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FLEXIBILITY CONCEPT IN THE CONTEXT OF EUROPEAN INTEGRATION – EVOLUTION, SURVEY AND PERSPECTIVES[2]

Abstract

The paper presents an attempt to shed the light on the importance of flexibility concept in the context European integration. The debate on flexibility in matters relating to the European integration is not new. The concept of flexibility has always been built into the foundations of the European construction. The paper primarily focuses on the evolution of theoretical and political debate on flexibility (Chapter 2), following by analyses of categories and examples of flexibility (Chapter 3). The flexibility concept was formally recognized by the Amsterdam Treaties. The enhanced cooperation provisions of the EU Treaties, whether in their Amsterdam or Nice or Lisbon guises, represent a key manifestation of a flexibility concept (Chapter 4). Nowadays, the mechanism of enhanced cooperation has only been initiated twice: first in the area of the law applicable to divorce and legal separation and second in the area of unitary patent protection (Chapter 5). Commission's White Paper on the future of Europe, from March 2017, offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept (Chapter 6).

Keywords: *flexibility, European integration, European Union, differentiated integration, enhanced cooperation.*

1. Introductory remarks

Flexibility has always existed in European integration process. Numerous manifestations of diversification derive from the Treaties and

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from the secondary law. Special regimes, derogations, exceptions, and safeguard clauses are to be found in the Treaties right from the start of the process of integration. However, those forms of differentiation were temporary, limited, and did not create permanent separation among the Member States.

There is a lot of secondary legislation which provides alternative solutions, and minimal or optional harmonization. These acts do not reflect objectively defined different solutions, but different views on the desirable content of the rule. They allow for some flexibility in the way common objectives are achieved. As far as exceptions are concerned, these regimes were either temporary, motivated by objective circumstances, or they were placed under the tutelage of the Community. Purely political and permanent exceptions were considered as anomalies, as they were derogations to the features of orthodox Community law which, evidently, can only be tolerated on the basis of Primary law.

Since the signature of the Treaty of Amsterdam, the notions of flexibility and differentiation have caught both political and scholarly attention and are becoming new paradigms in the study of EU law and politics. Several clauses authorize, in an abstract way, a majority of Member States to establish 'enhanced cooperation' between themselves in areas covered by the Treaties. There is a widespread feeling that unity and uniformity, which were the traditional characteristics of the European Community legal order in its early decades, have, to some extent at least, been replaced by the rival characteristics of flexibility and differentiation.

However, the flexibility is not a new phenomenon in European law. Political and doctrinal reflections on differentiation started at the beginning of the 1970s, after the first enlargement of the European construction. Enlargements brought a quantitative and qualitative increase in diversity in the Union and with it, the need for policy adaptations. The principle that all States must do the same thing at the same time and the rigidity of EU policy-making was an obstacle for further European integration.[3]

Nowadays, the ideas of flexibility and differentiated integration have been invoked as a possible solution for the EU crises. Namely, after decades of success, since 2008 the EU has been struggling with the most serious crisis in its history. The economic and political difficulties that the EU is facing at the moment threaten to undermine the fundamental values achieved by the Community, such as peace and stability in the European

[3] J. Ćeranić, "Differentiated integration – a good solution for the increasing EU heterogeneity?" in: *Multi-speed Europe* (eds. A. Kellerhals, T. Baumgartner), Europa Institute at the University of Zurich, Zurich 2011, 14.

Communities over the past sixty years.[4] Commission's White Paper on the future of the Europe, from March 2017, offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept.

The aim of this paper is to give a historical overview of the debate and issues relating to flexible integration over past decades. The paper primarily focuses on the evolution of theoretical and political debate on flexibility, following by analyses of categories and examples of flexibility and enhanced cooperation mechanism as an institutionalized form of flexibility concept. Nowadays, the mechanism of enhanced cooperation has only been initiated twice. Finally, the paper analyses Commission's White Paper on the future of the Europe, from March 2017, which offers five scenarios for the future integration models. One of them is differentiated integration based on flexibility concept.

