdly, what became clear from the findings and results is that enhanced cooperation is designed in such way that any member state that was not able to join the enhanced cooperation process when the proposal was adopted, is still given the opportunity to join later. This appears first of all from the fact that during the initial request for the authorisation of enhanced cooperation nine member states send a letter to the Commission. Currently, there are sixteen member states who adopted the Rome III Regulation. Fourthly, the role of supranational actors and in particular the Commission is of great importance, especially in the initial phase of the enhanced cooperation procedure where it has to approve the Council’s request to authorise enhanced cooperation. But also in a later phase when the proposal for the regulation is send to the Council, the Commission has an important role to play since it drafts the proposal. The role of member states in the differentiated integration process remains important, but the roles of supranational actors are also influential. Still, if we view the hypothesis once more differentiation in the Rome III regulation does not temporary. The 12 non-participating

⁵⁵ This member of the European Parliament is a national member of the Polish Civic Platform, a center right political party in Poland who take a social-conservative position towards topics such as abortion and same-sex marriages.

member states have not expressed their willingness on joining in the near future. Thus, hypothesis can be partly accepted and is therefore not rejected nor fully accepted.

6.3 Enhanced cooperation as a form of differentiated integration in (liberal) intergovernmentalism theory

6.3.1 *European integration outcomes*

In (liberal) intergovernmentalism theory, integration is the outcome of member state preferences and intergovernmental bargaining (Hoffman, 1966 and 1982). Furthermore, integration is reached on issues that are bounded by topics on ‘low politics’ and the economic sector (Moravcsik 1993, Pollack, 2005, Leuffen et al., 2013).

In relation to the realisation of the Rome III regulation under the enhanced cooperation procedure, this picture seems fitting. According to a respondent differentiated integration was reached because the law applicable to divorce was able to eliminate the loophole that existed ever since the Brussels II Regulation came into force. Brussels II was not able to prevent ‘forum shopping’ and created legal uncertainty for at least one legal party. *“It is very specific to a situation and somehow to fulfil the loophole as a consequence of an already existing regulation on divorce. This regulation was not a hampering, it was not disturbing the internal market the external relations and so on”* (Council, 1: Appendix C).

Although the topic of law applicable on divorce did not seem as such a “*hampering*” regulation according to the respondent, the issue of divorce is a “*highly political sensitive issue*” according to another respondent (European Parliament, 1: Appendix C). In fact, during the negotiations, Finland⁵⁶ and Sweden stated that they considered the right to divorce as a fundamental right. Therefore, they considered the Rome III regulation as less liberal than their own rules on divorce. Sub-paragraph 6.3.4. will go into more detail on the reasons for member states not to participate in the Rome III Regulation.

6.3.2 *(Liberal) intergovernmentalism view on differentiation in European integration*

From a (liberal) intergovernmentalism perspective, differentiation in European integration flows from an opportunity for member states to possess distinctive rights and responsibilities with respect to different policy areas of the European Union (Schimmelfennig and Winzen, 2014). Furthermore, states will and continue to be the leading actors in the development of European integration (Jupille et al., 2003, Lelieveldt and Princen, 2011).

In sub-paragraph 6.2.2, one respondent argued that one should make a division between what is the ideal situation and what is reality. According to his argumentation differentiation is a way to get forward with a group of member states (Commission, 2: Appendix C). In the case of the Rome III regulation, this group of member states wanted to establish the regulation on the law applicable divorce. Differentiation might not be desirable, but it is a way for member states to possess those rights. Another respondent believes that the participating member states were fully aware of the advantages the Rome III regulation would bring them. *“I also have the impression personally that it was also for political reasons because certain member states at the highest level they understood that this could be a way forward in Europe”* (Council, 1: Appendix C). Thus the participating member state made use of the opportunity that was given to them. This opportunity meant differentiation in the European integration project.

⁵⁶ Council of the European document, 9843/10 ADD 1, Brussels, 19 May 2010.

In the case of the Rome III regulation, up until now 16 member states have joined. With 12 non-participating member states, this is a clear case of differentiation in European integration. The reasons for member states not to participate in this regulation are various.⁵⁷ As far as the Dutch position concerned, the respondent who was involved in the negotiations in the Council believes that there will be hardly any chance that the Netherlands will join Rome III in the (near) future. Divorce law and thus family law are to a large extent determined by the national approach of the member state. A regulation on inheritance for instance would be a different case since a lot of elderly possess foreign real estate. Furthermore, according to the respondent the Hague Conference on private international law offers more than adequate solutions for cross-border divorces. A separate EU legislation on divorce law was from a Dutch point of view not of any added value. Differentiation is therefore determined by the member states and as stated by the respondent the Netherlands is not going to join Rome III to solve that existing differentiation (Permanent Representation 2, NL: Appendix C).

6.3.3 *The function of the enhanced cooperation procedure*

As we have seen in paragraph 6.2 the enhanced cooperation procedure can be viewed out of a neofunctionalism perspective, where it is argued that the Commission has to approve the authorisation of the Council's decision. If we look at the enhanced cooperation from a (liberal) intergovernmentalism perspective we see that according to Article 329 (1) the member states request the authorisation of the enhanced cooperation procedure. Thus, the member states have the power in the Council to ask for an authorisation of the enhanced cooperation procedure.

On paper this seems as if the member states have the right to initiate enhanced cooperation. However, this might be misleading for two reasons. First, there is a threshold set in the Treaties which states that only a minimum of nine member states can submit the request for enhanced cooperation. Furthermore, although it may seem as if the member states initiate the authorisation process, it is a request based on a regulation that was originally proposed by the Commission. Second, according to Article 329 (1) the Commission *may* submit a proposal to the Council on enhanced cooperation. Although it did not happen with the Rome III proposal, according to the Treaties, the Commission is in the position to deny that request.

According to (liberal) intergovernmentalism theory, enhanced cooperation is a way to overcome deadlock in unanimity proposals. It can be perceived as a way to move forward with a group of member states in a certain area, as an opportunity for member states (Moravcsik, 1998, Schimmelfennig and Winzen, 2014). According to a respondent of the European Commission, the original intention of the enhanced cooperation was to allow a group of member states to go off while others could catch up in a later stage.⁵⁸ According to this respondent, enhanced cooperation in practice is used more and more as a way to overcome deadlock while negotiation on unanimity files. Enhanced cooperation can then be viewed out of an intergovernmentalist perspective when one could argue that member states negotiate for themselves without acknowledging the common European project. However, it is important to notice that enhanced cooperation is only allowed in the field of unanimity that has a completely different negotiation dynamics than the sphere of qualified majority. Enhanced cooperation in the field of unanimity can indeed be used as a way to overcome deadlock, but it can also be perceived as a useful tool for those group of member states who seek further integration.

⁵⁷ See paragraph 6.3.4.

⁵⁸ See paragraph 6.2.

6.3.4 State identity and state autonomy

Domestic goals and interests determine the course of integration according to (liberal) intergovernmentalism assumptions (Moravcsik, 1993). As stipulated in sub-paragraph 6.3.1 there were various reasons for member states not to participate in the enhanced cooperation procedure.

Before the Rome III regulation was adopted under the enhanced cooperation procedure, there were extensive discussions among the member states to adopt this regulation. For some member states, the adoption and application of foreign law on divorce was inadmissible. They were in favour of the *lex fori* approach. Countries like Cyprus, Ireland and the UK are an example of those countries who work with this common law tradition. This resulted in the non-participation of Ireland and the UK. The Netherlands can also be categorised under the *lex fori* but the option for parties to decide which law would be applicable already existed in this country (Henderson, 2010). According to the main reason for the non-participation of the Netherlands was that indeed the *lex fori* could not be listed in the regulation. Moreover, at that time (2007-2008) the former Minister of Justice mister Hirsch Ballin experienced a lot of pressure from the Dutch House of Representatives not to join the Rome III. By applying *lex fori* the Dutch divorce system can be typed as 'liberal' similar to countries like Sweden and Finland. Adopting the Rome III would result in a 'step back' for their countries in their legal order (Permanent Representation 2, NL: Appendix C). And that was from a domestic point of view unacceptable.

The other non-participating states were the Czech Republic, Estonia, Greece, Lithuania, Poland and Slovakia. The Czech Republic did not join due to a political decision. Experts in the field of private international law were in favour of the proposed regulation. However, the Czech government decided otherwise (Boele-Woelki, 2010: 27). The reason for non-participation by Estonia is related to two reasons. First, they were not in favour of enhanced cooperation in the field of cross-border civil cooperation and second, they were not convinced that the possible ramifications were exhaustively evaluated (Boele-Woelki, 2010:27). Greece first belonged to the group of member states that submitted the request for the authorisation of enhanced cooperation but withdrew in a later stage due to political reasons. In 2009 the Greek government had to cut down on severe measures resulting in the dismissal of several advisory committees and therefore revoked its request (Boele-Woelki, 2010: 28). Lithuania did not participate because due to religious and political reasons. Due to the influence of the Catholic Church and a ruling conservative government, Lithuania decided that regulation on family matters should remain the exclusive competence of the member state (Boele-Woelki, 2010: 27). Poland also did not participate in the enhanced cooperation procedure due to political reasons. The Polish government feared that the acceptance of the Rome III Regulation would lead to a situation where same-sex couples with different nationalities could demand a divorce in Poland (Boele-Woelki, 2010: 27). Lastly Slovakia decided not to join the enhanced cooperation procedure since it considers divorce to be a "state controlled" institution which is conflicting with the idea of independence of legal parties (Boele-Woelki, 2010: 27).

From the sixteen countries that did participated in the enhanced cooperation procedure on divorce law, the position of Malta is perhaps most striking since under Maltese law neither allows a divorce or the disintegration of a marriage after legal partition. In practice this can result in a situation where a court in Malta was⁵⁹ not obligated to grant a divorce (Boele-Woekli, 2010: 36). In sum, we see that the identity of a member state, its political reasons and legal traditions to a great extend determine whether a state is participating in the enhanced cooperation procedure.

⁵⁹ The law on divorce was authorised in 2011.

6.3.5 Conclusion on (liberal) intergovernmentalism hypothesis

In chapter three, the following hypothesis derived from the (liberal) intergovernmentalism theory was formulated:

H2: If differentiation as a result of enhanced cooperation is the outcome of member states' preferences in intergovernmental bargaining, bounded by topics on low politics and the economic sector, while preserving state autonomy and identity, then enhanced cooperation is best explained by (liberal) intergovernmentalism theory.

What can be concluded on the findings and results on the Rome III regulation as the first case of enhanced cooperation is that there indeed can be found elements of (liberal) intergovernmentalism theory in the differentiated integration process. However, what must be noted is that these empirical findings on the intergovernmentalism theory are perceived to have less explanatory power than the findings on the neofunctionalism theory. First, differentiated integration is from the intergovernmental perspective bounded by topics on low politics. On the one hand this seems true if we look at the content of the regulation that is solely aimed at the law applicable to divorce. On the other hand, the content of the regulation might be aimed at the law applicable to divorce, divorce itself is a highly political issue considered by some member states as an exclusive national competence. Secondly, intergovernmentalism theory perceives differentiated integration as an opportunity to overcome deadlock. This assumption is plausible because without the opportunity to differentiate there would not have been an opportunity for those member states who wanted to adopt the Rome III regulation. Thirdly, the outcome of integration and thus differentiated integration is a result of member state preferences and intergovernmental bargaining. The role of supranational actors such as the Commission is limited (Moravcsik, 1993 and 1998). In the case of enhanced cooperation the member states are the ones who ask for an authorisation of the procedure. To some extent the member states indeed arrange the conditions for differentiated integration. But the role of supranational actors such as the Commission is not limited. Lastly, a (liberal) intergovernmental assumption is focused on the premise that domestic goals and interest determine the course of integration. If we analyse the reasons for non-participating member states, we see that their reasons for not participating (identity, political, legal) are indeed bounded by their domestic interest. In sum, although the hypothesis cannot be confirmed, it cannot be rejected. To some extent, the realisation of the Rome III regulation under the enhanced cooperation procedure presents some theoretical assumptions confirmed by (liberal) intergovernmentalism theory. Therefore hypothesis 2 can be partly accepted.

6.4 The possible implications of enhanced cooperation on the unity of EU law

Before the establishment of enhanced cooperation in the field over divorce law, there were no existing Union rules on how to regulate this matter. Therefore, in the 26 member states⁶⁰ of the EU that cooperate in the field of judicial cooperation in civil matters in 2010, 26 different sets of legal rules existed. In order to test the hypothesis on the possible implications on the unity of EU law as a result of enhanced cooperation the criteria to test the hypothesis is connected to Article 326 TFEU that states that '*any form of enhanced cooperation should comply with the Treaties and with EU law*'.⁶¹ This Treaty article will serve as the guideline in this paragraph to illustrate whether enhanced cooperation in the case of Rome III has posed a threat to the unity of EU law.

6.4.1 *Legal (un)certainty*

⁶⁰ Denmark has a complete opt out in the field of judicial cooperation in civil matters. The United Kingdom and Ireland may opt-in. Croatia was not an EU member in 2010.

⁶¹ Art. 326 TFEU.

According to Article 20 (4) TEU the Rome III regulation should not affect the existing EU *acquis*, a condition that has been listed in the proposal of the European Commission on the Rome III Regulation too.⁶² Since the enhanced cooperation is established in an area of shared and not exclusive competences of the EU, no common rules on the law applicable on divorce existed. The main reason for the European Commission to ‘harmonise’ the national laws on divorce were derived from the situation where legal uncertainty was created in divorce cases with a transnational element. This legal uncertainty was shaped due to the fact that it was hard for international couples wanting a divorce to predict which law would be applied. Before Rome III came into existence there were a number of member states that did not provide spouses a chance to choose the law applicable in marital proceedings. In order to prevent ‘a rush to the court’ of one party or ‘forum shopping’, rules on a European level had to be assured according to the European Commission (Henderson, 2010).⁶³

Furthermore, from a ‘European point of view’ the harmonisation of conflict-of-law rules would facilitate mutual recognition of court judgments. With Rome III the member state courts would apply equal conflict-of-law rules thus making the process for European citizens more easy (Henderson, 2010). This would result in a reinforcement of mutual trust in legal decisions given in other member states (Peers, 2010). Mutual recognition as a fundamental principle of the internal market of the EU can be typed as the main driver of market access in other member states. Rome III therefore marks the Europeanisation of family law in the European Union. In close connection to the free movement of persons⁶⁴ in the Union the adoption of the Rome III regulation offers the instrument of mutual recognition to a limited extent since the regulation is only adopted in 16 out of the 28 member states. In connection to judgments in the cases *Konstandinidis*⁶⁵ and *Garcia Avello*⁶⁶ the mutual recognition of divorce law can be seen in light of the free movement of persons where legal principles, such as the right to divorce, cannot be revoked by another member state. Thus, Rome III would have a positive effect on the free movement of citizens of the participating member states (Fiorini, 2010).

However, what must be noted is that the EU has a limited competence to deal with family law. To a large extent, matters on divorce, legal separation and other matrimonial matters are national competences of the member states. The established EU regulations on matrimonial matters such as Brussels 2, Brussels 2A and Rome III concern the competence of the EU to establish regulations based on the principle of mutual recognition. The role of the EU in family matters is to ensure that decisions taken in one member state can be implemented in another. As regards to Rome III this should foster mutual trust in legal decisions. This assumption is only partly true. If the Rome III regulation would have been established on a uniform basis⁶⁷ meaning by all the 26 member states then mutual trust would have increased. Rome III as it has been adopted now only applies in sixteen member states. Therefore only a limited instead of absolute increase of mutual trust is created in the area of the law applicable to divorce.

One of the consequences of the establishment of Rome III via the enhanced cooperation procedure is that the adopted regime is only binding for the participating member states. Thus, the legal system that has been established by enhanced cooperation must respect the competences and rights of the twelve member states that are not participating in this regime.⁶⁸ In practice this can result in a situation where

⁶² European Commission, COM(2010) 104 final, 24 March 2010.

⁶³ *Ibid.*, recital 22.

⁶⁴ One of the four fundamental freedoms of the EU.

⁶⁵ Case C-168/91.

⁶⁶ Case C-148/02.

⁶⁷ Uniform in the area of justice, freedom and security means without the UK, Ireland and Denmark.

⁶⁸ Article 327 TFEU.

the courts of the member states which are not participating in the regime will continue to apply their own national legal principles (Paulino Pereira, 2013). While perhaps creating legal certainty for the spouses Rome III results in a few coordination problems for the practitioners. For instance, practitioners have to verify whether both parties are residing or were born in a member state that participated in the enhanced cooperation procedure. It therefore remains questionable if a regulation that is established through enhanced cooperation thus creating differentiation in the legal order of family law, increases mutual trust and legal certainty.

