

**COMMENT ON *KINGDOM OF SPAIN V. COUNCIL*  
*ITALIAN REPUBLIC V. COUNCIL* (CASES C-274/11 AND C-295/11)**

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**Introduction**

The tendencies to differentiate integration processes in terms of time and scope have been present in the European Communities practically from the beginning of their functioning. These tendencies have grown stronger each time alongside subsequent enlargements of the Communities (and then – the European Union) and with the extension of competencies conferred upon the organization by its Member States. Amendments to the Treaties resulting in an extension of the geographic and substantive scope of integration provoked discussions about the feasibility of uniform integration at the same time by all Member States. The examples are numerous: Schengen Agreements, Protocol on Social Policy, Economic and Monetary Union, Protocols concerning the particular status granted to the United Kingdom, Ireland and Denmark within the framework of the Area of Freedom, Security and Justice. These tendencies towards differentiation reached their culmination point in the Treaty of

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Amsterdam, which introduced the mechanism of enhanced cooperation into EU primary law. The new provisions introduced into the Treaties enable a group of Member States to establish between themselves enhanced cooperation within the framework of the EU, provided that particular requirements defined in EU law are respected.

Following several amendments by the Treaty of Nice and the Treaty of Lisbon, the clauses enabling enhanced cooperation (so called: ‘enabling clauses’) are to be found in Article 20 TEU and Articles 326-334 TFEU. Any enhanced cooperation established in the framework of the EU must:

- be established within the framework of Union’s non-exclusive competences,
- be established by at least 9 Member States,
- aim to further the objectives of the Union, protect its interests and reinforce its integration,
- be open at any time to all Member States,
- comply with the Treaties and the Union law,
- avoid undermining the internal market or economic, social and territorial cohesion,
- avoid constituting a barrier to or discrimination in trade between Member States and avoid distortion of competition between them,
- respect the competences, rights and obligations of non-participating Member States
- be decided as a last resort.<sup>1</sup>

Enhanced cooperation within the EU may be established after an authorizing decision is adopted by the Council, acting by qualified majority, on a proposal from the European Commission and after obtaining the consent of the European Parliament.<sup>2</sup>

The ‘enabling clauses’ introduced into EU primary law were considered to be a positive change in the logic of integration within EU. The main point of interest was shifted from those Member States being the least enthusiastic about further integration to those Member States willing and able to go further and faster towards integration within the competencies of the EU. At the time, when the ‘enabling clauses’ were introduced into the Treaties, they were hoped to be an efficient tool to make the inte-

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<sup>1</sup> See to this effect: Article 20(1) TEU, Article 326 and 327 TFEU.

<sup>2</sup> See to this effect Article 329 TFEU.

gration process more efficient. At that time it seemed that the 'enabling clauses' could help to avoid a situation in the future, when those Member States which are unwilling to adopt common rules in a new domain would again be granted opt-outs as the price for their consent to amending the Treaties. This was the lesson from the past, for example, in Maastricht – when the United Kingdom and Denmark were granted opt-outs concerning EMU, as well as in Amsterdam – when the United Kingdom, Ireland and Denmark were granted special status concerning the Schengen *acquis* incorporated into the EU legal framework. For that reason the provisions enabling enhanced cooperation were to be considered as an important step forward for the more effective functioning of the EU. Moreover, it was considered that the threat of being excluded from cooperation could induce any hesitant Member States to change their approach.

Conversely, it was argued that the 'enabling clauses' would make it possible for a group of Member States to commence cooperation without hesitant Member States which were unable to participate in it for economic and/or social reasons (meaning reasons other than the absence of political consent). Establishing enhanced cooperation could – in extreme cases – result in leaving some Member States at the margins of the integration processes. It was argued, however, that the above mentioned requirements for enhanced cooperation within the framework of the EU aimed exactly at preventing such a scenario.<sup>3</sup>

It must not be ignored, however, that any respect for the substantive conditions for enhanced cooperation within the framework of the EU would be illusory without effective judicial control being exercised by the EU courts. It is clear that all three institutions involved in establishing enhanced cooperation within the EU share a common responsibility for respecting the above mentioned requirements. Still, it is of fundamental importance whether the Court of Justice is capable and willing to review the legality of enhanced cooperation in the light of the Treaties. The ruling of the Court of Justice in the present case shows that, unfortunately, such judicial control has been illusory to date.

