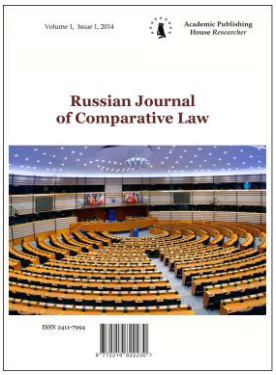

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The Principle of Flexibility in the European Union: Before and After Constitutionalisation

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Abstract

The principle of flexibility was first introduced in the European Community in the late 1950s and is a natural result of European integration. The peculiarity of functioning of this principle in the EU is that it was first fixed in practice and only then in law. Examples of the flexible approach are the Schengen agreements, which united five states of Europe in the beginning, the so-called adaptation provisions of the treaty of accession of new member states to the EU, the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it. After the principle of flexibility was introduced into the European law in accordance with the Treaty of Amsterdam and later on in the Treaty of Nice and the unsuccessful Constitution for Europe, it has never been used. Only after the Treaty of Lisbon of 2007 there appeared the three examples of practical implementation of the principle of flexibility in the EU.

The hypothesis of the article is that the principle of flexibility was more widely used in the practices of the European Union before its constitutionalisation in the EU founding documents. The arguments can be found in the rather strict regulations of the mechanism in the founding documents.

Keywords: the principle of flexibility, the European Union, differential integration, enhanced cooperation, multi-speed Europe, the Treaty of Lisbon.

1. Introduction

The principle of flexibility was taken by the European Union from constitutional theory and practice of such European countries as Germany, Switzerland, Belgium, France, and Spain, in which it is a constitutional principle and is manifested in a horizontal contractual relationship between the constituent units of federations and between the administrative-territorial entities of unitary states as well as in vertical contractual relations between federations and their constituent units (Shaikhutdinova, 2016: 139).

The principle of flexibility in the federal context means the treaty arrangements among constituent units (the horizontal dimension) and between a federal center and constituent units (the vertical dimension) in further widening and deepening mutual cooperation, going far beyond the margins established in the relevant federation (Steyger, 2002). It is a constitutional principle in a number of federations worldwide, such as Germany, Switzerland, the USA and the Russian Federation (Goudappel, 2002: 29).

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The principle of flexibility was first introduced in the European Community in the late 1950s and was formulated by the Minister of European Affairs of Spain Carlos Westendorp in his report of 5 December, 1995. The principle of flexibility is a natural result of European integration. It was originally intended to exercise the so-called "linear integration", the essence of which was that all States move at the same tempo without any exceptions and transitional periods. In the course of accession of the new states to the Communities this system became more and more unrealistic. The idea of a flexible approach to merging of the European states, which implies granting freedom of choice to the Member States, arises along with the idea of integration of the European states (Schimmelfennig et al., 2015: 764).

The principle of flexibility was first introduced into the European law in accordance with the Treaty of Amsterdam. A clear procedure for the establishment of flexible integration relations was established under the name of "closer cooperation" (Chauvet, 1998). This procedure was significantly changed by the Treaty of Nice, which came into force in 2003. The Nice Treaty uses the term "enhanced cooperation". The Treaty of Lisbon 2007 concretizes and extends the scope of enhanced cooperation in the European Union. Currently, the principle of flexibility means the possibility for a certain number of EU member states to deepen integration in any sphere through the use of the institutions, procedures and mechanisms of the Union. At the same time, the European Union Member States, which were not included for any reason in the leading group, may join later, upon the occurrence of the necessary conditions (Shaikhutdinova, 2007).

2. Materials and methods

The main sources for analysis were the European Union founding treaties, international agreements among the EU member-states, other EU documents, mainly the EU Council regulations, the constitutions of EU member-states, materials of the journal publications. The study used the basic methods of cognition: the chronological, historical, systemic and the method of comparative law. Author's arguments are based on chronological and comparative approaches. The use of historical method allows to follow the evolution of the principle of flexibility in practice and its regulation in European law. Method of comparative law allows to assess the different mechanisms of flexible cooperation, which have existed in the EU.

3. Discussion

In the EU the principle of flexibility arises in the beginning and is first fixed in practice and only then in law. The Schengen area is the first concrete example of the flexible cooperation among the member states of the European Union.

Before the creation of its legal basis, the principle of flexibility in the EU was carried out in various forms: multispeed Europe, European vanguard, the core of Europe, various geometry, a la carte, concentric circles, etc. Respectively, now within the EU the concepts with the same name of the enhanced cooperation are realized (Shaw, 2005: 60).