6.4.2 Enhanced cooperation and the case of Malta

The adoption of the Rome III regulation via the enhanced cooperation procedure has shown that differentiation in the European legal order exists. It creates a form of fraction in the European Union since there are now two (or perhaps three) different legal rules on the law applicable to divorce. The differentiation that came into existence via enhanced cooperation should be viewed per case. In this case, enhanced cooperation has been established in the area of justice, security and freedom. If we view the area of justice, security and freedom we can, to some extent, type it as the area where differentiation is most present. When you are adopting an instrument in the area of justice, freedom, and security where there already are a number of instruments present, it is almost impossible to prevent interconnection between these legal instruments.

The role of Malta in the process of enhanced cooperation can be typed as a rare case that requires further explanation. At the moment that the enhanced cooperation procedure was approved and launched by the Council's decision, Malta was the only participating member state where divorce was legally not possible (Boele-Woelki, 2010). This seems controversial since the regulation concerns the law applicable on divorce. Through joining the enhanced cooperation procedure, Malta tested the boundaries of the proposed regulation. And they succeeded.

While joining the enhanced cooperation procedure the Maltese delegation asked for a provision in the regulation that would dispose Malta of all the rights to authorise a divorce requested by an international couple habitually residing in Malta (Sapota, 2013). This demand resulted in Article 13 of the Rome III Regulation 'differences in national law': *'Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation'*.⁶⁹ In practice, this comes down to the situation where Malta as a participating member state of the enhanced cooperation procedure is not obliged to apply the rules of the Rome III regulation. In practice Malta would not be obliged to grant a divorce of one of its citizens living in another EU member state. This unique situation results in Malta, while joining the enhanced cooperation procedure and decision-making process, has gained a *de facto* opt out on the level of secondary legislation in the EU.

The situation with Malta has been resolved in 2011, when the Parliament approved the act that authorised divorce. The *de facto* opt out has therefore ceased to exist. Still, there were no mechanisms present in Treaties that prevent Malta to join the decision-making process of enhanced cooperation in the first place. When Malta decided to join the enhanced cooperation there was no special provision that dealt with this situation. Article 20 TEU specifically aims at enhanced cooperation being open to all member states. It however does prescribe what to do in a situation when a member state decides to join that seems not to be in favour of the establishment of such a regulation. It seems as if the

⁶⁹ Council Regulation (EU) No 1259/2010, Official Journal of the European Union, L 343/10.

provisions on joining or not joining the enhanced cooperation procedure are not clearly defined in the Treaties. Whereas if you view the existing Protocols in the area of freedom, justice and security that are being granted to the UK, Ireland and Denmark the rules of the game are more clear. The case for Denmark is the clearest: it has a complete opt-out. If Denmark would be willing to join the enhanced cooperation procedure a separate Treaty has to be made.

The rules for the UK and Ireland to opt in are laid down in special Protocols in the Treaties. According to Protocol 21⁷⁰ the UK and Ireland have an opt-in protocol as regards Council measures established in the area of justice, freedom and security (Title V, Part Three TFEU).⁷¹ The UK and Ireland can choose to opt in within three months after the proposal has been presented. If the UK and Ireland wish to opt in, they have to notify the President of the Council of their intentions. There is no possibility to opt out in a later phase. If the UK decides not to opt in it loses its voting rights in the Council and its negotiation weight is reduced. There is always the possibility however to opt in after the proposal has been established. The Commission has to approve this demand and both the Council and Commission can set conditions for the member state.⁷² The Title V Protocols for the UK and Ireland offer specific mechanisms that prevent those member states to veto legislation between the participating member states in the area of freedom, justice and security. If the UK or Ireland were to opt in and violate or obstruct the Council negotiations the Council can adopt a measure without the participation of both countries.⁷³

In the enhanced cooperation, the rules of the game are less detailed. Member states who are participating in the procedure are not bound by strict protocol rules. It is true that to some extent member states that express their willingness to participate in the procedure are obliged to ask the Commission permission on the basis of Article 331 (1) TFEU. However, once you are in as a member state there is no possibility of excluding that member state out.

In the case of Malta, there was no mechanism in the enhanced cooperation procedure that could have prevented them to join the procedure and to obtain the provisions set out in Article 13 of the Regulation. In enhanced cooperation you are therefore reliant on the member states that are playing the (political) game. In the case of Malta, their hidden agenda was set out during the negotiations in the Council. What can be derived from this unique case is that even between the participating member states in the enhanced cooperation procedure there was no convergence in their legal regimes. In this striking example Malta should have first accepted divorce before deciding to join the Rome III Regulation that concerns the law applicable to divorce (Boele-Woelki, 2010). However, in 2011 this situation has been resolved. The Maltese Parliament adopted the legal proposal to authorise divorce in Malta (Sapota, 2013).

6.4.3 Conclusion: the possible implications of enhanced cooperation on the unity of EU law

In chapter four the following hypothesis on the possible implications of enhanced cooperation on the unity of EU law was formulated:

H3: Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law.

⁷⁰ PROTOCOL (No 21) ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE, TEU and TFEU, OJ C 83/295.

⁷¹ Title V TFEU, chapter 3, Judicial cooperation in civil matters.

⁷² Article 3 Protocol 21 ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE.

⁷³ Ibid.

In order to test the premises of this hypothesis, Article 326 TFEU that lays down the general provisions of enhanced cooperation was taken as a minimum requirement.⁷⁴ Art. 326 TFEU states that “Any enhanced cooperation shall comply with the Treaties and Union law”. Based on the findings in this paragraph we can conclude the following. Firstly, the Rome III regulation has resulted in differentiation between member states. Although Rome III has not touched upon the functioning of the internal market neither affected the *acquis*⁷⁵ it has created three different sub sets of legal rules in Europe.

The first group can be typed as ‘conservative’ member states who did not want to join Rome III since due to political or domestic reasons the regulation could not be adopted in their member state. The second group are the 16 member states who adopted the Rome III rules. And the third group are the ‘liberal’ typed member states who apply *lex fori*. Instead of creating a two-speed Europe, Rome III more or less creates a three-speed Europe. The ultimate goal of streamlining divorce law and creating more legal certainty for all the EU citizens has therefore not been achieved⁷⁶. While creating Rome III through the enhanced cooperation procedure unanimity in these cross-border cases on divorce has been reduced. Therefore enhanced cooperation from a legal point of view can be questioned. Ever since the establishment of the European Community in 1957, the principle of unity and uniform application of EU law dominated the European Union.

Second, the first case of enhanced cooperation has not resulted in a European Union that is functioning as a disconnected and fragmented legal order. The Rome III regulation is not affecting the internal market and the EU *acquis*. Especially if we view the Rome III regulation in light of the already existing protocols and opt-outs in the area of freedom, security and justice, this regulation seems to be a pinprick in the unity of EU law (Peers, 2010). Hypothesis 1 stated that enhanced cooperation forms a threat to the unity of EU law. As been explained at the beginning of this paragraph, this hypothesis was tested on the basis of the criterion set in Article 326 TFEU⁷⁷. On the sole basis of that criterion only, one cannot accept hypothesis 1 since as has been illustrated Rome III is complying with the Treaties and EU law. Therefore hypothesis 1, that states that enhanced cooperation forms a threat to the unity of EU law must be rejected. Nevertheless, from a broader perspective, a few remarks can be made. It is of importance to ask whether enhanced cooperation was the right move to make in the field of family law. Harmonisation of family law in the European Union is only possible in areas where member states find consensus as regards to legal and political fundamental principles. In the case of Rome III there existed a great division between legal and political assumptions of member states on divorce (Malta case). As set out in the Treaties the enhanced cooperation procedure has been designed to allow a group of member states to go further, expecting that others will catch up later. The chance that non-participating member states will join the enhanced cooperation in the (near) future is highly unlikely.

6.5 The possible implications of the enhanced cooperation procedure on the equality of the member states

In chapter four, the principle of equality has been laid down as the traditional principle of the European Union that has been questioned since the Treaty on the European Union in the beginning of

⁷⁴ See paragraph 5.4 that laid down the criteria for testing hypothesis 3 on the unity of EU law

⁷⁵ The regulation has been established in the area of non-exclusive competences of the Union and where common EU rules were non-existing.

⁷⁶ For the citizens who are originated from the participating member state in Rome III one could argue that for this groups legal certainty has increased.

⁷⁷ Art. 326 TFEU: Any enhanced cooperation shall comply with the Treaties and Union law.

the nineties brought in elements of legal differentiation. In chapter five the criteria⁷⁸ have been set out that will test the hypothesis on the equality of the member states in relation with the enhanced cooperation procedure. These Treaty Articles will therefore lie at the basis of this paragraph and will be used to test the hypothesis on the equality of the member states in Rome III.

According to Article 328 TFEU enhanced cooperation shall be open to all member states willing to participate. From a procedural point of view, all member states had an equal chance to participate in the enhanced cooperation procedure. There were no indications that could lead to the assumption that one or several member states were hindered to participate in the establishment of Rome III under enhanced cooperation. Thus, it can be argued that the equality between member states has been maintained. On the other hand, in practice only 16 out of 28 decided to join. Therefore, from a substantial point of view the member states of the Union are not equal since the Rome III regulation has not been ratified by all 28 members. Equality would therefore be better served when more than 16 member states participated in the Rome III regulation. But, even before the adoption of the Rome III proposal under enhanced cooperation this narrow sense of equality could not be obtained otherwise the regulation would have been uniformly accepted by all member states. In addition, Denmark has a complete opt-out in the field of freedom, security and justice and therefore cannot opt in⁷⁹. The UK and Ireland have an opt-in clause of three months. In Rome III they decided not to join, but that was a free choice not a forced one.

Article 20 (1) TEU states that any form of enhanced cooperation shall be open to all member states. As regards the Rome III regulation we can conclude that not all member states took the opportunity to join due to various reasons, but it was always possible for them to join. The working method of the enhanced cooperation procedure entails that member states who do not know (yet) whether they want to join can still engage in the Council discussions. By means of this procedure it is still possible for a member state to join the discussions and to decide to join the regulation if its wishes are established. This matches the requirement of TFEU Article 328 that states that enhanced cooperation, when it is established, shall still be open to all member states. On the one hand this seems to justify the openness and equality principle of the member states in enhanced cooperation which can be typed as something that is beneficial towards equality. On the other hand, as we have seen in the case of Malta, this can result in situations where member states try to regulate the course of a proposal that is beneficial only to them. Thus, a careful approach towards the extent of openness in enhanced cooperation should be taken.

According to Article 327 TFEU *'any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States'*. Thus the competences, rights and obligations of the non-participating member states have to be respected (Fiorini, 2010, Peers, 2010). As regards the Rome III regulation the non-participating member states will not be forced to apply any other law than their own. In the case of Netherlands this resulted in them applying *lex fori* as they previously did. Thus non-participating member states can still apply their own private international law rules and the competences and obligations of non-participating states are respected.

⁷⁸ The criteria that will test whether enhanced cooperation is a threat to the principle of equality of the member states are: Treaty Articles 20 (1) TEU, 20 (4) TEU, 326 TFEU, 327 TFEU and 328 (1) TFEU.

⁷⁹ Since the beginning of this year the position of Denmark in the area of justice, freedom and security has gained momentum since the Danish government obtained consent to hold a referendum no later than 31 March 2016 to amend the complete opt-out of Denmark in the area of justice, freedom and security. As a consequence of the revision on the Europol Regulation, Denmark would no longer be able to participate in this cooperation. If the referendum turns out positive, Denmark will opt-in on several legal acts (See press release of the Danish Ministry of Foreign Affairs on <http://um.dk/en/news/newsdisplaypage/?newsid=85867e49-b075-4425-97d5-d6fcf73f4bf4>).

This provision mentioned above closely fits to the condition set out in Article 20 (4) TEU that states that acts adopted within the framework of enhanced cooperation shall only bind the participating member states. The Rome III regulation does not form part of the EU *acquis* and Croatia was not obliged to accept the regulation when it acceded to the EU. Furthermore, as previously stated, the non-participating member states have not been obliged to accept any of the provisions of Rome III and are still applying their own rules.

In addition, as stated in Article 326 any form of enhanced cooperation should comply with the Treaties and EU law. The possible implications of the unity of EU law have been discussed in the previous paragraph. However, this Treaty provision also focuses on the requirement of enhanced cooperation where the established regulation cannot affect the internal market. It can be said that Rome III created a three-speed Europe where still legal differences exist between groups of member states. In fact, Rome III was supposed to streamline the legal rules on divorce, therefore making divorce rules in member states more equal via the instrument of mutual recognition. While one can doubt about this streamlining process, there are neither signs nor data⁸⁰ to be found that Rome III affected the internal market. One could argue that for the 16 participating member states Rome III has streamlined the functioning of the internal market. Obstacles to free movement for EU citizens, who were previously facing problems as a result of different national laws applicable to divorce, now face more legal certainty. This is ought to have a positive effect on the free movement of persons in the EU.

The case of Malta has resulted in the creation of a new dimension of equality. Malta was first of all considered equal with all the other 26⁸¹ member states of the European Union in the Council. By joining the enhanced cooperation procedure Malta moved to the side of participating member states. From a substantial point of view Malta was then considered equal with the participating member states and 'unequal' with the non-participating member states. However, one could reasonably doubt the equality between Malta and the other participating member states. First of all, before authorising divorce in 2011, Malta was the only participating member state in enhanced cooperation that did not allow divorce. Since the Regulation contained provisions on the law applicable to divorce this seems rather striking. Second of all, Malta was not equal in comparison to the member states who accepted the regulation on the level of secondary law. In the Council, Malta remained equal towards the participating member states on the basis of decision-making but not on the level of applying secondary legislation. Due to Article 13⁸² in the Rome III Regulation Malta became the only member state who was not obliged to apply the rules of Rome III which resulted in a situation where Malta had a *de facto* opt out. Although the situation has been resolved in 2011 when Malta granted divorce it is interesting to see that there can still be inequality between the participating member states on in the enhanced cooperation procedure.

The aim of the Rome III regulation was to increase mutual trust in the area of freedom, security and justice (Peers, 2010). As we have seen in paragraph 6.4 this is only the case for the participating member states. For example, the regulation would prevent a 'rush to the court' by spouses who are preparing in a divorce. The 'rush to the court' can only be prevented in cases where the spouses are either living or originated from a participating member state. In a situation where there exists a link with a non-participating member state, this 'rush' will still exist. This does not result in an equal situation for the spouses of the participating and non-participating member states.

⁸⁰ Primary, secondary data or ECJ case law.

⁸¹ Croatia joined the EU in 2013.

⁸² Council Regulation 1259/2010, article 13: Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

The hypothesis formulated in chapter four was stated as follows:

H4: The mechanism of enhanced cooperation is a threat to the principle of equality of the member states.

This hypothesis has been tested on the basis of the criteria set out in paragraph 5.4⁸³. On the basis of the first criterion, Article 20 (1) TEU it can be noted that enhanced cooperation in the case of Rome III has been open to all member states. Secondly, on the basis of Article 20 (4) TEU the regulation that has been adopted is only binding for the participating member states. Member states that are not participating in the procedure and thus have decided not to adopt the Rome III regulation are not obliged to apply any other law than their own private international law rules. This criterion would have been questioned if Malta had not authorised divorce in 2011 since the prior situation with Malta would have led to a situation where an adopted act would not be binding for a participating member state. Third, on the basis of Article 326 TFEU Rome III complies with the Treaties and EU law. The aim of Rome III was to streamline the law applicable to divorce. It can be argued that this succeeded only partly since still 12 member states are not participating. Fourth, the rights of the non-participating member states were respected on the basis of Article 327. Lastly, when enhanced cooperation was established in the case of Rome III it was open to all member states willing to join (Article 328 TFEU). In sum, despite the fact that Rome III has created a three-speed Europe in the field of the law applicable to divorce, the regulation does not form a threat to the principle of equality of the member states. The fourth hypothesis therefore has to be rejected.⁸⁴

7) Establishing a European wide unitary patent

7.1 The realisation of the unitary patent regulation

Over the past forty years, member states and the European Commission have been negotiating a patent package. Patents are legal titles that grant rights to designers in return for their willingness to reveal their inventions (Kroll and Leuffen, 2014: 361). The attempts of establishing a European wide unitary patent can be derived back to the 1970s. In 1975, “the Convention for the European patent for the common market” was held by all Community members⁸⁵ and named the Luxembourg Convention (Community Patent Convention) (Ullrich, 2006: 5). The Luxembourg Convention can be marked as the first Community attempt in establishing a unitary wide European patent (Sugden, 1991, Peers, 2011: 232). However, ratification of the Community Patent Convention did not succeed due to the second enlargement⁸⁶ of the Union, where new member states did not want to accept the new rules. A new attempt was made by the Council after fourteen years. The “Agreement on the Community Patent”⁸⁷ was a revision of the Community Patent Convention of 1975. This new agreement tried to resolve the disputes between the participating member states. As regards the language system, the new 1989 agreement proposed translation of the patents in all languages of the participating countries.⁸⁸ Agreement on the 1989 proposal on a Community Patent could not be reached. The proposal was too

⁸³ 1) Article 20 (1) TEU, 2) Article 20 (4) TEU, 3) Article 326 TFEU, 4) Article 327 TFEU, 5) Article 328 (1) TFEU

⁸⁴ Ibid.