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<sup>3</sup> These are the conclusions formulated in the doctoral dissertation published in 2005: M. Szwarc, *Zróźnicowana integracja i wzmocniona współpraca w prawie Unii Europejskiej*, [*Differentiated integration and enhanced cooperation in the EU law*] Warszawa 2005, in particular p. 283.

## 2. Factual and Legal Background of the Case

In joined cases C-274/11 and C-295/11, Spain and Italy sought to annul Council Decision 2011/167/EU authorizing enhanced cooperation in the area of the creation of unitary patent protection<sup>4</sup>. This decision was adopted following negotiations concerning the establishment of a system of unitary patent protection which were blocked due to the position of Spain and Italy, which were unwilling to accept the language arrangements of the system. It was envisaged to be based on English, German and French, to the exclusion of Italian and Spanish. The legal basis for unitary patent protection – Article 118 TFEU – necessitates unanimous voting in the Council, which means that a veto exercised by at least one Member States prevents adoption of the act. So, following years of discussions and negotiations, the institutions faced the realistic prospect of a lack of consensus, so the procedure for authorizing enhanced cooperation commenced. This procedure ended with the adoption of Council Decision 2011/167/EU, the legality of which was challenged in the commented case.

The substantive issues of unitary patent protection and the political background of enhanced cooperation in this field have been presented and analyzed elsewhere<sup>5</sup>, so the present commentary focuses only on the legal implications of the ruling for the application and interpretation of ‘enabling clauses’.

## 3. Judgment of the Court of Justice

The applicant Member States forwarded five pleas in law and the Court considered all of them. First, the Court rejected the claim that

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<sup>4</sup> O.J. 22.03.2011, L 76, p. 53.

<sup>5</sup> A. Nowicka, *Patent europejski a próby ustanowienia patentu Unii Europejskiej* [European patent and initiatives to establish unitary patent of European Union], ‘Ruch Prawniczy, Ekonomiczny i Społeczny’ 2010, no 4, at pp. 39–60; K. Szczepanowska-Kozłowska, *Czy patent jednolity jest potrzebny – głos w dyskusji* [Is unitary patent necessary?], ‘Europejski Przegląd Sądowy’ 2013, no 4, at pp. 4–11; E. Gromnicka, *Systemowe aspekty jednolitej ochrony patentowej w UE* [Systemic aspects of the unitary patent protection in European Union], ‘Europejski Przegląd Sądowy’ 2013, no 4, at pp. 24–31.

the Council lacked the competence to establish enhanced cooperation. It had to decide whether Article 118 TFEU, which confers on the Union the competence to create European intellectual property rights and to create, as regards those rights, centralized, Union-wide authorization, coordination and supervision, must be considered to constitute an exclusive competence of the Union or, alternatively, a non-exclusive competence. This was important to decide whether the condition laid down in Article 20(1) TEU had been complied with. The Court analyzed the wording of Article 3(1)(b) TFEU, granting the Union exclusive competence in the field of 'competition rules necessary for the functioning of the internal market' and the wording of Article 4(2)(a) TFEU, granting the Union non-exclusive competence in the field of the 'internal market'. It also referred to Article 26(2) TFEU, which provides the Union with the competence to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. The Court concluded that the expression 'relevant provisions of the Treaties' makes it clear that competences falling within the sphere of the internal market are not confined to those conferred by Articles 114 and 115 TFEU, but also extend to any other competence concerning the objectives set out in Article 26 TFEU, such as those competences conferred by Article 118 TFEU. For these reasons, the competences conferred by Article 118 TFEU fell within the area of shared competences for the purpose of Article 4(2) TFEU and were, in consequence, non-exclusive. Accordingly, the condition laid down in Article 20(1) TEU had been complied with as regards the enhanced cooperation in question and this plea was rejected.<sup>6</sup>