2. The evolution of theoretical and political debate on flexibility

In the period from 1974 to 2017, four waves of the flexibility debate can be distinguished.[5]

2.1. The first wave of the flexibility debate: 1974-1978

The debate on flexibility in matters relating to European integration is not new. The roots of the current differentiated integration debates can be traced back to the early 1970s. Although flexibility as a concept existed in the European Communities since its founding, the early debates on flexibility remained exclusive. There were, however, two springboards to the debate on flexible integration, which emerged in the mid-1970s.

The first springboard was the speech of Chancellor Willy Brandt to the European Movement in Paris in November 1974. On that occasion, Brandt claimed that the Community needed what he called "graduated integration". The underlying argument for applying the flexibility concept was that economic diversity was not necessarily compatible with the equal treatment of all (at that time) nine Member States. He stated that if all the countries were treated equally, the danger was that the cohesion among them would be undermined. As a solution, Brandt suggested that the objectively stronger countries were to be more closely integrated first and others to follow at the latter stage. It is important that there should be

[4] A. Rabrenović, J. Ćeranić, *Alignment of the Serbian Law with the Acquis Communautaire – Priorities, Problems, Perspectives*, Institute of Comparative Law, Belgrade 2012, 314.

[5] A. Stubb, *Negotiating Flexibility in European Union: Amsterdam, Nice and Beyond*, Palgarave Macmillan, Paris 2002, 34-40.

no permanent dissolution between stronger and weaker Member States. He was persuaded that the flexibility would have a centripetal effect which would drive the process forward and pull the weaker countries along into the core group.[6]

The Tindemans Report of December 1975 is considered as a second springboard for the flexibility debate.[7] Leo Tindemans, prime minister of Belgium and convinced federalist, in his 1975 report on the future of European integration focused less on the final goal of a federal Europe than on the model of what would be later called "multi-speed Europe".

Elaborating ideas put forth by Brandt, Tindemans argued that it was not 'absolutely necessary that in every case all stages of integration should be reached by all the States at the same time'. He pointed to the divergence of the economic and financial situation of the Member States and suggested that those states which were able to progress had a duty to forge ahead, and those states which had reasons for not progressing should allow the others to forge ahead.[8]

The Belgian leader also emphasized the difference between his model of multi-speed Europe – which assumes that all the Member States agree on the final goal of political integration, and only the speed with which they move toward it may vary – and the model of Europe à la carte. According to the latter model, no one must participate in everything, a situation that though far from ideal is surely much better than avoiding anything that cannot be cooked in the single pot.[9]

The original reactions to the Brandt and Tindemans proposals were negative. Most EU capitals immediately rejected any form of differentiation. Smaller Member States, in particular, feared that any differentiation would lead to different classes of membership and possible exclusion.

2.2. The second wave of the flexibility debate: 1979-91

Ralf Dahrendorf's Jean Monnet lecture of November 1979 marks the beginning of the second wave of reflections upon the concept of flexibility. He claimed that 'European union has been a remarkable political success, but an equally remarkable institutional failure'. Dahrendorf argued that the rigidity of Community policy-making was an obstacle to further

[6] *Ibid*., 34.
[7] Report by Leo Tindemans, Prime Minister of Belgium to the European Council, Bulletin of the European Communities, Suppl. I, 1976.
[8] A. Stubb (2002), 34.
[9] J. Gillingham, *European Integration, 1950-2003*, Cambridge University Press, Cambridge 2003, 91-92.

European integration. The solution was to agree on a short list of common and genuinely political decisions such as a common budget and a customs union while allowing more freedom to choose areas of cooperation in others. Dahrendorf called his vision 'Europe à la carte', which he defined as 'common policies where there are common interests without any constraint on those who cannot, at a given point of time, join them'.[10]

Dahrendorf's speech has to be put in context. It coincided with two important events: the second enlargement and the launching of the European Monetary System (EMS). The debate about Greek membership was in motion in 1979. In 1976 the Commission advised against Greek membership in its avis to the Council. The Council, however, defied the Commission and Greece negotiated its membership agreement, which was signed in 1979. In 1981 Greece became the tenth member of the EC. The second important event was the 1979 establishment of EMS, an initiative to create a zone of relative monetary stability in a world of fluctuating exchange rates. The EMS became an odd form of flexibility. Only EC Member States were allowed to participate in the EMS, although none was obliged to do so. And, indeed, Britain did not join the system.

