

# The feasibility of enhanced cooperation on the Pact on migration and asylum

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- ▶ The case for differentiated integration
- ▶ Identifying a new legal issue concerning enhanced cooperation
- ▶ A glance at parallel treaty-option
- ▶ Looking at the rules on enhanced cooperation in search for an answer in general terms
- ▶ Tailoring an answer on a reform of the “Dublin rules”

# CONTENT

# The case for differentiated integration

- political stalemate on a substantial reform of the current legislation (enhanced cooperation as a last resort)
- ownership of new rules (is majority voting desirable?)
- vulnerability of concerned persons (is forcing the hand on Member States a good idea?)



**A new legal issue:**

do the EU treaties allow differentiated integration on rules that, in the relations amongst participating states, **waive existing rules** applicable to **all** of the Member States?



A new legal issue...

... as applied to enhanced  
cooperation

➤ enhanced cooperation would be developed in **matters that are already the subject of EU secondary law**

➤ **Non-participating** member states would remain **bound by current rules**

enhanced cooperation in an area where **a substantial body of EU rules is already in force**, in such a way as to establish **important exceptions** to those rules to be applied **only to participating states?**

- ▶ Enhanced cooperation is about the exercise of a **Union's** competence, **not a State's competence.** >> treaty-established limits to the exercise of shared competences do not apply
- ▶ Article 20 TEU «Enhanced cooperation should aim to further the objectives of the Union, protect its interests and reinforce its integration process»
- ▶ Article 326 TFEU «Any enhanced cooperation shall comply with the treaties and Union law»
- ▶ Objective of enhanced cooperation

**GENERAL**  
(i.e. remarks applicable to  
any subject matter)

Answer - as generally applicable to any area  
of Unoon's (shared) competence

Business as usual





A new legal issue..... as applied to parallel treaty

Could a **parallel treaty** among a limited number of member states accomplish differentiated integration **in an area where the Union has already exercised its competence?**

## ► Preliminary issue

Could a **parallel treaty** among a limited number of member states accomplish differentiated integration **instead of enhanced cooperation**?

► An obiter dictum in Pringle [2012]

The Court refused to declare that the conclusion of the EMS Treaty was prevented by Article 20 TEU (i.e. by the availability of an institutional tool for differentiated integration) on the ground that the Union did not have a specific competence on establishing a mechanism for financial stability

- Joined Cases C-181/91 & 248/91, Parliament v. Council [1993]; Case C-316/91, Parliament v. Council [1994]; Case C-91/05, Commission v. Council [2008]

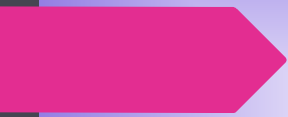
Court was open to treaties among the member states in areas where they were exercising their competence by means of inter se treaties → NOT areas of shared competences

Enhanced cooperation as **the sole tool for differentiated integration** in areas of shared competences  
*[a theory of the speaker (-:)]*

## An Answer anyway

- Art. 2(2) TFEU and Protocol 25

Parallel treaties **could never be used** for «elements» governed by EU law already



Tailoring an answer on a reform  
of the “Dublin rules”  
(RAMM proposal)  
(Crisis and *force majeure* proposal)

\* **Solidarity conditionality?** Article 326, second subparagraph: economic, social and territorial cohesion should **not be undermined** by enhanced cooperation

\* **Article 20, para. 1**

**no lowering** of the level of solidarity

**what upgrade** for solidarity?

\* **A choice of states?** Not in an open procedure... yet conditions (Article 328 TFEU)

\* **The impact of solidarity deepening on non-participating states** (Article 327 TFEU)

## A dual-speed solidarity?