⁸⁵ Nine members at that time.

⁸⁶ Greece 1981, Spain and Portugal 1986.

⁸⁷ Published by the Council in the Official Journal of the European Community, 1989, L401, 1.

⁸⁸ These were 10 languages by then.

complex and translation costs for the patents would be too high (Ullrich, 2002, Ullrich, 2006: 6-7). For a while, negotiations on a unitary patent agreement were left untouched by the Council and thus the member states.

In light of the negotiations on a unitary patent it is of importance to notice that there already existed a European Patent. This European patent system was found outside the Treaties in 1973 when the European Patent Convention ('Munich Convention') was signed and amended in 2000 by 38 European countries (Bonadio, 2011, Jaeger, 2010: 65, Peers, 2011: 230). As a result, the European Patent Organisation (EPO) and the European Patent Office, an intergovernmental organisation, were established (Schovsbo, 2011: 7). The EPO now has 40 members including all the member states of the EU. It is EPO's task to grant patents, but they still need to be legalised in the states where that patent should apply. Therefore the patents remained nationally fragmented (Jaeger, 2010: 66). Thus, there are differences in the process of legalisation and fees also differ per country (Kroll and Leuffen, 2014: 361, Lamping 2011: 29). This explains why there was the need for the European Union to establish a European Union wide patent.

In 1997, the first Commission's Green Paper⁸⁹ on "Promoting innovation through patents" was published (Lloyd, 1998, Peers, 2011). This can be marked as the first attempt by the Commission to establish a unitary patent. The aim of the Commission was to resolve the existing disputes between the member states on matters such as the costs and language system. The Commission concluded that under the European Patent Convention (Munich Convention), the existing national fragmentation resulted in effectiveness barriers of protecting patents in Europe (Ullrich, 2002, Jaeger, 2010: 70). According to Article 352 (1) TEU⁹⁰, the Council had to decide by unanimity on the proposal set out by the Commission. In 2000, the Commission proposed a regulation on a European wide patent (Ullrich, 2002, Ullrich, 2012).⁹¹ After a round of negotiations, issues on the costs of the patent system, language translations and the proposal on establishing an independent patent court were issues that member states could not overcome (Ullrich, 2006). By 2003, there were 19 interested member states willing to participate in the patent system. The Commission concluded that the costs of translation for 19 different patent regimes were extremely high and inefficient (Ullrich, 2006: 14). Furthermore, the Eastern enlargement in 2004 was rapidly approaching, resulting in new complications for acceding member states.

In 2009, the European Commission decided to re-launch the proposed regulation and announced a communication on 'enhancing the patent system' in Europe (Jaeger, 2010, Peers, 2011: 234 – 235).⁹² The Commission's main conclusion was that patents in the EU were about nine times more expensive than patents in Japan or the United States (Kroll and Leuffen, 2014: 361). After the adoption of the Treaty of Lisbon in 2009 Article 118 TFEU formed the legal basis for the Commission's proposal that granted the Council and Parliament the competences to adopt, by ordinary legislative procedure, 'measures for European intellectual property rights' in the sphere of the internal market. Article 118 (2) provided guidance and a solution towards the discussion on a language system.⁹³ In order to

⁸⁹ "Promoting innovation through patents". Green Paper by the European Commission on the Community patent and the patent system in Europe. COM (97) 314 final.

⁹⁰ Article 352 (1) TEU. "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures".

⁹¹ Com (2000) 412, 1 August 2000.

⁹² Council of the European Union document, No. 1722/09.

⁹³ Article 118 TFEU (2) "The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament".

stimulate the research and development area of the EU, increase legal certainty and promote innovation and competition the member states were in favour of a single patent system that would make it easier to register and protect new patents (Fabbrini, 2012: 15, Jaeger, 2010: 71). In 2009, the Council did not reach consensus on establishing a uniform and European wide patent system (Lamping, 2011: 25). During the Competitiveness Council meeting on the 11th of October 2010, some member states made the announcement that when uniform agreement between all member states could not be reached by the end of 2010, they would consider resorting to the enhanced cooperation procedure (Troncoso, 2013: 240, Lamping, 2013: 2).⁹⁴ Consensus between all member states could not be reached during the next Council meeting in November 2010⁹⁵, due to the dispute concerning the language system (Kroll and Leuffen, 2014: 361, Troncoso, 2013: 240). In December 2010, a final Competitiveness Council was held. During that Council meeting “the majority of delegations considered that enhanced cooperation, as provided for in the EU treaty, is the only option for making progress on the creation of a unified EU patent system” (Troncoso, 2013).⁹⁶

Shortly after this Council meeting, twelve member states submitted an idea on enhanced cooperation concerning a common European patent (December 2010) (Lamping, 2013). The number of member states in favour of such proposal grew rapidly. Early 2011, 25 member states decided to join the enhanced cooperation procedure. These were all the EU member states, except for Spain and Italy. Although there existed consensus among the member states on the economic necessity of a single patent, there existed differences on how the patent system should be designed (Jaeger, 2011). A majority of the member states was in favour of a trilingual regime to register a patent. Those three languages were English, French or German. Italy and Spain opted either for one language only (English) or an extension of the languages regime with Italian and Spanish (a total of five) (Fabbrini, 2012). Before the enhanced cooperation was considered, the dispute on translation arrangements has been a topic on the agenda during the negotiations on a European patent ever since the 1970s (Jaeger, 2011, Ullrich, 2013).

The Parliament approved the Commission’s proposal by giving its consent in February 2010.⁹⁷ Finally, the Council gave the approval of the enhanced cooperation project in March 2010⁹⁸ (Cantore, 2011). As a result, the Commission submitted two proposals to the Council in April 2010. One proposal for a ‘Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection’⁹⁹ and one proposal for a ‘Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to translation arrangements’.¹⁰⁰ Combined, these two Commission proposals formed the unitary patent package that consisted of three elements: 1) a regulation on establishing a European Union wide unitary patent, 2) a regulation considering the translation system of those patents, 3) an international agreement establishing an independent Unified Patent Court (Troncoso, 2013: 241). In December 2011, a final compromise text by the Council was reached.¹⁰¹ In December 2012, a Council regulation on a European wide patent¹⁰² and a Council

⁹⁴ Council of the European Union document, Competitiveness Council Press release, 14426/1/10 REV 1, Luxembourg, 11-12 October 2010.

⁹⁵ Council of the European Union document, Competitiveness Council Press release, 16041/10, Brussels, 10 November 2010.

⁹⁶ Council of the European Union document, Competitiveness Council Press release, 17668/1/10 REV 1, Brussels, 10 December 2010.

⁹⁷ European Parliament legislative resolution of 15 February 2011 on the draft Council decision authorising enhanced cooperation in the area of the creation of unitary patent protection (05538/2011 – C7-0044/2011 – 2010/0384(NLE)).

⁹⁸ Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU). OJ L 76/53.

⁹⁹ COM(2011) 215 final, 2011/0093 (COD), Brussels, 14 March 2011.

¹⁰⁰ COM(2011) 216 final, 2011/0094 (CNS), C7-0145/11 –EN, Brussels, 14 March 2011.

¹⁰¹ Council of the European Union document, 17578/11, Brussels, 1 December 2011.

¹⁰² Council Regulation (EU) No 1257/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

regulation on the language system¹⁰³ were adopted (Kroll and Leuffen, 2014: 362).

In addition to the two Council regulations on establishing enhanced cooperation in the patent area and the adoption of the language system, as mentioned before, a third component is essential in the unitary patent package. This is the creation of an independent, intergovernmental Unitary Patent Court (UPC) which does not form part of the EU legal order.¹⁰⁴ This third agreement was signed by all the 25 participating member states (Xenos, 2013: 247). In sum, the patent package can be typed a hybrid since the foundation of a European Patent Court is arranged by intergovernmental agreement (Cook, 2012).

In sum, the adopted unitary patent package will result in different layers of patents at force in Europe. The first layer concerns the classic national patent, granted by national patent offices. These patents will only have effect on the territory of where the patent is granted. The second layer contains the classical European patent, granted by the European Patent Office (EPO). Each patent granted by EPO has to be validated in different countries. The third layer concerns the unitary patent regulation. This patent is still granted by EPO on behalf of the EU member states. The member states granted EPO the rights of issuing the unitary EU patent. One month after EPO granting the patent, the patent holder has to ask EPO to grant in fact a unitary protection for all the participating member states.

The Spanish and Italian withdrawal from the enhanced cooperation resulted in both countries filing a complaint at the Court of Justice of the EU that dismissed their actions in April 2013 (Kroll and Leuffen, 2014: 361, Troncoso, 2013: 244). Spain and Italy asked for an annulment on the decision of enhanced cooperation by the Council.¹⁰⁵ Both countries stated that in relation to the establishment of enhanced cooperation several requirements from the Treaties were not met (Lamping, 2013: 3). The decision by the Court of Justice on the Council decision authorising enhanced cooperation was anxiously waited for. First, since it would determine the course of the enhanced cooperation on the unitary patent regulation. Second, since it would create a precedent on enhanced cooperation and the use of the procedure in other policy fields (Lamping, 2013: 4). However, there have been recent developments. Spain appealed the Court's decision on cases C-146/13 (Spain v. Parliament) and C-147-13 (Spain v. Council). The judgment of the Court has been published on the 5th of May 2015.¹⁰⁶ In this judgment the Court dismisses Spain's request on annulment of the two regulations (1257/2012 and 1260/2012) on implementing enhanced cooperation in the area of the creation of a European wide patent (Lamping, 2013). Paragraph 7.4 and 7.5 will go into more detail as regards these cases.

7.2 Enhanced cooperation as a form of differentiated integration in neofunctionalism (supranationalism) theory

7.2.1 European integration outcomes and spill-over effects

of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. OJ L 361/1, 31 December 2012.

¹⁰³ Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements. OJ L 361/89, 31 December 2012.

¹⁰⁴ The aim of this thesis is enhanced cooperation, viewed from a political science and legal perspective. Therefore this thesis examines the process and establishment of enhanced cooperation, thereby excluding the enforcement and ratification of the patent regulation and thus the Unitary Patent Court.

¹⁰⁵ See Case C-274/11, Spain v/ Council, 2011 OJ (C 219) and Case C-295/11, Italy v. Council, 2011 OJ (C 232).

¹⁰⁶ JUDGMENT OF THE COURT (Grand Chamber) 5 May 2015 in Case C-146/13 Kingdom of Spain v. The European Parliament and the Council of the European Union.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=164092&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1>

From a neofunctionalist (supranationalist) perspective member states can only manage steps of the integration process to some extent. Furthermore, integration results in spill-over effects that will lead to more integration in that area or other policy areas (Haas, 1963). In the case of the unitary patent regulation we have seen that negotiations on a unitary patent can be traced back to the 1970s with the signing of Community Patent under the Luxembourg Convention. Member states were unable to reach uniform agreement on topics that concerned the fees for granting the patents and the language system for validating and granting patents.

According to the theoretical assumptions on the spill-over effects of integration, the realisation of the unitary patent regulation should have led to more integration in that area or other areas. If we look at the establishment of the patent regulation under the enhanced cooperation procedure, we see that it functioned as a stimulating force that resulted in a total of 26¹⁰⁷ member states that joined the enhanced cooperation procedure. Two respondents¹⁰⁸ believe that Spain will eventually join in the process (Permanent Representation 1 NL and Council, 2: Appendix C). Another respondent who represented the Netherlands in the Council working groups on the establishment of the regulation, explained that once the enhanced cooperation procedure was set in motion there was almost no member state that wanted to risk not-joining the process (Min of Economic Affairs, NL: Appendix C).

As regards spill-over effects of integration in other areas, it can be noted that the enhanced cooperation procedure has been used for the third time for the establishment of the financial transaction tax. This regulation is still being negotiated. One respondent also argued that he hoped that the establishment of the unitary patent regulation under the enhanced cooperation procedure would work precedential for other negotiations where unanimity has not or cannot be reached (Permanent Representation 1, NL: Appendix C).

7.2.2 Neofunctionalism (supranationalism) view on differentiation in European integration

As seen in paragraph 6.2, neofunctionalism (supranationalism) prefers uniform integration over alternative ways of integration. Differentiated integration is therefore a second-best solution. If you take the Community Patent Convention in the 1970s as the starting point for the negotiations on the patent regulation, then one can argue that the member states and the Commission tried to establish uniform agreement on a patent regulation for many (over thirty) years. Moreover, under the Treaty of Lisbon Article 118 TFEU was specifically designed in order to clarify the legal basis for the establishment of the patent regulation. Article 118 (2) TFEU even laid down the legal condition of reaching uniform agreement on the language regime. From a neofunctionalist perspective, the member states and the EU institutions tried to reach uniform agreement for many years.

According to a respondent of the European Commission resorting to enhanced cooperation is “*a very difficult decision to take. It is very important to weight the different interests and to be taken into consideration all the different aspects of the questions. I think it is really a last resort that you decide to go for the enhanced cooperation*” (European Commission, 2: Appendix C). Another respondent, who represented the Netherlands during the Council discussions, argues that differentiation can be viewed from different perspectives. On the one hand there is a way of viewing European integration and differentiation out of a fundamental perspective. Here you can argue that differentiation is not desirable for the European integration project. The Netherlands on the other hand who can be typed as a ‘leader’ in the differentiated integration process thought differently. According to the respondent, the Dutch reason to resort to differentiation was based on pragmatic grounds (Min of Economic Affairs,

¹⁰⁷ Including Italy.

¹⁰⁸ Out of nine in total.

NL: Appendix C). The Netherlands wanted the patent regulation to be established and differentiated integration turned out to be the best option.

One respondent expressed that the differentiation in the patent regulation hopefully can be typed as temporary. *“The differentiation therefore is hopefully only temporary. When it concerns the internal market you see that markets are more and more integrated with each other. Therefore the national approach becomes less important. So the dynamics of integration are at work here, only they take time”* (Council, 2: Appendix C). From a neofunctionalist point of view this fits the assumption that the end goal of integration remains uniformity.

7.2.2 The function of the enhanced cooperation procedure

In the Treaties, the enhanced cooperation procedure is explained by Article 20 TEU. It allows a group of member states to further the objectives of the Union. According to a respondent of the European Commission, the enhanced cooperation turned out to be the instrument that made the realisation of the patent regulation possible. *“Without enhanced cooperation we would still be discussing the matter or even worse I think it would have been put into the bin because it would have been totally impossible to reach uniform agreement on that. I think that for me it more or less obvious that without the enhanced cooperation it would probably be the end of the dossier so it was absolutely necessary to go further but to again I think the interest of everybody is to even if it was difficult for Spain and Italy to join”* (European Commission, 2: Appendix C).

Another respondent of the Council stressed that *“all who work here are very wary about everything that divides the Union and creates different layers in the single market. That is always bad. It always creates a lot of problems downstream. Nobody in its right mind would encourage it for its own sake. But sometimes it is the only way forward and then it has to be used. It is absolutely a last resort”* (Council, 2: Appendix C). What can be noticed from these responses is that the aim of the enhanced cooperation in the patent area was meant as a tool for member states to go ahead, but expecting and hoping that other member states would join in the process. Enhanced cooperation allowed a group of twelve (in this case) to start off while other member states were given the chance to consider the proposal and join in a later stage. This seems to have worked in the case of the patent regulation since almost all member states joined. Thus, differentiation is temporary and the end goal remains uniform integration.

7.2.3 The role of the European Commission

Similar to the realisation of the Rome III regulation, the role of the Commission is of importance due to the provisions laid down in the Treaties.¹⁰⁹ According to all the respondents, this position is confirmed (Appendix C). According to a respondent *“the Commission acted in a very traditional way during the process. It acted as a facilitator. The Commission is the drafter of the proposal, so their involvement was very clear from the beginning actually”* (European Parliament, 2: Appendix C). According to the Dutch respondent who was present during the Council meetings on the establishment of the regulation, the Commission tried to push the Council towards unanimity. During the Council negotiations the Commission became aware of the fact that unanimity was never going to be reached (Min of Economic Affairs, NL: Appendix C). The Commission accepted this situation. As a result the

¹⁰⁹ Art. 20 TEU and Arts. 326 – 334 TFEU.