At this stage, official papers on flexibility were also launched. The French Commissariat Général du Plan (1980), for example, argued for a Community of variable geometry. In May 1984, François Mitterand, speaking before the European Parliament, said that a multi-speed or variable geometry Europe was a virtual necessity. In preparing the Single European Act (SEA), the Dooge Committee (1985) estimated that differentiation, as means by which to achieve the objectives of the single market, would facilitate both the decision-making and negotiation of the Single Act.

It is interesting that from 1885 to 1991 there was a remarkable lacuna in flexibility debate, especially in the literature. It seemed that only certain politicians (Kohl and Mitterand) were engaged in debates about flexibility.

The shift in the debate was to come with the signing of the Maastricht Treaty and institutionalization of functional flexibility in the form of EMU and the Social Chapter.

2.3. The third wave on the flexibility debate: 1992-1997

Much of the credit for the resurgence of flexibility literature can be given to the differentiated arrangements established in the Maastricht Treaty. The Treaty on the European Union (TEU) introduced an array of functional flexibility in areas such as EMU, Social Policy, Common

[10] A. Stubb (2002), 35.

Foreign and Security Policy (CFSP) and Judiciary and Home Affairs (JHA). The Maastricht Treaty thus stepped up the debate by introducing flexibility into major policy areas.

Two decades after Brandt and Tindemans, there were to be three documents which triggered the debate on flexible integration in relation to the 1996-97 IGC. The first of these was written by two prominent German politicians, Wolfgang Schäuble and Karl Lamers (1994) of the CDU/CSU coalition party. The second was written by the Prime Minister of the United Kingdom, John Major (1994), and the third by the then Prime Minister of France, Edouard Balladur (1994). Each of them illustrated various forms of flexibility, the political implications and context.

2.4. The fourth wave of the flexibility debate: 1997-2017

"The Treaty of Amsterdam has turned the exception into a constitutional principle". [11] Its formal constitutional recognition by the Amsterdam Treaty and its subsequent confirmation by the Treaties of Nice and Lisbon marked the beginning of the fourth wave of the flexibility debate.

3. Categories and Examples of Flexibility

The vernacular of flexible integration should be narrowed to three main concepts and divided into theoretical and practical flexibility. The sub-categories of theoretical discourse are multi-speed, variable geometry and à la carte. The corresponding sub-categories of the practical discourse are transitional clauses, enabling clauses and pre-defined flexibility together with case-by-case flexibility, respectively. These main sub-categories correspond to three variables signifying flexibility – time, space and matter. The distinctions between time, space and matter are used as ideal types, not absolute categorizations, because differentiated integration inevitably refers to different speeds for different Member States in different policy areas and sometimes in different integrative units. [12]

3.1. Multi-speed/transitional clauses

The definition of multi-speed integration and transitional clauses are very similar. The approaches signify integration in which member countries decide to pursue the same policies and actions, not simultaneously but at

[11] E. Phillipart, M. Sie Dhian Do, "From Uniformity to Flexibility: The Management of Diversity and its Impact on the EU System of Governance", in: *Constitutional Change in EU: From Uniformity to Flexibility* (eds. G. De Búrca, J. Scott), Hard Publishing, Oxford 2000, 300.
[12] A. Stubb (2002), 43-44.

different times. The vision is progressive in that, although admitting to differences, the Member States maintain that the same objectives will be reached by all of them in due time. In this sense, it is primarily concerned with *when* integration takes place.[13]

Multi-speed integration is not new within the EU framework. One can look back to the Treaty on European Community from 1958 to discover that each Member State had transitional periods in relation to particular national concerns. Successive enlargements also brought a range of long-term special arrangements for areas such as the Faroe Islands and Greenland.