The Court also rejected a plea based on the misuse of powers. The applicant Member States claimed that the true object of the contested decision was not to achieve integration (as required by the second paragraph of Article 20(1) TEU) but, rather, to exclude Spain and Italy from negotiations concerning the language arrangements for the unitary patent and to deprive those Member States of their right to oppose language arrangements which they were unable to approve. The Court rejected the arguments of the applicants, stating that the Treaties do not exclude the situation when enhanced cooperation is

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<sup>6</sup> Paras 16-25 of the judgement.

established in a domain where competences should normally be exercised by the Council acting unanimously. The Council's decision to authorize enhanced cooperation, which is adopted by qualified majority, by no means constituted circumvention of the requirement for unanimity laid down in the second paragraph of Article 118 TFEU. In the opinion of the Court, this was not a case of misuse of powers, but rather, "having regard to its being impossible to reach common arrangements for the whole Union within a reasonable period" it is contribution to the process of integration.<sup>7</sup>

The applicant Member States also argued that the contested decision breached the 'last resort' condition. This plea was also rejected by the Court, which accepted that a wide margin of discretion had been left to the institutions, in particular to the Council. This issue will be commented upon later.

The fourth plea was based on an alleged breach of the particular substantive conditions for enhanced cooperation, namely that the cooperation: must aim at furthering the objectives of the Union, protecting its interests and reinforcing its integration process; must be in conformity with the Treaties and the Union law (Article 118 TFEU in this case); shall not undermine the internal market or economic, social and territorial cohesion nor constitute a barrier to or discrimination in trade between Member States, nor distort competition between them and that must respect the competences, rights and obligations of those Member States which do not participate in it. None of the arguments raised by the applicant Member States were accepted. It is interesting to note that the Court of Justice did not really enter into a legal analysis of the effects of the enhanced cooperation in question to the process of integration, in particular effects for the internal market or competition between the Member States. The reasoning of the Court (or rather – the absence of reasoning in this respect) will be commented upon below.

The last plea of the applicant Member States concerned the alleged disregard for the judicial system of the Union. Their arguments were once again rejected by the Court of Justice, which ruled that the Council was not obliged to provide in the contested decision further information with regard to the possible content of the system adopted by the participants

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<sup>7</sup> Paras 33–37 of the judgement.

in the enhanced cooperation in question. Consequently, the review of the legality of the enhanced cooperation was limited strictly to the authorizing decision in question, and no account was taken of the substantive effects of the enhanced cooperation established as a result of this decision.

#### 4. Comment

As indicated in the introductory remarks, the ruling is interesting primarily because it verified in practice the feasibility of judicial control of enhanced cooperation within the EU. The limited – not to say illusory – scope of such review results from two factors, which will be outlined below: first is the text of an authorization decision itself, which makes substantive review impossible in practice, second is reluctance of the Court to conduct such substantive review in order to avoid usurping the EU legislature with its own policy choices. In addition, a third issue will be dealt with – that of the role ‘enabling clauses’ play in the process of integration and in the decision-making processes.

##### **4.1. Limited Scope of Judicial Review of Enhanced Cooperation Resulting from the Nature of an Authorizing Decision**

The feasibility of a review as to whether or not the envisaged enhanced cooperation conforms to the requirements of EU law depends upon the content of an authorizing decision itself. In other words, the more concise an authorizing decision is, the more difficult any review of the conformity of enhanced cooperation with EU law becomes. For that reason, at the time when ‘enabling clauses’ were introduced into the EU law it seemed reasonable to assume that an authorizing decision should take shape of an act, containing all the substantive conditions of the enhanced cooperation in question. It seemed reasonable to exclude an authorizing decision consisting of 2 articles (stating vaguely the scope and participating Member States), because this would give rise to consent *in blanco* and would make judicial review illusory in practice.<sup>8</sup> The practice of enhanced cooperation verified this assumption negatively.