Commission accepted the authorisation request of the Council to resort to enhanced cooperation after all. This seems to stroke with the theoretical assumption of neofunctionalism that states that the Commission suggests solutions to a direction that suits its own preferences (Lelieveldt and Princen, 2011). With enhanced cooperation it seems as if the Commission rather favours integration with a smaller group inside the existing EU framework, using the EU institutions and procedures instead of establishing a cooperation measure outside the EU framework. This assumption is also confirmed by the respondent who explained that although the Commission favoured uniform integration, they had no other option than accepting enhanced cooperation (Min of Economic Affairs, NL: Appendix C).

Furthermore, in the process of creating a European wide patent, from the beginning of the Commission's proposal in 2000 until the adoption under the enhanced cooperation procedure in 2011, it remained the Commission's approach to stick to a trilingual regime of French, German and English. Instead of following the agreements made by the countries in the Community Patent Conventions in 1979 to adopt all languages, the Commission kept proposing a trilingual regime. This is seems striking in light of the new provisions under the Lisbon Treaty where according to Article 118 (2) TFEU, a solution for a language system had to be reached by unanimity (Ullrich, 2012: 11 – 12).

7.2.4 The role of non-governmental actors

Besides the role of the European Commission, there were other actors playing a role. This concerned the involvement of the European Court of Justice in the establishment of the patent regulation under the enhanced cooperation procedure. For the first time in Cases C-274/11 and 295/11 the European Court of Justice was enabled to comment on enhanced cooperation. According to neofunctionalist assumptions supranational actors such as the CJEU influence integration once the process of integration has been set in motion (Lelieveldt and Princen, 2011). This influence is clearly visible in the Court's judgment on the decision on enhanced cooperation. The Court decided to dismiss the claims brought forward by Spain and Italy, therefore influencing the process of integration in a 'positive' way. Advocate General Bot and the judges made clear that enhanced cooperation is to 'aim to further the objectives of the Union (...). That mechanism aims to enable and encourage a group of Member states to cooperate inside rather than outside the Union'¹¹⁰. According to the Court, the use of enhanced cooperation should be avoided unless there is no other alternative: 'The Union's interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole'.¹¹¹

Although the aim of this thesis is enhanced cooperation, it is interesting to note that the intergovernmental agreement that has been signed by the member states will establish a Unitary Patent Court that will lie outside the Treaty framework. According to a respondent, the CJEU tried to influence this decision by gaining the authority of litigating patent cases (Permanent Representation 1, NL: Appendix C). The Court however does not possess any judges who are experts or specialists in the area of intellectual property. Furthermore, the member states perceived the Court as bureaucratic and rather slow in their judgment while patent cases needed to be settled quickly (Min of Economic Affairs, NL: Appendix C).

The role of European Parliament was relatively small compared to other EU legislative bodies. This has to do with the fact that the parliament is required to give its consent on the authorisation of

¹¹⁰ Opinion of Advocate General Bot, delivered on 11 December 2012, Joined Cases C-274/11 and C-295/11. Kingdom of Spain (C-274/11), Italian Republic (C-295/11) v Council of the European Union, recitals 23 – 24 .

¹¹¹ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 49

enhanced cooperation.¹¹² However, this can be typed as the formal role of the Parliament. According to a respondent the Parliament is quite involved in the discussions and gathers with the Council and the Commission in informal ways to discuss the proposal (Parliament, 2: Appendix C).

7.2.5 The roles of participating and non-participating member states

In neofunctional and supranational theories, member states remain important actors since they organise the conditions for integration but they are not able to completely regulate the course and extent of the following process (Schmitter, 2004).

A respondent explained that there was a smooth and fast cooperation between the member states in the Council, the Parliament and the Commission. This resulted in the fact that the enhanced cooperation for the patent regulation was relatively quick established (six months). Only a week after the member states requested an authorisation for enhanced cooperation, the Commission came with a proposal (Min of Economic Affairs, NL: Appendix C). There seems to be interdependence between the member states, European Commission and to a lesser extent the European Parliament when it regards enhanced cooperation.

This interdependence also takes place in the discussions in the Council among the member states. If a member state decides to join the enhanced cooperation procedure¹¹³ that state will be able to engage in the discussions and vote on the proposal. If a member state decided not to join the process of enhanced cooperation that member state cannot engage in the discussion neither vote on the proposal. Thus, member states who do participate in the enhanced cooperation procedure are not able to regulate the course and extent of the following process. They are dependent on the outcomes of the member states that joined the enhanced cooperation procedure. According to a respondent, this resulted in a position for Italy experiencing a situation where it cannot comment on the proposal anymore. Since Italy decided to join the enhanced cooperation procedure after the Court's dismissal in May, it is now an observer in the implementation phase with no power to influence the implementation process (Min of Economic Affairs, NL: Appendix C).

7.2.6 Conclusion: hypothesis on neofunctionalism (supranationalism)

In chapter three, the following hypothesis derived from the neofunctionalism (supranationalism) theory was formulated:

H1: If differentiation as a result of enhanced cooperation is temporary, the end goal remains uniform integration, and the supranational actors are the driving force behind the integration process, then enhanced cooperation is best explained by supranationalism theory.

What we can derive from the findings and results on the unitary patent regulation, is that most of the neofunctionalist theoretical assumptions seem to fit this case. First of all, the case of the unitary patent has shown that integration in the area of intellectual property has produced spill-over effects. There was initially a small group of member states that wanted to proceed with the enhanced cooperation

¹¹² The vast majority of European laws are adopted jointly by the European Parliament and the Council through the ordinary legislative procedure. As regards enhanced cooperation the Parliament has the power of consent.

¹¹³ See para 5.2. The enhanced cooperation procedure is defined as the process towards the formal request of the member states to start the enhanced cooperation and the moment it [enhanced cooperation] started in practice. Thus this includes the authorisation of the Commission to launch the enhanced cooperation procedure and the thereby coming discussions in the Council on the new proposal that will be eventually adopted by the participating member states.

procedure. Apparently this worked as a stimulating factor resulting in a total number of 26 member states who joined.¹¹⁴ Secondly, the negotiations on the unitary patent case can be traced back to the 1970s. All those years the EU institutions and the member states have tried to find a common solution for all states. The end goal remained uniform integration but it turned out to be impossible. Although the Commission favoured uniform integration, it had no other option than to grant the authorisation request for enhanced cooperation. The other alternative was that member states would cooperate outside the EU Treaty framework, which is undesired by the EU institutions. Thirdly, the patent case seems to have lived up to the provisions set out in the Treaty. According to Article 20 TEU enhanced cooperation is to further integration with a group of member states with the expectation that others will follow in a later states. Lastly, the role of non-governmental actors seems present. The role of the European Court of Justice in cases C-274/11 and 295/11 have resulted in the situation where the 25 member states were allowed to carry on their integration process. Thus, the ECJ has had a significant influence on the integration process of the unitary patent regulation. The hypothesis on enhanced cooperation form neofunctionalism (supranationalism) theory seems fitting but it is hard to determine whether the differentiation is temporary. Therefore the hypothesis can only be accepted to a very large extent.

7.3 Enhanced cooperation as a form of differentiated integration in (liberal) intergovernmentalism theory

7.3.1 European integration outcomes

In intergovernmentalism theory member states seek more integration on topics bounded by 'low politics' and the economic sector (Moravcsik, 1998, Pollack, 2005, Leuffen et al., 2013). The unitary patent regulation is established on the basis of Article 118 TFEU that concerns intellectual property and thus matters concerning the internal market. The unitary patent would bring the member states more harmonisation of the patent regime. Impact studies of the European Commission have shown that the costs for granting a patent would be decreased and it would become easier for companies (especially the small medium enterprises (SMEs)) to register and protect their patents. According to two respondents who were closely involved in the establishment of the patent regulation the realisation of the patent would result in economic advantages for the Netherlands. It was in the interest of the Netherlands to establish a unitary patent since after Germany, the United Kingdom and France the Netherland comes on the fourth place on the list of patent requests (Permanent Representation 1, NL: Appendix C).

The establishment of the patent was perceived as something that the EU '*really needed*' (European Parliament, 1: Appendix C). The prices for registering and granting patents in the US and Japan for instance were much lower resulting a competitive disadvantage for entrepreneurs in Europe. Therefore the patent regulation can be typed as a 'classic internal market' topic. It was mainly in the interest of industrialised countries such as the Netherlands, Belgium and the Scandinavian countries who export a lot and have a large market (Min of Economic Affairs, NL and Council, 2: Appendix C). For other member states such as the Central and Eastern European member states, the establishment of a unitary patent would foster the area of research & development and the functioning of the internal

¹¹⁴ On the position of Croatia: Croatia acceded the EU in 2013 and therefore is slowly adopting the EU acquis. The patent regulation does not form part of the EU acquis. Thus there is no obligation for Croatia to join. There is no formal statement of the Croatian government saying Croatia will join the patent regulation. Croatia is however a member of the European Patent Convention.

market by making access to the patent system easier and less costly.¹¹⁵ Integration in the patent is therefore bounded by a topic that concerns the internal market and thus the economic sector.

7.3.2 (Liberal) intergovernmentalism view on differentiation in European integration

In (liberal) intergovernmentalism theory, differentiation can be perceived as an opportunity for member states to possess distinctive rights with respect to different policy areas of the Union (Schimmelfennig and Winzen, 2014). Furthermore, states will continue to be the leading actors of European integration (Jupille et al., 2003, Lelieveldt and Princen, 2011). What has been argued by several respondents also in relation to the establishment of the Rome III regulation is that differentiation is not desired, but sometimes it is unavoidable. In the case of the patent regulation we have seen that differentiation to a large extent has proven to be temporary. At first, there was a small group of member states that requested the authorisation for enhanced cooperation. Now, with 26 member states on board, this differentiation is temporary. However, it has resulted in a situation where member states because of the possibility to differentiate could possess the distinctive rights in the field of intellectual property.

According to a respondent, it became clear that differentiation and thus resorting to enhanced cooperation was the only option the Commission could accept. There already existed a European Patent Agreement, which is an intergovernmental agreement signed by the member states of the EU and other countries. During the negotiations the Commission pushed for uniform agreement, but the member states told the Commission that enhanced cooperation was the only way. If the Commission would have denied that proposal, the member states would have resorted to intergovernmental ways of cooperation (Min of Economic Affairs, NL: Appendix C). One could therefore argue that from an intergovernmental point of view the states remained the leading actors in the integration process.

7.3.3 The function of the enhanced cooperation procedure

According to a respondent who witnessed the negotiations on the patent regulation in the Council, the enhanced cooperation procedure can best be viewed as a way of pressuring other member states to join the integration process (Permanent Representation 1, NL: Appendix C). According to a second respondent it has proven to be the only successful instrument to overcome deadlock while negotiating files that require unanimity (Parliament, 2: Appendix C). Another respondent stated that without the possibility to resort to the enhanced cooperation procedure, the proposal would have ended up in the bin (European Commission, 2: Appendix C).

A fourth respondent stated that enhanced cooperation turned out to be the only solution from the Dutch (member state) point of view. From a pragmatic, economic point of view it was of necessity that the patent regulation would be established. Belgium, as a relatively small member state, would benefit from a unitary patent regulation to a similar extent as the Netherlands. It was therefore that under Belgium Presidency the enhanced cooperation procedure was started. It was the aim of Belgium to finish the dossier of enhanced cooperation before its term ended. And they succeeded (Min of Economic Affairs, NL: Appendix C).

7.3.4 State identity and state autonomy

Domestic goals and domestic interests determine the course of integration according to (liberal) intergovernmentalism theory (Moravcsik, 1993). The considerations for member states to join or not

¹¹⁵ REGULATION (EU) No 1257/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. OJ L 361/1.

to join the enhanced cooperation procedure can be derived back to one reason: language. Language systems of the 28 member states are closely connected to a country's sovereignty and national economic and industrial policy (Ullrich, 2012: 16). The 'unity in diversity' of the European Union is to a large extent determined by the fact that we are all sovereign countries with our own language regime. It is therefore that languages enjoy a special status and protection in the European legal order (Jaeger, 2013: 2000, Ullrich, 2013: 595 and Lamping, 2011:914). The member states all agreed on the establishment of a unitary patent system but they were unable to overcome their differences towards the language system of the patent registering (Permanent Representation 1, NL: Appendix C). All respondents point towards the dispute on language systems as the explanatory factor on why uniform agreement could not be reached.

In the case of Spain (and Italy) we have seen that their identity which is to a large extent determined by language has resulted in one of their main arguments of non-participation. As stated by a respondent *"the argument put forward by Spain was that they said that Spanish was a very important language in the world etcetera."*¹¹⁶ So yes, if you view this whole dispute you could argue that it had a lot to do with Spain's pride, or Spain guarding its state identity" (Parliament, 2: Appendix C). Another respondent stressed that the patent case showed how *"languages are used not as a means of communication but as a political strategy"* (Council, 2: Appendix C).

The reason why Italy decided to join the enhanced cooperation procedure after all has to do with the Northern industrialised part of Italy that would benefit from the establishment of a unitary patent, according to a respondent. Furthermore, Italy currently has a government that is aimed at making reformations in the Italian industry (Min of Economic Affairs, NL: Appendix C). Italy is after Germany, France and the UK the largest patent holder. Their domestic interest, and thus the government interest, therefore agreed to have a unitary patent after all, even if their language was not included as one of the three main patent languages.

7.3.5 The role of non-governmental actors

As we have seen in paragraph 7.2.4 from a neofunctionalist perspective, the role of non-governmental actors such as the European Court of Justice has been influencing in the process of integration. From an intergovernmental point of view the role of non-governmental actors are limited in the integration process (Moravcsik, 1993, 1998). If we view the establishment of the patent regulation under the enhanced cooperation procedure there seems one situation that can be highlighted as limiting the role of non-governmental actors. As has been mentioned before¹¹⁷ the unitary patent package includes an intergovernmental Treaty that will establish a Unified Patent Court. The role of the European Court of Justice would be non-existing. This can result in several implications on the unity of EU law that will be viewed in paragraph 7.4.

Although the CJEU tried to influence this process, the member states wanted to establish a special Patent Court since they felt the European Court of Justice did not have the right expertise to deal on these specialised patent cases (Permanent Representation 1, NL: Appendix). Furthermore, the Court was perceived as an actor that steered towards more centralisation. The member states and especially the business communities of the member states wanted a specialised patent Court. A court which judgments were made quicker and its judgments less unpredictable (Min of Economic Affairs, NL: Appendix C).

¹¹⁶ Unfortunately this argument can neither be confirmed or rejected since there are no official EU documents or any other relevant literature that confirm this statement of Spain. What can be noted is that Spanish is the second largest language in the world with 329 million native speakers. <http://www.ethnologue.com/>

¹¹⁷ See paragraph 7.1.

According to another respondent “*the specialised knowledge that would be needed (for a patent court) had to be built up from scratch like it is now with this specialised court. Of course you know that the long standing positions of certain member states to keep the European integration as low as possible has of course led this member states oppose any other solution than this unified patent court*” (Council, 2: Appendix C). It can be argued from an intergovernmental perspective that by establishing an intergovernmental agreement on the Unified Patent Court the role of the ECJ has been limited.

7.3.6 Conclusion: hypothesis on (liberal) intergovernmentalism theory

In chapter three, the following hypothesis derived from the (liberal) intergovernmentalism theory was formulated:

H2: If differentiation as a result of enhanced cooperation is the outcome of member state preferences in intergovernmental bargaining, bounded by topics on low politics and the economic sector, while preserving state autonomy and identity, then enhanced cooperation is best explained by (liberal) intergovernmentalism theory.

Viewing the unitary patent regulation from a (liberal) intergovernmental perspective we can conclude the following. First, according to intergovernmental theory member states seek more integration on topics that concern the economic sector, and thus the internal market. If we view the establishment of the unitary patent regulation, this theoretical assumption is highly acceptable. Second, in intergovernmental theory states remain the leading actors in the integration process. According to findings it seems as if the member states and in particular a small group who took the lead in the enhanced cooperation procedure were pushing for the establishment of the regulation. Although the Commission wanted to establish uniform agreement, the member states concluded that unanimity was not feasible in the (near) future. If the Commission would have denied the request of the member states to launch the enhanced cooperation procedure, there might have been other intergovernmental ways of cooperation that would have led to an intergovernmental treaty on patents. Third, the reason of Spain and Italy not to join the launch of enhanced cooperation is linked to the member states’ autonomy and identity of which language is a crucial element. Lastly, in intergovernmentalism theory the role of non-governmental actors is limited. If we view the intergovernmental Treaty that will establish the Unified Patent Court, we can indeed argue the role of the CJEU has been limited. To conclude, (liberal) intergovernmental theory also has explanatory power while viewing enhanced cooperation as a form of differentiated integration in the case of the unitary patent.