Transitional periods can apply to new and old policy areas. The underlying idea is that the *acquis communautaire* is to be preserved and developed. Transitional clauses are often used in accession agreements to give a new Member State a transitional period in a particular area.

The Treaty also introduced a very important element of multi-speed into the development of Economic and Monetary Union (EMU). Under the terms of the Treaty, the European Council was obliged to decide whether a majority of Member States had fulfilled the convergence criteria and was ready to go forward to stage three of EMU and to adopt the single currency. With the exception of Denmark and the United Kingdom, the Member States set out common objectives which were to be reached in due course. It should, however, be pointed out that EMU illustrates that a specific policy area can reflect many forms of differentiation.[14]

The secondary legislation also portrays a wide variety of examples of multi-speed integration. Some examples are the progressive elimination of agricultural support prices, the gradual abolition of monetary compensatory amounts, the implementation of value added tax (VAT) and the approximation of national law. This list is extensive.

3.2. Variable geometry/enabling clauses

The next two concepts of flexibility, variable geometry and enabling clauses, can also be used interchangeably. Variable geometry can be defined as a mode of flexible integration which admits to irreconcilable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser-developed integrative units.[15] The corresponding variable of these two terms is *space*. A Europe differentiated by space goes further in institutionalizing diversity than integration differentiated by time. Whereas integration

[13] A. Stubb, "A Categorization of differentiated integration", *Journal of Common Market studies*, 2/1996, 283-295.
[14] A. Stubb (2002), 47.
[15] *Ibid.*

differentiated by time defines and maintains a wide range of common objectives and goals, integration differentiated by space takes a view beyond the common objectives. According to this view, Europe, in all its diversity, should always organize itself around a multitude of integrative units. The emphasis is *who opts into what*.[16]

There are numerous examples of variable geometry both outside the Union and inside the Treaty framework.

Within Europe, but outside the Union, the pre-Amsterdam arrangements of the Schengen Agreements are an example of a conglomeration of states which pursue deeper integration within a separate integrative unit. These differentiations are not a form of multi-speed integration because they are not a part of the common objectives established in the Treaties. Nor can they be considered as examples of à la carte integration mainly because they are forms of opting-in, as opposed to opting-out.[17]

Variable geometry existed inside the Treaty framework, in a non-institutionalized form, before the Amsterdam treaty. Former article 306, for example, refers to the pre-existing Benelux cooperation. In essence, article 306 is a form of variable geometry because it allows for a specific group of Member States to pursue integration in a general policy area, in this case outside the Treaty framework.

3.3. *A la carte*/case-by-case flexibility or predetermined flexibility

The third main concept of differentiation is pick-and-choose or à *la carte* flexibility. By definition, the culinary metaphor of a Europe à la carte allows each Member State to pick and choose, as from a menu, in which policy area they would like to participate while, at the same time, maintaining a minimum number of common objectives. This approach is focused on *matters*, that is, specific policy areas. The issue here is *what* the Member State opts out of. This stands in stark contrast to both multi-speed Europe, which defines common objectives towards which Member State strive (in due time) according to ability, and variable geometry, which institutionalizes differentiation of Member States in order to create space between the various integrative units or forms of integration.[18] *A la carte* integration corresponds to both case-to-case flexibility and predefined flexibility.

The classic example of à *la carte* flexibility can be found in the British derogation from the Social Chapter. Protocol 14 states that '…The United Kingdom…shall not take part in deliberations and in the adoption of… proposals made on the basis of this Social Protocol…'.

[16] *Ibid.,* 48-52.
[17] *Ibid.,* 50.
[18] A. Stubb, (1996), 283-295.