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<sup>8</sup> M. Szwarc, *supra*, p. 222.



The authorizing decisions adopted to date consist *exactly* of two articles, stating that the enhanced cooperation is authorized between the Member States mentioned therein and formulating rather vaguely the subject of the enhanced cooperation. This is the case as regards Decision 2010/405/EU of 12.7.2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation,<sup>9</sup> Article 1 of which enumerates the Member States participating in the enhanced cooperation “in the area of the law applicable to divorce and legal separation”. This is also the case of the contested Decision 2011/167/EU of 10.3.2011, Article 1 of which enumerates the Member States participating in the enhanced cooperation “in the area of the creation of unitary patent protection”. The substantive conditions of the enhanced cooperation in both cases were defined later, in acts of enhanced cooperation adopted after the authorization decisions, namely: Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>10</sup> and 2 regulations concerning unitary patent protection: Regulation 1257/2012/EU implementing enhanced cooperation in the area of the creation of unitary patent protection<sup>11</sup> and Regulation 1260/2012/EU implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.<sup>12</sup>

As a consequence, the judicial review of an authorizing decision is in practice based on an analysis of the recitals in its preamble. Since such recitals are formulated in quite general terms, such review is likely to lead to the conclusion that the envisaged enhanced cooperation is in conformity with the requirements stemming from Article 20 TEU and Articles 326-327 TFEU. In these circumstances the judicial review of enhanced cooperation at the moment of authorization is rather illusory and any genuine review of the substantive effects of enhanced cooperation for the EU is postponed until the judicial review of the acts adopted in the framework of enhanced cooperation, containing the substantive provisions.

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<sup>9</sup> O.J. 22.07.2010, L 189, pp. 12–13.

<sup>10</sup> O.J. 29.12.2010, L 343, pp. 10–16.

<sup>11</sup> O.J. 31.12.2012, L 361, pp. 1–8.

<sup>12</sup> O.J. 31.12.2012, L 361, pp. 89–92.



The acceptance of such a limited scope of review by the Court of Justice can be traced back in two points of its argumentation. First, the Court rejected as inadmissible the argument of the applicant Member States that the enhanced cooperation breached the second paragraph of Article 326 TFEU, stating that the cooperation in question “shall not undermine the internal market or economic, social and territorial cohesion [and] shall not constitute a barrier to or discrimination in trade between Member States, nor shall not distort competition between them”. The Court considered that, insofar as the applicants made reference to the language arrangements considered in recital 7 in the preamble of the contested decision, the compatibility of those arrangements with Union law may not be examined in the present actions. The language arrangements, mentioned in recital 7, corresponded, according to the court, to a proposal by the Commission and they did not form a component part of the contested decision<sup>13</sup>. Advocate General Y. Bot shared this view in his opinion, saying that “judicial review of the authorization decision must not be confused with judicial review of the acts subsequently adopted within the context of the enhanced cooperation”.<sup>14</sup>

Second, when the Court rejected the argument of the applicant Member States that the contested decision disregarded the judicial system of the Union. The Court considered the fact that the scope and objectives of the enhanced cooperation proposed were indicated in recitals 6 and 7 of the preamble to the contested decision. It subsequently concluded that “the Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question”. It went on to state that

The sole purpose of that decision was to authorize the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TWE and 326 to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judiciary sphere.<sup>15</sup>

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<sup>13</sup> Paras 76–77 of the judgment.

<sup>14</sup> Para 137 of the opinion of AG Bot.

<sup>15</sup> Para 92 of the judgment, in the same vein AG Bot in paragraphs 97–99 of his opinion.