7.4 The unity of European law

Ever since the 1970s the aim has been to establish a unitary patent, with uniform application throughout the European Union. The already existing European patent was typed by its non-unitary character, therefore member states within the Union wanted to establish a patent with a unitary character. According to Ullrich (2006: 30), the idea of creating a Community patent was connected first to the idea of creating unity in the economic market of the EU. By establishing simple and equal access for all member states as regards patent protection, patent fees would not be bounded by prices of the national- but single markets. A second argument is that in order to establish a patent with a unitary character in the European market, a requirement is that uniform rules of protection and thus legal rules are the same. Therefore it is important to determine in this section whether the patent regulation is in compliance with EU law.

As mentioned in the theoretical overview of the thesis in chapter four and the methodological

approach on testing the hypothesis on the unity of EU law in chapter five, the minimum requirement that will be tested is Article 326 TFEU.¹¹⁸ By establishing the patent regulation via the enhanced cooperation procedure, differentiated integration has been incorporated in the legal order of the European Union. As a logic consequence, the regulations established under this mechanism are under judicial control of the European Court of Justice (Lamping, 2013). This right has been exercised in 2011, when Spain and Italy filed a complaint before the Court challenging the validity of the Council authorising enhanced cooperation (Lamping, 2013: 3). The legal basis for the regulation implementing enhanced cooperation in the field of unitary patent, the cases brought before the ECJ by Spain and Italy and the unity of EU law are discussed in this section.

Legal basis and cases C-274/11 and C-295/11

On 16 April 2013, the European Court of Justice, decided on joint Cases C-274/11 and 295/11, the Kingdom of Spain and the Italian Republic v. the Council of the European Union. By their applications, the Kingdom of Spain and the Republic of Italy sought annulment of Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.¹¹⁹ In the joint cases of Spain and Italy resulted in five pleas in law. First, it was not up to the Council and its competences to start enhanced cooperation in the field of patent. Secondly and therefore, the Council misused its powers. Third, the Council violated the condition that enhanced cooperation should be adopted as a ‘last resort’. Fourth, Articles 20 (1) TEU, and Articles 118, 326, 327 TFEU were breached. Lastly, the judicial system of the Union was disregarded (Lamping, 2013, Fabbrini, 2013).¹²⁰

Before the Court pronounced its decision on the joint cases, Advocate General Bot gave his opinion on the case.¹²¹ In the opinion of the Advocate General (AG), Article 20 TEU was only subject to a ‘limited review’ (Lamping, 2013, Fabbrini, 2013). As stated by the AG recital 10: “it was recorded at the Council meeting on 10 November 2010 and confirmed on 10 December 2010 that the objective to establish unitary patent protection within the Union cannot be attained within a reasonable period by the Union as a whole, thus fulfilling the requirement in Article 20(2) TEU that enhanced cooperation be adopted only as a last resort”.

According to Article 3 (1) TFEU, the Union has exclusive competences in measures relating ‘the establishment of the competition rules necessary for the functioning of the internal market’. Thus, measures established in these spheres belong to the exclusive competences of the European Union. According to Article 4 TFEU, other measures established concerning the internal market are shared competences between the member states and the Union. The argument brought forward by Spain and Italy, in relation to Article 118 TFEU was that the patent regulation should be considered as an exclusive competence of the EU. Both the Court and the AG disagreed.¹²² The Court ruled that the competences conferred by Article 118 TFEU ‘fall in the area of shared competences for the purpose of Article 4 (2) TFEU and are in consequence, non-exclusive for the purpose of Article 20 (1) TEU’.¹²³ According to the Advocate General, the exclusive competences of the EU have to be clearly defined in

¹¹⁸ Article 326 TFEU: ‘Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation 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’.

¹¹⁹ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 1.

¹²⁰ Ibid., recital 9.

¹²¹ Opinion of Advocate General Bot, delivered on 11 December 2012, Joined Cases C-274/11 and C-295/11. Kingdom of Spain (C-274/11), Italian Republic (C-295/11) v Council of the European Union.

¹²² Ibid., recital 12.

¹²³ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recitals 10

the Treaties.¹²⁴

The AG argues that the creation of rules on intellectual property belong in the sphere of the internal market (Peers, 2011: 251). However, while acknowledging this known fact, the AG did not agree with Spain and Italy, who argued that the establishment of the unitary patent regulation would create unfair competition rules and thus a violation to a smooth functioning of the internal market.¹²⁵

The legal basis for establishing the unitary patent is derived in the Council Regulation from Article 118 TFEU.¹²⁶ According to this article in the TFEU, the EU is competent to create measures of European intellectual property rights. The verb ‘to create’ can be interpreted differently. To create means creating something that previously did not exist. Thus, the creation of measures of European intellectual property rights should be non-existing, thus new. As regards to the patent regulation, the regulation is not introducing a system that is completely new. Firstly, there already existed a European patent and a European Patent Office. Secondly, instead of creating a real European wide patent with unitary effect, the regulation is now only binding for those member states participating in the enhanced cooperation procedure. Thus instead of creating a European Union Patent Regulation, a European patent with unitary effect within the sphere of enhanced cooperation was created (Ullrich, 2012: 9). In order to meet the criteria stated in Article 118 TFEU, the patent regulation should have created uniform patent protection throughout the whole Union, building a centralised EU wide authorisation (Troncoso, 2013: 250-251). One could argue that these criteria are, due to the fact that the regulation has been established by means of enhanced cooperation, not met.

On the other hand, Article 118 TFEU could be interpreted differently in light Article 3 and Article 4 TFEU. Article 118 TFEU specifically points towards the creation of intellectual property rights throughout the Union. The establishment of European intellectual property rights cannot by definition not be accomplished by the member states (Lamping, 2013: 8). Thus, Article 118 TFEU implicates a right that can be solely exercised by the Union itself. Even though the creation of the Unitary patent regulation as it has been adopted now does not imply that there is a total new creation of a European wide patent, the fact that the regulation has given a unitary effect on the level of secondary law, can in some extent be seen as an exclusive competence (Lamping, 2013: 8, Ullrich, 2013). According to Kingston (2008: 439) Article 118 (2) has been adopted in the Treaty of Lisbon as a result of the long-standing negotiations on languages and the Community Patent regulation. The unanimity requirement thus has been adopted to protect the interest of member states in relation to intellectual property. In this situation, the complete opposite occurred.

Furthermore, as stated in TFEU Article 118 (2), ‘decisions concerning the language regime should be made unanimously’. This provision in the Treaty has not been safeguarded. This claim, brought forward by Spain and Italy has been considered by the Court in a limited way.¹²⁷ The requirement of language regime is quite exceptional (Lamping, 2013: 8). Especially in a European Union, with 28 member states and 24 different language regimes, languages are interwoven with the identity of a member state. It is therefore that languages enjoy a special status and protection in the European legal order (Jaeger, 2013: 2000, Ullrich, 2013: 595 and Lamping, 2011:914). The regulation implementing

¹²⁴ Opinion of Advocate General Bot, recital 50.

¹²⁵ Ibid., recital 57.

¹²⁶ Article 118 TFEU: ‘In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament’.

¹²⁷ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 35.

enhanced cooperation in the area of patent with regard to the applicable translation agreements, this condition is not met. This implicates an infringement of the enhanced cooperation procedure with the EU treaties and thus Article 326.

Moreover, enhanced cooperation should be adopted by the Council as a last resort (*ultima ratio*) (Art. 20 TEU). It does not become clear by examining this article what this ‘last resort’ is. One of the claims from Spain and Italy concerned the argument that by establishing enhanced cooperation, Article 20 TEU was breached.¹²⁸ They argued that the ‘last resort’ condition for resorting to enhanced cooperation was not fulfilled. The ‘last resort’ condition can be viewed from two sides. From the Spanish and Italian perspective¹²⁹, enhanced cooperation should be used as a last resort when it is established that member states cannot reach unanimity on the content of the proposed regulation. In this particular situation of the patent regulation, Spain and Italy were never against the establishment of a European wide patent from an economic point of view.¹³⁰ Still they decided to bring the other member states before the CJEU which is quite a rough and uncooperative step to take. Apparently, the level of dissatisfaction and opposition was so high for these two countries that bringing the other member states before the Court seemed as the right thing to do. One could argue that on a substantive level the conclusion to resort to enhanced cooperation was incorrect since Spain and Italy were unable to agree with the other member states on a procedural requirement concerning the language regime. The argumentation brought forward by Spain and Italy concerned the fact that a six-month period of negotiations and discussions in the Council were too short to ensure calm and frank discussions.¹³¹ A comparison is made between the Council negotiations on the first case of enhanced cooperation concerning divorce law, where four years passed before the procedure was authorised.¹³²

The counterargument can be made when the negotiations on the establishment of a unitary patent are put in broader perspective. According to the Council, more than ten years passed between the submission of the Commission proposal to establish a unitary patent by uniform integration and the authorisation of enhanced cooperation.¹³³ In Cases C-274/11 and 295/11 the Court¹³⁴ and AG Bot gave the Council discretion in determining when the ‘last resort’ condition has been fulfilled (Fabbrini, 2013: 218). This given discretion to the Council is a result of the Court using the ‘separation of powers’ argument, where the Court only gives an opinion on the question whether the Council ‘has carefully and impartially examined’ the willingness of the member states to compromise and whether it has therefore correctly concluded that the adoption of legislation for the Union as a whole was out of reach (Lamping, 2013: 10).¹³⁵ It therefore seems evident that the rules on when to establish the ‘last resort’ are not clear in the Treaties. Thus, it can be argued that procedure of enhanced cooperation should not be used as a ‘last resort’ if there is a political dispute, as was clear in the cases brought to the Court by Spain and Italy. Enhanced cooperation should be used when a group of member states wants to further the objectives of the Union while others decide to join later or not to join at all. Here it seems that enhanced cooperation is used to circumvent a political dispute on language and that should never be a goal of European integration.

Furthermore, Spain and Italy stated that the Council infringed Article 326 TFEU that states that ‘any form of enhanced cooperation shall comply with the Treaties and EU law. Furthermore such

¹²⁸ Ibid., recitals 42 – 46.

¹²⁹ Corresponding to their claims brought forward in Cases C-274/11 and C-295/11

¹³⁰ Unanimity only had to be reached on the translation regime regulation, not on the content of patent regulation.

¹³¹ Opinion of Advocate General Bot, arguments of the parties, recital 104.

¹³² See supra note 13.

¹³³ Opinion of Advocate General Bot, arguments of the parties, recital 106.

¹³⁴ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 59.

¹³⁵ Ibid., recital 53.

cooperation should not undermine the internal market (..)’ (Troncoso, 2013: 244, Ullrich, 2013). By not including Spain and Italy in the enhanced cooperation procedure, the principle of non-discrimination is breached, resulting in a distortion of the functioning of the internal market. The arguments brought forward by Spain and Italy concerned the existing European Patent Convention (EPC) signed in 1973, where a certain level of legal uniformity existed due to the participation of all member states in this Convention. The creation of a unitary patent without Spain and Italy would lead to fragmentation of EPC provisions. Thus, a higher form of integration (as a requirement of Art. 20 TEU) would not be obtained. According to the pleas brought forward by the Council, there will be no negative effects on the markets of Spain and Italy due to the establishment of the Regulation by enhanced cooperation. The Council argues that the fragmentation that existed before the patent regulation would be diminished by the new unitary patent regulation.¹³⁶ In the prior situation undertakings had to validate their patents in every single member state while with the new regulation a patent has to be validate once to have a unitary effect.¹³⁷ The Council however seems to forget that there are indeed negative effects on the markets for the non-participating states and especially for the SME that want to validate a patent. A Spanish SME still has to validate its invention in every member states since it is not a member of the unitary patent regulation. The position of business owners in non-participating member states will be weakened resulting in a competitive advantage for the participating member states.

In its judgment the Court has argued that when certain member states resort to enhanced cooperation, the established measures will be meant for those member states only and not the Union as a whole. As stated by the Court: “it cannot validly be maintained that, by having it in view to create a unitary patent applicable in the participating Member States and not in the Union, the contested decision damages the internal market or the economic, social and territorial cohesion of the Union”.¹³⁸ Throughout the whole judgment of the Court, this is all that is being said on the claim of Spain and Italy concerning the infringement of Article 326 TFEU. It does not seem very well balanced to waive the possible effects on the internal market, especially concerning language systems and competition, with one sentence. Establishing a unitary patent in not all European member states will lead to territorial fragmentation since it does not cover the entire area of the internal market (Hilty et al., 2012). It remains a valid question that should have deserved a more thorough analysis. While reviewing the effects of the unitary patent in the markets of the non-participating member states, one should bear in mind that there still remains the option to validate a classical national patent. Although this patent does not have a unitary effect, it protects the invention of the patent holder on its own territory. But, this of course creates a competitive disadvantage for the patent holder who needs to seek additional protection in all the other member states. For a patent holder who is living on the territory of a member state who adopted the patent regulation this results in a situation where he will be granted a patent with unitary effect for all 25 member states but has to request alternative national patents in (Italy) Spain and Croatia. It is therefore not completely unthinkable that a situation could arise where Spain as a non-participating state will face a competitive disadvantage over the participating member states. Although one can type this a chosen competitive disadvantage, this argument has not been assessed by the Court at all (Lamping, 2013).

Although the Regulation is named from Community Patent to European Patent with Unitary Effect, this seems unjust. The name of the Regulation suggests a unitary patent, with effect on the entire territory of the European Union. This assumption is unjustified since not the entire EU territory is

¹³⁶ Opinion of Advocate General Bot, arguments of the parties, recital 133 – 134.

¹³⁷ Unitary effect in all member states except Spain, Italy and Croatia.

¹³⁸ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 75.

protected by the regulation since the regulation was established through the enhanced cooperation mechanism (Troncoso, 2013). If the regulation on the Unitary Patent Package is adopted and implemented by all member states who participated in the enhanced cooperation procedure, there will exist fragmentation in the European Union. The non-participation of Spain will lead to a division in the functioning of the internal market leading to unfair competition between the 26 participating member states and Spain.¹³⁹

The Unified Patent Court (UPC)

As has been mentioned in this chapter, the unitary patent package also includes the realisation of a Unified Patent Court. This Unified Patent Court Agreement, signed in 2013, is an international agreement that can only be joined by EU member states. The Unified Patent Court will be an intergovernmental institution established outside the EU Treaty framework. The patent regulation and the patent court agreement will enter into force simultaneously. If the UPC will be established, jurisdiction of national courts in legal disputes concerning patents will be shifted from the national level to a new centralised judicial authority on the European level (Xenos, 2013: 246). The CJEU has only limited supervision on this independent patent court. According to the Council agreement on the patent court a new supranational authority will be created with a Court of Appeal based in Luxembourg and a Court of First Instance with a central division in Paris and regional divisions in London and Munich.¹⁴⁰ The EU is not a party to the agreement.

However, the European Court of Justice is involved in the UPC in several ways. First of all, the UPC shall cooperate with the CJEU *“in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU”*.¹⁴¹ Furthermore, if participating member states of the unitary patent regulation and thus the UPC infringe EU law these states are liable for these damages in line with the case law of the CJEU.¹⁴² Thirdly, according to Article 21 of the agreement *“as a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court”*.¹⁴³

The provisions in the patent court agreement seem to safeguard the involvement of the CJEU in patent cases. However, what must be noted is that the creation of a UPC leads to a fragmented system of patent jurisprudence on the level of substantive law. The unified patent court will be ruling over infringements and validity of EU patents of the 26 participating member states of the unitary patent regulation. The UPC will possess exclusive jurisdiction over issues concerning EU patents (Bayliss, 2014: 450). The European Court of Justice on the other hand, will rule over preliminary references sent by the UPC regarding infringements and of the unitary patents and the interpretation of EU law. Thirdly, national courts of non-participating member states will keep their competences to rule over infringements and validity of national and European patents. Thus, the UPC will not have any jurisdiction over EU patents of non-participating member states (Bayliss, 2014). Instead of consolidating European law, the Unified Patent Court has created an extra enforcement layer (Hilty et al., 2012: 2).