In sum, à *la carte*, much like multi-speed and geometry variable, has been a part of Community process from the beginning. It might not always have been the preferred form of flexibility, but it has helped the Community to overcome a log jam.[19]

4. The Institutionalization of Flexibility

The concept of flexibility has always been built into the foundations of the European construction. The enhanced cooperation provisions of the EU Treaties, whether in their Amsterdam or Nice or Lisbon guises, represent a key manifestation of a pervasive phenomenon in the EU: differentiated integration.[20]

4.1. The Treaty of Amsterdam

The Amsterdam Treaty (1997) constitutionalized a notion of closer cooperation, by introducing for the first time the formalized possibility for the future development of flexible integration under the Treaties, subject to certain conditions.

Provisions on closer cooperation, introduced by the Amsterdam Treaty, provided a set of general principles for closer cooperation, supplemented by specific principles applying to pillar one and pillar three. No general provision for closer cooperation was made within pillar two, where the possibility of introducing flexibility was limited to constructive abstention.

The technique used in the Treaty was to authorize the Member States wishing to engage in closer cooperation to make use of the institutions, procedures, and mechanisms laid down in the Treaty, provided that the cooperation complies with certain guarantees relating to the objectives of the EU, the principles of EC and EU, the protection of the *acquis communautiare* and the single institutional framework, and the commitment to use closer cooperation only as a 'last resort' mechanism. A specific authorization by the Council was also required for each instance of closer cooperation, which must involve a majority of Member States but must be open to the participation of all Member States.

According to the Amsterdam Treaty provisions, authorization for establishing closer cooperation will be provided by the Council acting by a qualified majority, on a proposal by the Commission, after consulting the European Parliament. In the event that one of the non-participating Member States become unhappy about the move to closer cooperation by the majority, that Member State had to cite the important and stated reasons of national

[19] A. Stubb (2002), 54.
[20] *Ibid*., 25.

policy and no vote will be taken. In that case, the Council might request, by a qualified majority, that the matter is to be referred to the European Council, which would itself decide by unanimity. This mechanism was termed 'emergency brake'.

Notwithstanding the innovatory character of the institutional dimension of these provisions, their practical utility has been regularly doubted in view of the severity of the conditions which need to be satisfied. The provisions were so restrictively drafted that it was difficult to conceive of the circumstances in which they could be used. However, the Treaty of Amsterdam, with its flexible agenda, should be seen as an opening rather than a closure, in terms of the development of the Treaty-based dimension of variable arrangements.[21]

4.2. The Treaty of Nice

The broad lines of the Nice Treaty amendments (2001) are rather easy to state. They raise the concern of the procedural conditions for engaging in flexibility and many of its substantive conditions.

As to the procedural conditions, the new provisions provided that the number of participating states had to be eight, even after Union enlarged. The emergency brake had largely been removed in pillar one and three. The substantive terms have also been changed, with the hurdles set by the cumulative conditions for EC Treaty flexibility being lowered. At the same time, the essential protections both for the non-participating Member States, for the institutions, and for the character of the Community legal order and the Union *acquis* were in large measure retained.

The role of the European Parliament in pillar one was marginally strengthened. The Parliament was given a veto over enhanced cooperation if it related to an area where legislation is normally to be adopted by co-decision. This was intended to protect democratic legitimacy. The already strong role of the European Commission was preserved.[22]

In regard to pillar two, the new Nice provisions formally established the possibility of enhanced cooperation but explicitly excluded matters having military or defence implications from the range of matters on which enhanced cooperation might be engaged.

4.3. The Treaty of Lisbon

Since the Lisbon Treaty (2009) merged together with the three pillars, there is no more difference between the procedures of initiating the enhanced cooperation mechanism in pillar one and pillar three.

[21] *Ibid.,* 91.
[22] J. Ćeranić, 28.

However, some specificity remained in the field of the Common Foreign and Security Policy.