Consequently, the Court again rejected the plea as inadmissible.

The view expressed by the Court in this respect is fully comprehensible, taking into account that it is impossible to control a proposal for an act or an act which has not been contested in the proceedings in question. Conversely, however, the negative result of such legal circumstances is that it is very easy to state on the basis of an authorizing decision that this particular case of enhanced cooperation respects the requirements of EU law. Still, to effectively review the enhanced cooperation the applicants must contest acts adopted subsequently in the framework of enhanced cooperation. Actually this is the case here, since Spain brought an action for annulment of the Regulations establishing enhanced cooperation in the field of unitary patent protection.<sup>16</sup>

#### **4.2. Limited Review of Enhanced Cooperation Stemming from the Reluctance of the Court to Replace the EU Legislature**

The judicial review of an authorizing decision is limited not only due to the text of decision itself (as indicated above), but also due to the approach adopted by the Court as regards its jurisdiction to review the Council's decision.

AG Bot recognized the circumstances that the choice of establishing enhanced cooperation is made by the institutions, namely the Commission, the European Parliament and the Council, who are “required to assess, on the basis of numerous elements, the effects of the enhanced cooperation, to weigh up the various interests at stake and to make political choices on matters within their own area of responsibility.” He then noted that the Court has always recognized “that the EU legislature has a wide discretion as to the nature and scope of the measures to be taken in the areas of Union action. It thus confines itself to reviewing whether, in the exercise of that freedom of choice, the EU legislature has made a manifest error or misused its powers or has manifestly exceeded the bounds of its discretion”.<sup>17</sup>

The Court of Justice followed the reasoning of Advocate General. In its argumentation rejecting the alleged breach of the “last resort” condition,

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<sup>16</sup> Spain v. European Parliament and Council C-146/13, pending.

<sup>17</sup> Opinion of AG Bot, paras 28–29.

the Court argued that: “the Council, in taking that final decision, is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future. The Court, in exercising its review of whether the condition that a decision authorizing enhanced cooperation must be adopted only as a last resort has been satisfied, should therefore ascertain whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council”.<sup>18</sup> So the only control exercised by the Court was to make sure, that in the recitals 3 and 4 in the preamble to the contested decision, the several stages in preparation of unitary patent protection at Union level were presented.

Such an approach of exercising only limited judicial review is also visible in the very concise argumentation of the Court, rejecting the plea based on the alleged breach of the substantive conditions for enhanced cooperation within the EU. The Court did not really get involved in any in-depth analysis of the effects the contested decision could have on the integration process, in particular regarding the internal market or competition. It limited itself to merely verifying whether such considerations were taken into account in the preamble to the contested decision.

The approach adopted by the Court, accepting that a wide discretion had been left to the institutions, in particular to the Council, makes effective judicial control of enhanced cooperation very difficult, if not impossible. Assuming that the applicant involves in a judicial control of an act of enhanced cooperation, effective judicial review also will be very difficult, for the same reason, namely the wide discretion left to the institutions.

Again, the reluctance of the Court of Justice is comprehensible, when one takes into account that, in reality, the establishing of enhanced cooperation is a political choice. In this respect, the judicial review of enhanced cooperation is similar to judicial review of the subsidiarity principle. In this context, the Court has also shown a considerable reluctance to control policy choices made by the institutions. The negative

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<sup>18</sup> Paras 53–54 of the judgment.

consequence of such an approach is, however, quite considerable. In practice, even if the substantive conditions for enhanced cooperation within the EU (Article 20(1) TEU and Articles 326–327 TFEU) are to guarantee the unity of the EU and to respect its fundamental principles, such as internal market or fair competition rules, it transpires that there are no effective tools to verify the choices made by the institutions. This may be dangerous, in particular for Member States excluded from enhanced cooperation (whatever the reasons for such exclusion), because the choices made by the institutions will be immune from judicial control.