¹³⁹ Croatia recently joined the EU (2013) and has therefore not considered (yet) whether to join the patent regulation.

¹⁴⁰ Council of the European Union. Agreement on a Unified Patent Court. 16351/12. Brussels, 11 January 2013. Retrieved from <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016351%202012%20INIT>

¹⁴¹ Ibid., page 4.

¹⁴² Ibid., page 4.

¹⁴³ Ibid., Article 21

Still, for matters concerning EU law the UPC has to rely on the CJEU. First of all by applying ECJ case law and second of all by means of preliminary rulings on the basis of Article 267 TFEU. These two requirements are similar requirements that national courts of the EU member states have towards the CJEU. In sum, the CJEU has maintained its influence to guard the unity of EU law by ensuring that the UPC complies with EU law (Bayliss, 2014). Once the unitary patent regulation has been ratified and the patent court is operating, the implications of the court on the unity of EU law can be analysed in more depth.

In chapter four the following hypothesis on the unity of EU law has been formulated:

H3: Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law.

This hypothesis has been tested by Article 326 TFEU that served as the minimum requirement. This paragraph on the unity of EU law in relation with the establishment of the unitary patent regulation has led to the following conclusions. First of all, according to Article 118 (2) TFEU unanimity among the member states on the translation regime had to be achieved. This provision has been adopted in the Treaty of Lisbon after negotiations on the language regime had proven to be difficult. Still, unanimity could not be reached which resulted in the launch of the enhanced cooperation procedure. Second, the complaints brought forward by Spain and Italy on the distortion of the internal market has shown that the established regulation indeed leads to territorial fragmentation on the internal market. But, after the Court's judgment in May this year Italy has decided to join after all which results in a regulation adopted by 26 member states. Thirdly, what has been mentioned previously, the regulation has been adopted by 26 member states. Despite the fact that from a legal perspective uniform adoption is preferred, the alternative is quite credible. Therefore, in relation to the establishment of enhanced cooperation in the patent area, the regulation does not form a threat to the unity of EU law. On these grounds hypothesis 3 has to be rejected.

7.5 Principle of equality of the member states

In this paragraph, the hypothesis on the principle of equality of the member states shall be tested on the basis of the criteria set out in paragraph 5.4.¹⁴⁴

In the claims brought forward by Spain and Italy in cases C-274/11 and C-295/11, both countries argued that Article 327 TFEU was breached by the Council. Article 327 TFEU states that '*any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States*'. The claim brought forward by Spain and Italy was that during the process of enhanced cooperation, the rights of non-participating member states were not respected (Troncoso, 2013: 244).¹⁴⁵ Secondly, as stated in Article 20 (1) '*any form of enhanced cooperation shall be open to all Member States in accordance with Article 328 of the Treaty on the Functioning of the European Union*'. Thirdly, as stated in Article 328 (1) TFEU the Commission and the participating Member States shall ensure to promote participation by as many Member States as possible.

¹⁴⁴ The criteria to test the hypothesis on the equality of the member states are: Art. 20 (1) and Art. 20 (4) TFEU and Arts. 326 – 328 TFEU. See paragraph 5.4.

¹⁴⁵ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 79.

In cases C-274/11 and 295/11, Spain and Italy argued that they were excluded from the process of enhanced cooperation.¹⁴⁶ The objective of enhanced cooperation as set out in Art. 20 TEU is to further the objectives of the Union and thus foster integration. The decision of the Council to authorise enhanced cooperation was therefore contested by the two member states who claimed that enhanced cooperation was used as an instrument to circumvent the unanimity rules on the language regime laid down in Art. 118 (2) TFEU. The Council argued that the decision not to participate in the enhanced cooperation procedure was not a decision of the Council, but a decision solely made by Spain and Italy.¹⁴⁷

The Court reasoned that enhanced cooperation was not used to circumvent unanimity, making a reference to a situation where member states can lawfully resort to enhanced cooperation when uniform integration cannot be reached in a reasonable period of time.¹⁴⁸ The Court therefore ruled that Spain and Italy were not excluded but that it was impossible to reach uniform agreement.¹⁴⁹ In line with this reasoning, Advocate General Bot stated that ‘exclusion’ can be typed as a unique feature of enhanced cooperation. Enhanced cooperation is meant to further the objectives of the Union and to deepen integration, but it does not expect all member states to participate in this process. Therefore automatically some member states will be ‘excluded’.¹⁵⁰ However, exclusion or excluding member states from the process would mean a permanent exclusion resulting in a situation where it will become unable for them to join. As regards to the enhanced cooperation procedure, that is not what is stated in Treaty Article 20 TEU. Any form of enhanced cooperation shall be open to all member states. Of course, legal provision and the legal reality can widely differ.

Although Spain and Italy were not legally excluded from the process, the cases they brought in front of the CJEU have led to a situation of negative discrimination. As stated in Article 327 TFEU, ‘*any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it*’. Spain and Italy contested this Treaty provision in their joint-cases by stating that their rights as non-participating member states had been violated.¹⁵¹ The annulment of the Court in May this year on the second case brought forward by Spain¹⁵² and the following decision of Italy to join the enhanced cooperation procedure after all have resulted in a situation of discrimination of languages. Italy can only join by complying with all the terms in the agreement, and thus has to accept the trilingual language regime which it opposed in an earlier stage. For Spain, the other member state not participating in the enhanced cooperation procedure, this case is even more evident. Due to the language limitations, Spain is excluded from participation. The only choice that is left for Spain is to accept the current terms and agreement and comply with the language limitations. Furthermore, this situation is not in compliance with Article 118 (2) TFEU, as stipulated previously. In sum, it can be concluded that the ‘exclusion’ Italy is only temporary. The fact that Italy has decided to join the patent regulation in May after all, shows that the ‘exclusion’ argument is diluted and has lost its credibility.

However, what remains striking in the review of the Court of the two cases is that with regards to the language system of patent the Court only viewed the language claim from one perspective. The Court denies the claim brought forward by Spain and Italy who stated that the translation of patents should

¹⁴⁶ Ibid., 27.

¹⁴⁷ Arguments of the Council in Cases C-274/11 and 295/11 in: opinion of the Advocate General Bot, recital 72 – 75 .

¹⁴⁸ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 36 – 37.

¹⁴⁹ Ibid., recital 37.

¹⁵⁰ Opinion of Advocate General Bot, recital 83.

¹⁵¹ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 79.

¹⁵² Cases C-146/13 and 147/13

be either in English only or in five languages.¹⁵³ It is of importance to notice that this concerns a situation of the language system of patent translation and not the language of secondary legislation itself. The Court however does not question why the patents should be translated in English only and why German and French as a language are allowed and Spanish and Italian aren't. Perhaps this has to do with the fact that in the European Union the population who speaks German and French is larger than Spanish and Italian combined. There is no reason not to believe that the participating member states were unwilling to accept translations in English only. One may wonder if the negotiations would have worked out differently for Italy and Spain if the member states had stick to one language only.

The Court's judgment in Cases 274/11 and 295/11 can still be disputed by some of its arguments. The following judgment of the Court for instance is quite dubious. By stating that Articles 20 TEU and Articles 326 – 334 TFEU '*do not circumscribe the right to resort to enhanced cooperation solely to the case in which at least one member state declares that it is not yet ready to take part in a legislative action of the Union in its entirety*'.¹⁵⁴ This statement, related to the claim of Spain and Italy stating that the Council misused its powers to authorise the enhanced cooperation procedure, is explained by the Court in such a way that there may be various causes for member states not to participate in an enhanced cooperation procedure. According to the Court: '*the impossibility referred to in that provision may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement*'.¹⁵⁵ Although the Court might have given a limited review on the joint cases, this statement on the use of enhanced cooperation is quite dubious. According to the Treaties, enhanced cooperation should only be used as a last resort when unanimity could not be reached anymore. The statement made by the Court could implicate on a future use of enhanced cooperation in situations where member states will use the instrument when they due to political reasons do not want to strive for unanimity. Thus, the Court implicates with this statement on a use of enhanced cooperation as a way to overcome blockades in negotiations. One may wonder whether that is the aim of the procedure, since according to Article 20 TEU it is meant as an alternative way for member states to go further with reaching Union objectives and thus deepening integration.

According to Article 20 TEU enhanced cooperation is open to all member states. During the whole negotiation process, member states are able to join if they want. The only formal procedure that has to be taken by the member state that wants to participate is to send a letter to the Commission asking to authorise permission to enter the enhanced cooperation procedure. At first hand this process does not seem very complex. During the negotiations in the Council the position of non-participating member states is as follows. Despite of the fact that the non-participating member state is not able to vote on the proposal on the regulation, it is not excluded from the Council meetings. As regards equal voting rights in this process one could argue that they aren't. But, if you look at equality from the perspective that every member state is present during the Council meetings, one could argue that equality is preserved.

7.5.1 Cases C-146/13 and 147/13

In March 2013 Spain decided to seek annulment of the two regulations¹⁵⁶ on implementing enhanced cooperation in the area of the creation of a European wide patent. The arguments brought forward by

¹⁵³ English, German, French, Italian and Spanish.

¹⁵⁴ Joined Cases 274/11 and 295/11, Kingdom of Spain and the Italian Republic v. Council of the European Union, recital 36.

¹⁵⁵ Ibid., recital 36.

¹⁵⁶ Council Regulations 1257/2012 and 1260/2012.

Spain in Case C-146/13 relied on seven pleas.¹⁵⁷ This case was mostly aimed at the establishment of the unitary patent court. Case C-147/13¹⁵⁸ (Spain V. Council) related to the regulation on patent translation arrangements and provision of Article 118 (2) TFEU concerning discrimination of Spain by language. According to Spain, the current patent regulation has a language arrangement which is discriminatory to individuals whose language is not one of the official languages¹⁵⁹ of the European Patent Office¹⁶⁰. In its judgment, the Court dismisses this claim. Although the Court acknowledges the differentiation in language regimes, the regulation has a legitimate objective. *“It must be recalled that the aim of the contested regulation is to determine the translation arrangements for European patents to which unitary effect is granted under Regulation No 1257/2012. Since the EPO is responsible for the issue of European patents, the contested regulation is based on the translation arrangements in force at the EPO, which provide for the use of English, French and German, there being no requirement for a translation of the specification of the European patent, or at least its claims, in the official language of each State in which [the EPUE] is to be effective, as is the case for the European patent”*.¹⁶¹ According to the Court, the application of a patent should be uniform and easy accessible and less costly. Therefore, the Court has given priority to a trilingual language regime instead of a five-fold regime. The claims brought forward by Spain have led to a dismissal of both cases on May 5th, 2015.¹⁶² In sum, the position of Spain regards equality has not changed in comparison to the joint cases of Italy and Spain.

7.5.2 Conclusion on the principle of equality hypothesis

In chapter four the following hypothesis to test the equality principle between member states was described as followed:

H4: The mechanism of enhanced cooperation is a threat to the principle of equality of the member states.

This hypothesis has been tested by means of Treaty Articles 20 (1, 4) TEU and Articles 326 – 328 (1). In this section the cases of Spain and Italy have been discussed since both countries challenged these Treaty provisions before the Court of Justice. What can be derived from these cases and Court judgments is that the Court does not seem to agree with any of the allegations brought forward by Spain and Italy towards the Council decision or the language regime. Italy and Spain contested Article 327 TFEU for the reason that their rights, competences and obligations as a member state were not respected during the enhanced cooperation procedure. According to these member states the ‘last resort’ was established too soon and they were excluded from the process. All the claims brought forward by the Court were rejected in the advantage of the Council. Critical assumptions on these cases have been displayed in this paragraph. For instance it still remains unclear why the Council wanted to continue with a trilingual regime instead of resorting to English which would have accommodated the wishes of Spain and Italy. In relation to equality, it seems that the member states considered a Spanish and Italian language system as unacceptable. An English language regime would

¹⁵⁷ Case C-146/13, Kingdom of Spain v. European Parliament and Council of the European Union, recital 23: (i) infringement of the values of the rule of law; (ii) a lack of legal basis; (iii) a misuse of powers; (iv) infringement of Article 291(2) TFEU and, in the alternative, of the principles laid down in the judgment in *Meroni v High Authority* (9/56, EU:C:1958:7); (v) infringement of those principles owing to the delegation to the EPO of certain administrative tasks relating to the EPUE, and (vi) and (vii) infringement of the principles of autonomy and uniform application of EU law.

¹⁵⁸ Case C-147/13, Kingdom of Spain v. Council of the European Union.

¹⁵⁹ German, English, French.

¹⁶⁰ Court of Justice of the European Union. Judgments in Case C-146/13 Spain v Parliament and Council and Case C-147/13 Spain v Council. 5 May 2015.

¹⁶¹ Case C-147/13, Kingdom of Spain v. Council of the European Union, recital 39.

¹⁶² See supra note 154.

still mean a discrimination of Spanish, Italian and all the other EU languages but at least Spain (and Italy) would be willing to cooperate. The Court cases brought forward by Spain and Italy formed a stumbling block in the cooperation process and created differentiation between two camps of member states. These disputes are in no way beneficial to the relation between these groups of member states. The participation of Italy can be marked as a turning point for the opposing member states. It is not sure whether Spain will change its mind too. However, as regards equality of the member states it can still be argued that there is a case for negative discrimination. Even after the participation of Italy, this argument prevails since Italy has to give in on the language regimes. Thus, in the enhanced cooperation case of the patent regulation a distinction can be made between *de jure* and *de facto* inequality where a *de facto* inequality is absolutely present. The hypothesis on the equality principle can therefore neither be rejected nor confirmed. It seems that this case of enhanced cooperation is a case full of ambiguities.

8) Discussions

The aim of this thesis was to study enhanced cooperation as a form of differentiated integration in light of European integration theories and the possible implications on the unity of EU law and the equality of the member states. What firstly made this study unique is that there were not many studies conducted on enhanced cooperation as a form of differentiated integration in light of European integration theories. As been stated previously in this thesis, the book 'Differentiated Integration in the European Union' written by Rittberger, Leuffen and Schimmelfennig in 2013 formed the inspiration of this study. Their view on differentiation in primary law is a must read for researchers interested in the field of differentiated integration.

The second unique feature of this thesis is that not only differentiation in integration has been researched, but also the legal implications of differentiation. From a legal perspective, a lot has been written on differentiation in EU law that still can be typed either a 'Copernican Revolution' or a 'constitutional chaos'. The judgment from the Court in 1964 on the *Costa v. E.N.E.L.* case stated that application and interpretation of EC law should not vary from one member state to another. Today, legal differentiation seems to be a common reality of the European legal order. It really depends on the approach and fundamental values of the researcher whether this legal differentiation is perceived as a welcome remedy to the deepening vs. broadening dilemma of the European Union or whether flexibility remains in contradiction with the uniform application of EU law.

In this chapter, the two cases of enhanced cooperation, Rome III and the Unitary Patent Regulation will be compared on the basis of the findings and results derived from the European integration theories and the implications on the unity and equality of EU law.

8.1 A comparison of the results found in the cases of Rome III and Unitary Patent: European integration theories

8.1.1 Neofunctionalism (supranationalism) in the cases of Rome III and the Unitary Patent

European integration outcomes

According to neofunctionalism (supranationalism) theory, European integration outcomes are managed by member states to a limited extent. Furthermore, integration will lead to spill-over effects of integration in one area and other areas of the EU (Lelieveldt and Princen, 2011). Results from the Rome III have shown that member states indeed were in favour of a solution to the loopholes that existed in the application of divorce law. In order to streamline legislation and increase legal certainty, a solution on the European level had to be found. This solution was provided by the European Commission, a supranational actor. As regards spill-over effects it can be noted that the procedure for enhanced cooperation was initiated by nine member states and eventually resulted in the adoption of the proposal by 16 member states. Furthermore, Rome III can be typed as the first successful establishment of enhanced cooperation with a positive spill-over effect towards enhanced cooperation in the field of unitary patent and the financial transaction tax regulation.¹⁶³

In the case of the unitary patent, member states were looking for a way to establish a European wide patent for over forty years. Harmonisation of the internal market in the field of patents was needed since the price for patent applications in the US were significantly lower. Thus, a solution on the European level had to be found. The spill-over effects of the patent case are larger than the Rome III case. After the initial request by twelve member states, fourteen other member states joined. Once the enhanced cooperation procedure was set in motion it seems as if there was no option for other member states to lack behind. On the basis of this theoretical assumption of neofunctionalism, in both cases the member states needed the enhanced cooperation procedure to further integration in the field of family law and patents.