With regards to the preparatory stage, conditions for triggering enhanced cooperation remain restrictive, according to the provisions of the Lisbon Treaty.[23] Building enhanced cooperation is only possible within the framework of the Union's non-exclusive competences[24] and it has to comply with the Treaties and the law of the Union.[25] Moreover, the aim shall be to further the objectives of the Union, protect its interests, and reinforce its integration process.[26] In this way, undermining the internal market or economic, social and territorial cohesion, discrimination in trade and distortion of competition between the Member States are to be prevented.[27] While enhanced cooperation can make use of common institutions and exercised competences by applying the relevant provisions of the Treaties,[28] the competences, rights and obligations of the "outs" are to be respected.[29] Enhanced cooperation shall not become an exclusive club, and hence the provisions of the Lisbon Treaty continue to demand that cooperation remains open at any time to all Member States.[30]

Only the "last resort" condition and the threshold for the minimum of participating Member States have been reformed. The "last resort" principle has been definitely removed by stating that the "last resort" can be established by the Council. The minimum number of Member States wishing to engage in enhanced cooperation is set at nine, instead of eight.[31] Nine States might currently be considered reasonable because it is a one-third of Member States out of EU twenty-seven countries (following UK's withdrawal).

When it comes to initiation, according to the Lisbon Treaty, Member States wishing to establish enhanced cooperation between themselves shall address a request to the Commission, specifying the scope and objectives of enhanced cooperation proposed, eliminating submitting a request directly to the Council.[32]

The Lisbon Treaty, for the first time, provides a possibility of initiating the enhanced cooperation mechanism in the field of Defense Policy, called Permanent Structured Cooperation.[33]

[23] Art. 20TEU; Art.326-334 TFEU; Art.46 TEU.
[24] Art. 20 (1) TEU.
[25] Art. 326 TFEU.
[26] Art. 20 (1) TEU.
[27] Art. 326 TFEU.
[28] Art. 20 (1) TEU.
[29] Art. 327 TFEU.
[30] Art. 20 (1) TEU.
[31] Art. 20 (2) TEU.
[32] Art. 329 (1) TFEU.
[33] Art. 46 TEU.

5. Enhanced cooperation as constitutional form of flexibility

Nowadays, the mechanism of enhanced cooperation has only been initiated twice: first in the area of the law applicable to divorce and legal separation and second in the area of unitary patent protection. The unitary patent system has not entered into force yet.

5.1. Enhanced cooperation in the area of the law applicable to divorce and legal separation

Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (also called Brussels IIa). While Brussels IIa had established common rules of jurisdiction based on a large number of connecting factors, it did not regulate what substantive law these courts would apply to divorce. It was claimed that the difference between national laws led to uncertainty regarding marriage dissolution and often, the law applied did not correspond to the legitimate expectations of EU citizens.[34]

Therefore, in July 2008 eight EU Member States[35] initiated enhanced cooperation area of the law applicable to divorce and legal separation. Thereafter, five Member States joined them.[36]

In July 2010, the Council authorized enhanced cooperation in the area of the law applicable to divorce and legal separation. It was justified on the basis of legal certainty, predictability, and in order to prevent a "rush to court" and/or "forum shopping".

Following the adoption of Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,[37] the new Regulation, known as the Rome III, took effect in the 14 participating Member States on 21 June 2012. The other EU Member States are permitted to sign up to the pact at a later date.[38]

In this way, an EU instrument that comprises uniform conflict-of-laws rules to designate the substantive law applicable to divorce and

[34] N. Natov, "Enhanced cooperation between the Member States in the area of law applicable to divorce and legal separation", in: *Multi-speed Europe* (eds. T. Baumgartner, A. Kellerhals), Europa Institute at the University of Zurich, Zurich 2011, 80.

[35] Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

[36] Bulgaria, France. Belgium, Germany and Latvia formally joined them, while Greece withdrew.

[37] Council Regulation (EU) No. 1259/2010 on 20 December 2010 implementing enhanced cooperation in the area of law applicable to divorce and legal separation, 2010, Official Journal L 343.

[38] Lithuania joined in 2014; Greece in 2015; Estonia will join in 2018.

legal separation was elaborated. The Regulation provides higher legal certainty for international couples. It represents the first application of the enhanced cooperation mechanism within the Treaty of Lisbon.