### **4.3. Role of Enhanced Cooperation in the Decision-making Processes**

This judgment of the Court also raises an issue concerning the role of enhanced cooperation in the integration process. The Court expressed its view in this regard in its considerations concerning the alleged misuse of powers by the Council and the alleged breach of the ‘last resort’ condition. Both pleas were rejected, primarily – as was indicated above – due to a wide margin of discretion left to the Council. Interpreting Article 20(2) in this context, the Court stated that the ‘Treaties’ provisions “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” and that the impossibility referred to in Article 20(2) TEU

[m]ay 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.<sup>19</sup>

The Court also referred to the role that enhanced cooperation may play in the overcoming of a voting blocking when unanimity is necessary. This was the second plea of the applicant Member States. The Court stated that “nothing in Article 20 TEU or in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according

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<sup>19</sup> Para 36 of the judgment.

to the Treaties, be exercised unanimously”<sup>20</sup>. In connection with the last resort condition, the Court concluded, that

[a] decision to authorize enhanced cooperation, having found that the unitary patent and its language arrangements could not be established by the Union as a whole within a reasonable period, by no means constitutes circumvention of the requirement of unanimity laid down in the second paragraph of Article 118 TFEU or, indeed, exclusion of those Member States that did not join in making requests for enhanced cooperation.

It also added that such a decision, provided that it is in conformity with other requirements for enhanced cooperation, rather contributes to the process of integration – when it is impossible to reach common arrangements for the whole Union<sup>21</sup>.

Thus the Court confirmed exactly the logic of enhanced cooperation utilized to overcome a deadlock in a specific matter<sup>22</sup>. The ‘enabling clauses’ may be used when, because of the veto of a Member State, it is impossible for the Union to act as a whole. The use of enhanced cooperation then becomes a tool to overcome a situation wherein one member state may pose its veto. The Court also admitted that there are two main reasons for a veto: either a Member States is uninterested in the cooperation (for political reasons) or it is unable to participate in the cooperation (for economic or social reasons). It is clear that enabling clauses may be used in both cases, since their main goal is to enhance the effectiveness of the integration processes.

## 5. Concluding Remarks

The analysis of the commented ruling confirms that the conclusions arrived at in 2005 as regards the role of enhanced cooperation in the integration process remain valid. The Court confirmed that ‘enabling clauses’ may be validly used in order to overcome a veto from one or

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<sup>20</sup> Para 35 of the judgment.

<sup>21</sup> Para 37 of the judgment.

<sup>22</sup> Using the terms applied by AG Bot, see to this effect paras 108–126 of his opinion.

several Member State(s), which makes it impossible to adopt a measure falling within the non-exclusive competence of the EU binding for the EU as a whole. It is evident from the ruling that the use of 'enabling clauses' will not be deemed to constitute a circumvention of the unanimity requirement, stemming for example from Article 118 TFEU, nor the qualified majority requirement (if enhanced cooperation is established on a different legal basis). According to the Court, if all other requirements for enhanced cooperation are fulfilled, a decision authorizing such cooperation is treated as a tool to reinforce integration and to make such integration more effective.

At the same time, the practice of enhanced cooperation and the ruling of the Court, which hold it valid and legal in the light of the Treaties, requires a new assessment of the practical scope of EU judicial review. As indicated above, the judicial review of enhanced cooperation in light of the requirements stemming from the Treaties is very limited or even illusory. Firstly, because the Court has accepted that review should be undertaken separately concerning an authorizing decision and acts of enhanced cooperation. When an authorizing decision is very concise the review of enhanced cooperation is illusory and necessitates new proceedings concerning the legality of the adopted act of enhanced cooperation. Secondly, because the Court has accepted a very limited scope of substantive review. It has accepted that a wide margin of discretion was left to the institutions when making policy choices. For that reason, it will be very difficult to effectively undermine not only an authorizing decision, but also acts of enhanced cooperation in the future.