View on differentiation

According to the theoretical assumptions the EU institutions would favour uniform integration over differentiation. Establishing a regulation via enhanced cooperation is therefore perceived as a second best (Leuffen et al., 2013). In the establishment of Rome III, it became clear in the Council meetings that unanimity could not be reached. After four years of negotiations the Commission accepted the request from the Council to resort to enhanced cooperation. Some member states (such as Finland) expressed their disapproval on the establishment of enhanced cooperation in the field of family law. In the patent case, the member states tried to reach uniform agreement for a very long time. Discussion on an agreement can be derived back almost forty years ago. The incorporation of Article 118 (2) TFEU in the Lisbon Treaty that requires unanimity on the language regime marks the importance and attempts of the member states to reach unanimity. Even among the respondents there is still hope that Spain (and Croatia) would eventually join so that uniform agreement could be reached. This is in contrast with Rome III where uniform agreement seems far more out of reach. During the establishment of Rome III via enhanced cooperation, there were more serious concerns of the member states whether there should be a regulation on the law applicable on divorce at all. Member states that wanted to apply the *lex fori* approach doubted whether a regulation on the law applicable on divorce was needed in the first place. Issues concerning family law are to large extent competences that member states want to exercise. Other than establishing a European patent that would benefit the competition position of the EU towards the EU and Japan for instance, the need for a common solution on the EU level was perhaps less present.

The function of the enhanced cooperation procedure

According to the provisions in the Treaties enhanced cooperation should be used as a last resort. It is

¹⁶³ The financial transaction tax regulation is still being negotiated in the Council and has not been officially adopted yet.

meant as a way to further the objectives of the Union. A possibility for a group of member states to go off while others catch up later. If we compare the two cases of enhanced cooperation, one can point to a clear difference. In the case of Rome III, the enhanced cooperation procedure has been used by a group of member states to go off. This group of member states differs from the conservative group of member states that did not want to join Rome III and the more liberal group of member states that considered Rome III a decline in their standard of divorce legislation. Thus, although it remains possible for the conservative group of non-participating member states to 'catch up' and join Rome III it is highly unlikely that the liberal group of member states will consider lowering their legal standards to comply to the rules of Rome III.

Viewing the function of enhanced cooperation out of the patent case, it can be stated that the procedure has accomplished in furthering the objectives of the Union and a catch up by almost all (26) member states. Without the possibility of enhanced cooperation, the *status quo* would have been maintained and no further integration would be reached. Due to the existence of enhanced cooperation a solution to proceed with the regulation has been found, resulting in almost uniform adoption of the patent regulation.

The role of the European Commission and other supranational (non-governmental) actors

In both Rome III and the case of the unitary patent, the role of the Commission has proven to be key. According to neofunctionalist (supranationalist) assumptions the role of the Commission can be typed as a facilitator in the integration. Furthermore, the Commission suggests resolutions in the direction of a result that suits its own preferences best (Rosamond, 2000, Lelieveldt and Princen, 2011). If we compare the role of the Commission in both cases we see that the Commission acted as a facilitator and a key figure in the integration process. To a very large extent this is related to the official role for the Commission that is laid down in the Treaty provisions on enhanced cooperation. As stated in Article 20 TEU the Commission may approve or disapprove the request from the Council to resort to enhanced cooperation. Furthermore, the Commission makes the proposal for the regulation that will be implemented. In both cases the Commission played the same part: it authorised the request of the Council to resort to enhanced cooperation and it presented the proposal for the regulation.

As regards the role of non-governmental actors, both cases display some similarities and some deviations. In both cases there was involvement of the European Parliament that rises from the provisions laid down in the Treaties. According to Article 329 (1) the Parliament has to give consent on proposal implementing and authorising enhanced cooperation. Besides this formal role listed in the Treaties, the European Parliament had an informal role in the realisation of the Rome III regulation. According to the respondents who were involved in the enhanced cooperation procedure from the side of the Parliament, the Parliament was closely involved in informal dialogues with the Commission and the Council. Furthermore, these supranational actors aid the interest of citizens that are favoured by EU rules. This might explain why a Polish MEP became the rapporteur on the Rome III file, while Poland decided not to join the regulation since it would be obliged to allow divorce on same-sex marriages. The involvement of the rapporteur could be viewed from a European perspective, where the broader perspective weight heavier than the domestic perspective.

In the case of the patent the European Court of Justice played a significant role. By ruling over the joint cases by Spain and Italy versus the Council, the CJEU has gained the opportunity to comment on enhanced cooperation for the first time. The rulings of the Court, resulting in a dismissal of the claims, have greatly influenced the enhanced cooperation procedure in the unitary patent case. If the Court would have ruled in favour of Spain and Italy and would have approved their claim to annul the Council decision to resort to enhanced cooperation, things would have worked out completely different. In both cases the supranational actors influenced the process of European integration.

8.1.2. (Liberal) intergovernmentalism in the cases of Rome III and the Unitary Patent

European integration outcomes

In (liberal) intergovernmentalism theory integration is the outcome of member state preferences (Hoffman, 1966, 1982). Furthermore, integration is achieved on issues bounded by topics of low politics and the economic sector (Moravcsik, 1993, 1998). In relation to Rome III we have seen that this theoretical assumption is partly true. On the basis of the content of the regulation, Rome III only concerns the law applicable to divorce. The regulation was proposed in order to prevent parties from forum shopping and increase legal certainty. However the issue of divorce itself is a highly sensitive issue for many member states. Finland for instance regretted the fact that enhanced cooperation was used for the first time under Rome III since it considers divorce a fundamental right. Other member states such as Poland who took a conservative approach towards divorce questioned the regulation. The theoretical assumption of liberal intergovernmentalism and integration outcomes therefore best suits the case of the unitary patent regulation. Here, integration is achieved in the internal market which is an issue that concerns the economic sector. Thus, liberal intergovernmental assumptions seem to prevail most in the second case.

View on differentiation

Theoretical assumptions in liberal intergovernmentalism showed that differentiation is perceived as an opportunity for member states to possess distinctive rights and obligations (Moravcsik, 1993, 1998). In the end, the states will continue to be the leading actors in the integration (differentiation) process (Jupille et al., 2003, Lelieveldt and Princen, 2011). Comparing both enhanced cooperation cases it can be concluded that this assumption is correct. In the case of Rome III differentiation has been perceived as the way forward for 16 member states while 12 decided not to join. Those 16 participating member states now possess the rights that result from the adoption of Rome III. Up until now, the 12 non-participating member states have not, almost 3 years after the adoption, made an announcement stating they will join after all. What became clear from Rome III is that uniform agreement is highly unlikely. Non-participating member states will not join to resolve existing differentiation. This is in line with intergovernmentalist assumptions where states will remain the leading actors in the integration process.

In relation to the unitary patent regulation there are two reasons to assume that states were the leading actors in the integration process too. First of all, the member states pushed the authorisation of the enhanced cooperation procedure forward after the various attempts to reach unanimity. While the Commission kept pushing for unanimity the member states pressured the Commission to resort to enhanced cooperation. The Commission was aware that accepting the Council request was the only way to further the objectives of the Union in the EU framework. After all, there already existed an intergovernmental patent agreement with the member states and third states. If enhanced cooperation wouldn't have worked, the member states might have resorted to other, intergovernmental ways of cooperation.

The second argument that supports the claim that the states remain the leading actors in the integration process is the fact that the member states decided to establish an intergovernmental agreement on the Unified Patent Court, outside the EU framework. Thus, in both cases for enhanced cooperation it can be confirmed that from an intergovernmentalist point of view states remained the leading actors in the integration process.

The function of the enhanced cooperation procedure

From an intergovernmentalist point of view the enhanced cooperation is used as a way to overcome deadlock in unanimity negotiations in the Council. This assumption seems to prevail in both cases. In the case of Rome III the camps were divided in three: a conservative group, a liberal group and the

enhanced cooperation group. The enhanced cooperation group was allowed to go off on the non-participating member states. In the case of the unitary patent, enhanced cooperation too seemed to provide the solution to overcome deadlock in the Council negotiations concerning the language system. One respondent however stated that the function of enhanced cooperation was to pressure other member states to join the integration process and the patent regulation. If one compares this assumption with both cases then it is safe to say that this plan failed for the case of Rome III and succeeded for the patent regulation.

The role of the European Commission and other supranational (non-governmental) actors

If one sticks to (liberal) intergovernmentalist premises on the role of the European Commission and non-governmental actors, the assumption on a limited role for these actors should be confirmed (Moravcsik, 1998). Viewing the role of the Commission and other non-governmental actors in the establishment of Rome III and the unitary patent this theoretical assumption has to be rejected. In both cases the role of the Commission is key and has been typed as facilitating. Furthermore, on the basis of the Treaty provisions the Parliament is involved too by giving its consent. The role of the European Court of Justice has been typed as influential from the neofunctionalist point of view in the patent case since it ruled on the future of enhanced cooperation in the area of patents. From an intergovernmentalist point of view the influence of the CJEU can be slightly limited. As regards the establishment of the Unified Patent Court, the role of the CJEU has been limited since it will have no jurisdiction over issues concerning EU patents. Thus one could argue that from a liberal intergovernmental point of view the role of the CJEU as a supranational actor in the establishment of the UPC has been limited.

State identity and state autonomy

Domestic goals and interest determine the course of European integration in intergovernmentalism theory. In chapter six the various reasons for the non-participating member states have been listed. It can be confirmed that the domestic interest of the non-participating member states can be explained by their domestic goals. The fact that some member states rather apply *lex fori* can be seen as an example of domestic interests determining the course of integration (in this case non-participation). This also applies for the reasons for Spain and Italy, the two member states that at first did not participate in the enhanced cooperation procedure that established the unitary patent. But, what must be noted is that both Spain and Italy were not against the establishment of the unitary patent. They opposed the trilingual regime of translating the patents. Here, not the domestic interest was pursued but Spain and Italy preferred sticking to its domestic identity. Spain and Italy were of the opinion that both languages were of great importance in the language regime for the patents. A political dispute on language resulted in the stumbling block that prevented unanimity on the patent regulation.

8.2 A comparison of the results found in the cases of Rome III and Unitary Patent: unity of EU law and equality of the member states

8.2.1. Implications on the unity of EU law in the Rome III and the Unitary Patent regulation

In this study, the implications on the unity of EU law as a result enhanced cooperation have been measured by means of Article 326 TFEU that served as minimum requirement for testing the hypothesis set out in chapter four¹⁶⁴. When comparing the implications on the unity of EU law that arise from the establishment of the Rome III and the unitary patent regulation, similarities and differences can be point out. In both cases, before the establishment of the regulation, there was a fragmented legal order of different set of legal rules. In Rome III there were 26 different legal rules on

¹⁶⁴ H3: Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law.

how to deal with the law applicable on divorce. Before the adoption of the unitary patent regulation, there was a national patent that had to be validated in each EU member state separately, resulting in a situation where 26 different EU patents had to be validated.

The aim of Rome III was to create legal certainty and to harmonise the national rules on divorce. In the case of the patents the aim was create more unity in the economic market by harmonising the area of patent. In both cases this aim for full harmonisation has not been reached. This has to do with the fact that both regulations were established by means of enhanced cooperation which can only be used when unanimity (and thus full harmonisation) cannot be reached. It can be argued however that in the case of the unitary patent the aim for full harmonisation has almost been achieved with 26 out of 28 member states adopting the regulation. In the case of Rome III the harmonisation of national rules on divorce only succeeded for the group of 16 participating member states.

Rome III has created a third-speed Europe with a group of conservative member states, participating member states and liberal member states. The unitary patent has created a two-speed Europe: 26 participating member states and 2 non-participating member states. Still, one can hardly speak of a two-speed Europe since one group only comprises of 2 non-participating member states. Thus the creation of unity and harmonisation in the internal market in the area of patents has almost succeeded. For enhanced cooperation, where unanimity is not the fundamental idea this is quite an achievement.

Both Rome III and the unitary patent regulation belong to policy areas that fall under the shared competences of the member states and the European Union. Rome III falls under the area of freedom, security and justice. The patent regulation falls under the area of the internal market.¹⁶⁵ An official requirement to establish a measure by means of enhanced cooperation is that it has to be an area of non-exclusive competences of the EU. Although there did not exist a discussion as regards Rome III on the fact whether the law applicable divorce fell under the non-exclusive competences of the EU or not, the mandate of the patent regulation has been questioned. In the joint cases by Spain and Italy against the Council, both countries sought annulment for the Council decision on establishing enhanced cooperation in the area of patents. Spain and Italy claimed that the establishment of the unitary patent fell under the scope concerned the establishment of competition rules, an area of exclusive competences of the EU. The Court ruled against this claim.

Differentiation in the area of freedom, security and justice is most present. Besides the Rome III Regulation there are forms of legal differentiation by means of Schengen, the permanent opt out of Denmark and the opt outs of the UK and Ireland. As regards the already existing differentiation in the area of freedom, security and justice the Rome III regulation seems a pinprick in the unity of EU law. Nevertheless, it remains importance to ask ourselves whether enhanced cooperation was the right move to make in the field of family law. A field where harmonisation seemed impossible to reach due to existing differences in member states legal traditions. Still, Rome III neither has distorted the functioning of the internal market nor affected the EU *acquis*.

In comparison to the patent regulation that falls under the scope of the internal market, little differentiation exists. The aim for the establishment of the EU in the 1950s was to create a common European market based on the principle of mutual recognition. It is of importance that for the smooth functioning of the internal market, the policies are uniformly valid in all the member states (Schimmelfennig et al., 2015). Here differentiation is rather new. Still, this differentiation is not affecting the EU *acquis* and is complying with the Treaties and EU law. Thus, no threat is posed to the unity of EU law for this case. In the patent case the unity of EU has been challenged by Spain and

¹⁶⁵ According to Article 4 TFEU (2): 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (j) area of freedom, security and justice;

Italy in front of the European Court of Justice. One can discuss these claims once more in depth but it will not take away the judgment of the Court that ruled in favour of the Council and stated that the patent regulation complies with the Treaties and EU law. Still one cannot deny that businesses in the non-participating member states will experience a competitive disadvantage in comparison to businesses that are situated in the participating member states. A Spanish SME still has to validate its invention in every member states since it is not a member of the unitary patent regulation. The position of business owners in non-participating member states will be weakened.

For the future outlook it remains interesting to see what the implications of the Unified Patent Court will have on the unity of EU law since the UPC will have exclusive jurisdiction over issues concerning EU patents. In the agreement on the UPC, the member states committed themselves to a correct application and uniform interpretation of EU law.

Then there still remains the interesting position Malta obtained in the establishment of the Rome III regulation. In the prior situation, Malta did not allow divorce. Still, due to the provisions of the enhanced cooperation procedure Malta was able to join the decision-making process. This resulted in a situation where Malta gained a *de facto* opt out on the level of secondary law.

At least in the case of the unitary patent, Spain and Italy were honest about their motives of non-participation. They have not tried to join the decision-making process and gain a *de facto* opt out on the language regime for instance. They stated clearly that they would not join the enhanced cooperation procedure if the member states held on to a trilingual regime. One could argue that at least Spain and Italy were honest on their motives. Malta, in comparison to the opt outs of the UK and Ireland (Protocol 21) was able to achieve an opt out on a regulation within the decision-making process of that regulation. This situation would never occur if enhanced cooperation was established by means of the Treaty Protocols.

8.2.2. Implications on the principle of equality of the member states in the Rome III and the Unitary Patent regulation

In this study, the principle of equality of the member states has been tested by means of five criteria¹⁶⁶. In both cases it cannot be denied that Article 328 (1) has been breached. Enhanced cooperation has been open to all the member states. In the case of Rome III there was no evidence found that could point to a situation where one or several member states were hindered to join the process. From a procedural point of view, in both cases of enhanced cooperation the member states were considered equal. Still if we compare Rome III with the unitary patent case we see that 16 member states joined Rome III and 26 member states joined the patent regulation. What became clear from the literature review (Wouters, 2001) is that equality is better preserved when more member states join the process. So, in this case equality is better preserved in the case of the unitary patent than the Rome III regulation.

In addition it must be noted that it is harder to maintain equality of the member states in the area of justice, freedom and security than it is in the area of the internal market. As has been stipulated before, differentiation is most present in the area of justice, freedom and security. Differentiation is less present in the measures established in the internal market which results in a more equal position of the member states.