5.2. Enhanced cooperation in the area of unitary patent protection

Protection of patents in Europe essentially rests on national law only. The European patent as granted by the European patent Organization, while internationally uniform as to the conditions of the grant, represents but a "bundle" of as independent national patents as have been asked by the applicant. As a consequence, the terms of the exclusive right, which they confer upon their owner, are determinate by the various national laws. It is to remedy this territorially fragmented and more or less diverse protection that, since about half century, the EU attempts to establish an autonomous system of unitary patent protection of its own design, but has failed to achieve it whichever way it chose.[39]

In December 2010, twelve EU Member States[40] expressed their wish to establish enhanced cooperation in the area of the creation of unitary patent protection. Two days later, the Commission issued a proposal for enhanced cooperation.

In February 2011, thirteen Member States[41] addressed the Commission expressing their wish to join enhanced cooperation. Thus 25 Member States has officially initiated the enhanced cooperation. Outside the cooperation remained Italy and Spain only. In March 2011 the Council authorized a group of 25 Member States to implement enhanced cooperation in the area of unitary patent protection.[42]

Finally, in December 2012 the European Parliament and the Council adopted the unitary patent package consisted of three components: two regulations (Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection[43] and Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection

[39] H. Ullrich, „Harmonizing Patent Law: The Untamable Union Patent", *Max Planck Institute for Intellectual Property and Competition Law Research Paper*, 3/2012, 1-59.

[40] Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and United Kingdom.

[41] Belgium, Bulgaria, Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia.

[42] J. Ćeranić, *Unitarni patent*, Institut za uporedno pravo u Beogradu i Pravni fakultet Univerziteta u Banjaluci, Beograd 2015, 39-40.

[43] Regulation (EU) No 1257/2012 on 17 December 2012 of the European parliament and of the Council implementing enhanced cooperation in the area of the creation of the unitary patent protection, 2012, Official Journal L361.

with regard to the applicable translation agreements)[44] and the Agreement on a Unified Patent Court (UPC Agreement).[45]

The EU regulations establishing the unitary patent system entered into force on 20 January 2013, but they will only apply as from the date of entry into force of the UPC Agreement, that is, on the first day of the fourth month following the deposit of the 13th instrument of ratification or accession (provided those of the three Member States in which the highest number of European patents had effect in the year preceding the signature of the Agreement, i.e. France, Germany and the United Kingdom, are included).

Currently, all EU Member States except Croatia and Spain are participating in this enhanced cooperation. The participating Member States are currently working under the assumption that the unitary patent will become operational during the course of 2018.

6. White Paper on the Future of Europe

Many of the profound transformations Europe is currently undergoing are inevitable and irreversible. Other are harder to predict and will come unexpectedly. In order to categorize them to the best ability, Jean Claude Junker presents five scenarios for Europe by 2025 in White Paper on the future of Europe, in Mach 2017.[46] The starting point for each scenario is that the 27 EU Member States move forward together as a Union. The presented possibilities range from the *status quo* to a change of scope and priorities, to a partial or collective leap forward.

According to Scenario 1: *Carrying on*, the EU focuses on delivering its positive agenda.[47] According to Scenario 2*: Nothing but the single market*, the EU is gradually re-centred on the single market.[48] Scenario 4: *Doing less more efficiently* suggests that the EU focuses on delivering more and faster in selected policy areas while doing less elsewhere.[49] According to Scenario 5: *Doing much more together* the EU decides to do much more together across all policy areas.[50]

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[44] Council Regulation (EU) No 1260/2012 on 17 December 2012 implementing enhanced cooperation in the area of the creation of the unitary patent protection with regard to the applicable translation agreements , 2012, Official Journal L361.

[45] The Agreement on a Unified Patent Court, *https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf*, last visited 5 December 2017.

[46] White Paper on the future of Europe, European Commission, COM(2017)2025 of 1 March 2017.

[47] *Ibid*., 16-17.

[48] *Ibid.,* 18-19.

[49] *Ibid*., 22-23.

[50] *Ibid*., 24-25.

In accordance with Scenario 3: *Those who want more do more*, the EU allows willing Member States to do more together in specific areas.[51] Thus the EU consisted of 27 Member States proceeds as today but certain Member States which want to do more in common, one or several "coalitions of willing" emerge to work together in specific policy areas. These may cover policies such as defence, internal security, taxation or social matters.

As a result, new groups of Member States agree on specific legal and budgetary arrangements to deepen their cooperation in chosen domains. As was done for Schengen area or the euro, this can build on the shared EU framework and requires clarification of rights and responsibilities. The status of other Member States is preserved, and they retain the possibility to join those doing more over the time.

By 2025 a group of Member States decides to cooperate much closer on defence matters, making use of the existing legal possibilities. Several countries move ahead in security and justice matters. Also, a group of countries, including the euro area and possibly few others, chooses to work much closer notably on taxation and social matters. Further progress is made at 27 to strengthen the single market and reinforce its four freedoms. Relations with third countries, including trade, remain managed at EU level on behalf of all Member States.

The positive side of this scenario is that the unity of the EU is preserved while further cooperation is made possible for those who want. However, citizens' rights derived from EU law start to vary depending on whether or not they live in a country that has chosen to do more. Questions arise about the transparency and accountability of the different layers of decision-making. The gap between expectations and delivery starts to close in the countries that want and choose to do more.

7. Concluding remarks

Nowadays, the European Union is struggling with its worst financial, economic and social crisis in post-war history. However, the current situation need not necessarily draw the limit for Europe's future. Europe has always been at a crossroads and has always adapted and evolved.

Taking into account the existing heterogeneity among the Member States and all challenges that EU is currently facing (*inter alia* the United Kingdom's decision to leave the EU), it is clear that the concept of the European integration process has to be redefined. Some lessons can be learnt from the past.

[51] *Ibid*., 20-21.

Broader, more historically oriented views of European integration might provide a suitable conceptual framework for courses concentrating on policymaking in the EU. In this respect, flexibility concept is of a great importance.

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KONCEPT FLEKSIBILNOSTI U KONTEKSTU EVROPSKIH INTEGRACIJA – EVOLUCIJA, PREGLED I PERSPEKTIVE

Rezime

Rad predstavlja pokušaj da se osvetli značaj koncepta fleksibilnosti u kontekstu evropskih integracija. Koncept fleksibilnosti je samog početka prisutan u okviru evropskog integracionog procesa. Iako formalno dugo nije bio priznat, još od osnivanja Evropskih zajednica ovaj koncept primenjivan je u različitim oblastima saradnje. Rad se najpre fokusira na evoluciju teoretske i praktične debate o fleksibilnosti (Poglavlje 2), nakon čega sledi analiza kategorija i primera fleksibilnosti u istoriji evropskih integracija (Poglavlje 3). Koncept fleksibilnosti institucionalizovan je Ugovorom iz Amsterdama u vidu odredbi o bližoj saradnji. S obzirom na veoma stroge uslove za pokretanje bliže saradnje, ovaj mehanizam izmenjen je i dopunjen Ugovorima iz Nice i Lisabona (Poglavlje 4). Do danas mehanizam bliže saradnje formalno je pokrenut samo dva puta: prvi put u oblasti prava koje se primenjuje na razvod i pravno rastavljanje i drugi u oblasti uspostavljanja unitarne patentne zaštite (Poglavlje 5). Uzimajući u obzir krizu u kojoj se Evropska unija nalazi još od 2008. godine, Evropska komisija je, u martu 2017. godine, objavila Belu knjiga o budućnosti Evrope. Komisija predlaže pet scenarija, tj. pet različitih integracionih modela za prevazilaženje krize u EU. Jedan od njih je diferencirana integracija koji počiva upravo na konceptu fleksibilnosti (Poglavlje 6).

Ključne reči: fleksibilnost, evropske integracije, Evropska unija, diferencirana integracija, bliža saradnja.