On the basis of Article 327 TFEU the rights, competences and obligations of non-participating member states are respected during the process of enhanced cooperation. This assumption has turned out to be valid in the case of Rome III. The non-participating member states were not forced to apply

¹⁶⁶ See paragraph 5.4: Article 20 (1), Article 20 (4) TEU, Article 326, Article 327 and Article 328 (1) TFEU.

any other law than their own national rules on divorce. In the case of the Netherlands this comes down to them applying *lex fori* as they previously did. In the case of the unitary patent, Spain and Italy claimed that this Treaty Article was breached and that their rights, competences and obligations in the process of enhanced cooperation were disrespected. Despite of the Court ruling which rejected the claims brought forward by Spain and Italy, they still felt excluded from the process of enhanced cooperation. The fact that Spain and Italy were opposing to the Council decision to resort to enhanced cooperation and challenge the decision in front of the CJEU perhaps says enough on how the Council negotiations went down. The level of dissatisfaction apparently was so high for Spain and Italy that they decided to start a trial. What can be said is that although the Court ruled against the claim of Spain and Italy that there existed a *de jure* inequality, both countries have faced a *de facto* inequality. Even now, Italy can only join by complying with all the terms in the agreement, and thus has to accept the trilingual language regime which it opposed in an earlier stage. This does not foster the equality process of enhanced cooperation.

Connecting this position of equality concerning Spain and Italy in comparison to the position of Malta, few interesting remarks can be made. It can be noted that Malta and Spain and Italy both took different routes to obtain their rights in the enhanced cooperation procedure. Malta joined the enhanced cooperation and gained a *de facto* opt out during the decision-making process. Italy and Spain decided not to join and challenge the Council decision in front of the CJEU.

The position of Malta in the enhanced cooperation procedure has resulted in Malta giving a complete new dimension to the principle of equality. Malta was considered equal with the participating member states on the decision-making level but Malta was unequal on the level of secondary legislation since it received a *de facto* opt out. Malta made sure it was not excluded from the process of enhanced cooperation, where Spain and Italy were. Malta was 'in' but excluded itself by means of the *de facto* opt out. Spain and Italy had not chance to obtain a comparable situation since the other member states would not allow any other language regime than German, French and English.

9) Conclusions

This study focused on enhanced cooperation as a form of differentiated integration in the European Union. Differentiation has been a feature of the EU since the Treaty of Maastricht where differentiation is typed as the differential validity of formal EU rules across countries. Studies on differentiation in the Economic and Monetary Union or on the Schengen agreement are various. Differentiation in secondary law established by means of enhanced cooperation, Article 20 TEU, are lesser known. Therefore the following question in this thesis was formulated:

How can enhanced cooperation, as a form of differentiated integration, best be viewed in light of European integration theories (1) and what are the possible implications of enhanced cooperation on the unity of EU law and the principle of equality of the member states (2)?

Since this thesis is based on a two-tier perspective, namely a political science and legal approach, this research question has been divided in two sub-research questions. Answers to these questions have been searched by means of a case study approach on the Rome III and Unitary Patent Regulation. These two regulations were established through the enhanced cooperation procedure in the Council since unanimity on these files could not be reached. This chapter will try to answer the two sub-research questions in light of the four hypotheses that were formulated in this thesis.¹⁶⁷

9.1 Research sub-question 1: Enhanced cooperation in light of European integration theories

Main conclusion

The results as regards Rome III and the unitary patent regulation can be interpreted as follows. The way enhanced cooperation can be perceived has shown that both neofunctionalism (supranationalism) and (liberal) intergovernmentalism provide explanatory power for differentiated integration. Both cases show strong similarities with theoretical assumptions derived from the two integration theories. Nevertheless, as has been concluded for both cases, neofunctionalism (supranationalism) seems to provide a little more explanatory power in the end than (liberal) intergovernmentalism. This can be related to the fact that the supranational actors, in particular the European Commission, have an already 'built-in' power in the Treaty provisions. The Commission receives the request of the Council to launch enhanced cooperation, the Commission comes up with a proposal and the Commission makes sure that member states cooperate inside than rather outside the Treaty framework. What must be derived from these results is that both theories and thus hypotheses are not mutually exclusive. These findings are in line with the results from the study carried out by Leuffen, Rittberger and Schimmelfennig in 2013, who state that none of the two integration theories can entirely clarify the complex reality they had found on differentiation in primary law. It seems that enhanced cooperation as a form of differentiated integration has no number one winner when it comes down to neofunctionalism or intergovernmentalism theory. The two hypotheses that were formulated on the

¹⁶⁷ H1: If differentiation as a result of enhanced cooperation is temporary, the end goal remains uniform integration, and the supranational actors are the driving force behind the integration process, then enhanced cooperation is best explained by supranationalism theory.

H2: If differentiation as a result of enhanced cooperation is the outcome of member state preferences in intergovernmental bargaining, bounded by topics on low politics and the economic sector, while preserving state autonomy and identity, then enhanced cooperation is best explained by (liberal) intergovernmentalism theory.

H3: Enhanced cooperation as a form of differentiated integration is a threat to the unity of EU law.

H4: The mechanism of enhanced cooperation is a threat to the principle of equality of the member states.

basis of neofunctionalism and intergovernmentalism theory can therefore not be fully accepted or rejected.

Neofunctionalism (supranationalism) and (liberal) intergovernmentalism views on enhanced cooperation

As has been stated above, both neofunctionalism (supranationalism) and (liberal) intergovernmentalism theories seem to provide explanatory powers for enhanced cooperation as a form of differentiated integration. Still, neofunctionalism seems to provide a bit more explanatory power but this is related to the Treaty provisions on enhanced cooperation that give the European Commission and other supranational actors significant influence on the process. This paragraph will briefly summarise the main features of enhanced cooperation in relation to both integration theories.

From a neofunctionalist point of view enhanced cooperation should only be used as the last resort. It is meant as a way for a group of member states to go off while others catch up later. The role of the European Commission in the realisation and establishment of enhanced cooperation can be typed as key. This role is laid down in the Treaties. The Commission determines whether the Council decision to authorise enhanced cooperation is approved and acts in a traditional way by facilitating the differentiated integration process. The role of the European Parliament is also laid down in the Treaties. This role is significantly smaller since the Parliament is not jointly deciding on this proposal with the Council. The task of the Parliament is to give its consent. We have seen that the non-governmental actors have tried to expand their interests in the realisation of enhanced cooperation. Uniform integration remained the preferred option; enhanced cooperation was perceived as the second best.

According to neofunctionalist assumptions integration creates spill-over effects. In relation to enhanced cooperation that is a form of differentiated integration it can be noted that this assumption holds. The Rome III regulation was the first regulation established by enhanced cooperation. The unitary patent regulation followed and now a third regulation on a financial transaction tax is being negotiated in the Council. Still what must be noted is that these spill-over effects are moving at a slow pace. Enhanced cooperation was already introduced in the Treaty of Amsterdam in 1997 and has been used under the Treaty of Lisbon for the first time.

In the process of differentiated integration member states remain important since they organise the conditions for integration. However, member states are not able to completely manage the course and extent of the following process. In enhanced cooperation, member states are dependent on supranational actors such as the Commission on the one hand and on the other hand each other while cooperation in the Council. There is for instance a minimum requirement of nine member states to start the differentiated integration process. The three phases of enhanced cooperation (initiation-authorisation-implementation) show that member states can only manage the steps of differentiated integration to some extent.

From a (liberal) intergovernmentalist point of view one could argue that the states remain the leading actors in the process of enhanced cooperation and thus differentiated integration. It is up to the member states to decide to ask the Commission for an authorisation on enhanced cooperation. Thus, the member states have the power in the Council to ask for authorisation. Still, what must be noted is that the member states are limited by a threshold of a minimum of nine member states and the Commission may under Article 329 (1) disapprove the request by not submitting a proposal for a regulation.

During the process of differentiated integration by means of enhanced cooperation the member states are not obliged to join. Based on their own national preferences the member states decide to join the

enhanced cooperation procedure or not. Therefore, it can be assumed that the states remain the leading actors in differentiated integration. Furthermore, enhanced cooperation is perceived as a useful tool when unanimity cannot be reached in the Council and states still want to pursue the integration process. Lastly, the intergovernmental assumption that states that the role of supranational actors is limited does not hold. In fact, what became clear on the basis of neofunctionalist assumptions, the role of supranational actors such as the European Commission is rather influential.

These conclusions implicate on the assumption that there might be other integration theories that could also provide explanatory power for enhanced cooperation as a form of differentiated integration. It would be of interest to analyse enhanced cooperation as a form of differentiated integration from a social constructivism point of view. Social constructivism theory focuses on the importance of social ideas and discourses in relation to European integration. Enhanced cooperation could be viewed out of a sense of community-building among the member states.

9.2 Research sub-question 2: Implications of enhanced cooperation on the unity of EU law and the principle of equality of the member states

Main conclusion

The two regulations established by the enhanced cooperation procedure have not resulted in the EU functioning as a disconnected and fragmented legal order. With only two established regulations via enhanced cooperation, these two measures will not add up to an incoherent legal framework of the European Union. Although differentiation from a legal perspective is not desirable, it is better than member state cooperation outside the Treaty framework, isolated from the EU *acquis*. Rome III and the unitary patent regulation are both a pinprick in the uniformity of EU law, compared to all the existing opt-outs and differentiation in the monetary union and defence area.

As regards equality, enhanced cooperation might not have had a *de jure* implication on this principle since the Treaties seem to safeguard equality by keeping enhanced cooperation open to any member state at all time. One must however take a cautious approach on the *de facto* inequality. In the long term, this form of inequality between member states as we have seen in the case of Spain and Italy, will not be beneficial to the underlying relationships between member states in the European Union. Still, on the basis of the criteria that were formulated in the methodological chapter of this thesis that tested the two hypotheses, none of the two hypotheses could be accepted.

Implications of enhanced cooperation on the unity of EU law and equality of the member states

Enhanced cooperation marks the first form of pre-determined flexibility in the European legal order. Differentiation in the European legal order creates fragmentation. Regardless of this fragmentation creating a two- or three-speed Europe, differentiation by means of enhanced cooperation is a fact. Up until now, enhanced cooperation has been subject to a limited review by the European Court of Justice that gave a lot of discretion towards the member states. Regulations that have been adopted under enhanced cooperation are only binding for the participating member states. Thus, rights obligations and competences of non-participating member states are respected.

On the one hand differentiation in the European legal order is not the most preferable solution. In fact, it can be typed as a second best. From a legal perspective it is preferred to try to stick to the classical rules. The more differentiation and flexibility is accommodated, the more complex the European legal order will be. The results of the Rome III and unitary patent case have shown that these forms of differentiation have not posed a threat to the unity of EU law (yet). What must be considered is that, if enhanced cooperation is used more often in the future, it will remain to create differentiation and fragmentation as a result of different layers. The already complex European legal order will be even

more complex, not only for the citizens but also for the enforcers (lawyers, policy offers) of such regulations.

On the other hand, accommodating differentiation in the European legal order may fit best with the EU as we know it present day. The enlargement of the European Union, which is now counting 28 member states, exists of different countries with different legal traditions. Differentiation can therefore be seen as an outcome to accommodate this diversity, and provide a solution to those member states that want to go further and others, who need more time to catch up. Once more, this depends on the way a researcher perceives legal differentiation. Up until now, enhanced cooperation has only been used twice and its impact on the European legal order has been modest. Further and future research on the financial transaction tax, that will soon be the third case of enhanced cooperation, should tell us more about the implications on the European legal order in the near future.

The provisions laid down in the Treaties seem to protect the principle of equality of the member states in enhanced cooperation. The procedure is open to all member states, the rights of non-participating member states are protected and adopted acts are only binding for the participating member states. The working method of the enhanced cooperation procedure entails that member states are not excluded in the negotiation process. They remain present in the Council to engage in discussion, but they are not allowed to vote. This openness and transparency of enhanced cooperation benefits the equality principle. Still, this openness principle has one drawback: literally every member state can join. Even member states that do not support the content of the regulation can join. This results in remarkable situations such as the case of Malta in Rome III.

From a procedural point of view equality in enhanced cooperation is preserved since all member states are able and welcome to join. From a substantial point of view, equality would be better served when all member states would participate in the procedure. Of course, when this would be the case and unanimity would be reached, enhanced cooperation would not be needed in the first place.

9.3 Research methods and limitations

This thesis studied enhanced cooperation both from a political science and a legal perspective. By means of qualitative research methods, this study opted for a case study approach. By means of process tracing, the four hypotheses were analysed and the cases were described with the aim to 'put the film in order'. So far, the enhanced cooperation procedure has established two regulations. Therefore case selection was quite evident. Issues that concern case studies are based on only a limited amount of research units (cases) that can be studied. In order to overcome these issues, this thesis made use of triangulation. By retrieving data in more than one way, information is therefore abundant and of relevance. In this study, data has been retrieved in various ways: primary data such as official Council documents and EU documents, expert interviews and secondary data which included all relevant academic and non-academic literature.

The data retrieved from conducting expert interviews were used to strengthen the primary and secondary data on the Rome III and Unitary Patent regulation. In order to view enhanced cooperation as a form of differentiated integration in European integration theory it was of importance to understand how respondents working at the EU institutions or member state government viewed the process. As experts they were actively involved in the establishment of either one of the cases which made it of added value to interview them. Interviewing techniques require high demands of the involved researcher. The more structured the interviews, the better and the higher the reliability and validity of the research. In this thesis, semi-structured interviews were held. Based on a research design that transformed the theoretical assumptions of the two integration theories into statements,

questions were formulated. In comparison to structured interviews semi-structured interviews offers opportunities to go more in depth on relevant issues from the respondent's point of view. Results of interviews are subject to the interpretation of the researcher. Therefore, only subjective interpretations can be generalised. This can be viewed as a limitation of this research. In order to make a generalisation the sample of respondents should be extended.

9.4 An outlook on enhanced cooperation

Enhanced cooperation is designed in the Treaty of Amsterdam in 1997, and has been used under the Treaty of Lisbon for the first time. Enhanced cooperation can only be used in situation where unanimity between all member states cannot be reached. It is designed to accommodate the preferences of a group of member states that wants to further the objectives of the Union and deepen the integration. It is designed to be used only in specific cases. The content of a regulation established by enhanced cooperation should be drafted in such way that non-participating member states agree with the content and are able to join in a later stage.

Enhanced cooperation can be seen as an alternative instrument for member states who want to deepen European integration but uniform integration seems unfeasible at that time. It should be safeguarded that the enhanced cooperation procedure will not be used as a way to facilitate those countries unwilling to integrate. If we use enhanced cooperation as an instrument to circumvent political differences between member states, the differentiation between member states will be larger. If enhanced cooperation would be used more often in the future as an instrument to bypass member states that have different views on the content or different political opinion on such integration matters, the EU will be a Europe à la carte instead of a Europe of different speeds.

It would be a worrying development if the procedure will be used as a way to avoid the EU legislative process and the unanimity requirements set out in the Treaties. The intention of enhanced cooperation is therefore that it should not be used too often and too widely. Differentiation should be temporary. It should be used when member states cannot reach unanimous agreement on whether or not to act instead of how to act in a policy area. In the case of Spain and Italy in the second case concerning EU patent, the Treaty provision (Art. 118) clearly stated that member states had to vote unanimously on the translation agreements. For the group of member states who proposed to resort to enhanced cooperation, these two countries were bypassed since the decision to authorise enhanced cooperation is done by qualified majority voting. Therefore, the ultima ratio-requirement (Art. 20 TEU) should be formulated more clearly. It now leaves a lot of room of interpretation by the member states being capable to bypass other countries.

A comparison can be made between the rules of enhanced cooperation and the rules of flexibility in the European Union that originate from the Treaty Protocols. The situation with Malta gaining a *de facto* opt out might not have happened when the stricter rules from the UK and Ireland Protocol were followed. In enhanced cooperation you are reliant on the member states playing the (political) game. In the case of Malta there was no mechanism present that prevented them to join the enhanced cooperation procedure. When deciding to resort to enhanced cooperation these provisions in the Treaty should be made more clear. Therefore, rules on conditions for member states to join enhanced cooperation should be designed. Protocol 21 on the position of the UK and Ireland can serve as a guiding principle. If a member state would join enhanced cooperation and it appears that this member state is obstructing or violating the decision and negotiations then the Council must be given the mandate to adopt a measure without the participation of that country. In the case with Malta this would have prevented Malta to join. Only if Malta would have lived up towards the condition of actually allowing divorce, then access to the procedure should be offered. Thus, from a legal point of view

enhanced cooperation can be challenged. In comparison with the detailed Protocols on the situation with the UK, Ireland and Denmark, provide clear guidance on how to proceed with the process of opting in or opting out. Schengen, that was the inspiration towards Treaty provisions on enhanced cooperation has shown that it takes a well-established framework that safeguards the position of participating and non-participating member states. Enhanced cooperation as it is now is uncontrolled when member states have decided to join.

Still, enhanced cooperation can be perceived as a useful tool to accommodate differentiation and diversity in a European Union of 28 member states.

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