The concept of the multispeed Europe presupposes that a certain group of the EU states wishing and able to do it follows the way of deeper integration, and the others gradually join the leading group. All member states have uniform common goals and wish to reach them; the element of flexibility concerns only the period of time during which all EU member states will achieve common approved objectives. Enhanced integration can happen at the same time in various areas of cooperation, and the corresponding "subgroups of cooperation" can unite various member states. So, the Schengen agreement united five states of Europe in the beginning, gradually other EU member states joined it. Examples of the "multispeed Europe" concept can be found in the so-called adaptation provisions of the treaty of accession of new member states to the EU. Thus, paragraph 1 of Art. 3 of the Act on conditions of accession of the Czech republic, Republic of Estonia, Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and amendments to foundation agreements of the European Union provides that provisions of the Schengen acquis and acts adopted on their basis and otherwise related, as well as any subsequent acts which can be adopted before the date of the entry of a new member states into the EU will be considered legally obligatory and are to be applied in these new member states from the date of their accession to the EU. However, the second paragraph of this article describes the situation indicating that the application of the specified provisions in new member states is put

under certain conditions and is actually postponed for some time, namely before the corresponding conditions. Paragraph 2 of art. 3 of the Act provides that the legal statuses about the Schengen acquis specified in para 1 Art. 3, though they will be considered legally obligatory for new member states from the date of their accession to the EU, will be applied in new member states only after acceptance by the Council of the decision confirming that according to the Schengen assessment procedures the necessary conditions for use of all parts of the Schengen acquis are executed in this member state, and after consultations with the European Parliament. Thereby, the EU shows flexible approach to integration of new members into the Union. For some time they remain in the second echelon of the organization, move on the way of integration at a slower pace in comparison with the states making the Union up to May 1, 2004.

European avant-garde is considered one of the forms of the "multi-speed Europe" model. Vanguard is a group of the most developed leading EU member states grouped for the purpose of further accelerating progress towards jointly established goals of integration in various fields. Moreover, this group of states is more resistant in comparison with the advanced group of countries moving at the highest rate according to the multi-speed Europe concept.

Another embodiment of the concept of avant-garde is the "core of Europe" which suggests that a certain number of countries within the framework of the avant-garde would like to go further in European integration and adopt policies within the enhanced cooperation. Traditionally France and Germany are considered the potential leaders of the "core".

The concept of variable geometry is based on the factor of space and presupposes dividing the European Union into geographical areas, one of which is more developed and the other is less developed. This form of differentiation suggests a difference both in the speed of integration and the final goals of integration. The fundamental point of this concept is the recognition of the fact that there are significant differences between the ability and the desire to integrate between the twenty-eight European Union member states. There are several examples "of variable geometry" in the contemporary European Union: the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it.

The concept of a la carte, or "prefer and choose" provides the European Union member states with the opportunity to choose as if from the menu those areas of integration in which they will and are able to participate. Such flexibility provides exceptions or the freedom of choice in the interests of certain states that may be involved or excluded fully or partially from the application of certain rules or institutions.

For the first time the principle of flexibility was constitutionalised in the Treaty of Amsterdam in 1997 under the term of "closer cooperation", then in 2003 in the Treaty of Nice which uses the term "enhanced cooperation" and finally in the Lisbon Treaty of 13 December, 2007.

Now the acts on enhanced cooperation are adopted by the European Union member states on the basis of the rules on enhanced cooperation and are binding only for the states participating in them.

They have the most important features: the conventional character, the direct application on the territory of the European Union member states, which carry out enhanced cooperation, subject to the jurisdiction of the Court of Justice of the European Union. They perform preparatory and integrative function: they pre-determine the future of European integration, identify the priority areas of the cooperation between the European Union member states and develop the legal basis of the cooperation in specific areas. Moreover, they are of subsidiary nature: if the European Union is unable to carry out further integration in a specific area of cooperation, a certain number of member states can make it within the framework and using the procedures and mechanisms of the Union.

The question of the legal nature of the acts on enhanced cooperation of the European Union member states is important both from the viewpoint of the theory of European law and the practice of its implementation. It defines the correct understanding of the scope of such acts, binding force of their provisions, the possibilities of appeal to the Court, etc. The founding treaties of the European Union do not contain the specification of the legal form of enhanced cooperation acts. Moreover, in order to implement the provisions on enhanced cooperation of states properly it is necessary to determine the place of acts on enhanced cooperation in the structure of European law.

The TEU and the TFEU do not define the legal nature of the enhanced cooperation acts either. These treaties are silent on the form and order of the adoption of such agreements. The Treaty on European Union in Article 20 only confirms that acts adopted in the framework of enhanced cooperation are binding only for the member states that take part in it. They are not

considered as acquits which must be accepted by candidate states for accession to the Union. The TFEU provides that the Commission of the European Union takes the necessary transitional measures concerning the application of the acts that have already been adopted in the framework of enhanced cooperation (Art. 331).

Based on the fact that acts of enhanced cooperation are not considered to be part of EU law, that is the main component of European law, it can be assumed that these acts are as a specific part of European law. It seems that these acts will be acts of international public law, to decorate the relations between members of the international public law – sovereign Member States. According to international public law, there are rights and obligations for States that adopt them, rather than directly for legal entities and citizens of these countries.

The acts of enhanced cooperation are formed along with the European Union law. They contain the necessary potential to become later a part of Union law. Acts of enhanced cooperation are not included in European law, and constitute a potential European law. In support of our statement we present a number of arguments:

1. In accordance with Article 43 (1) (j) of the Nice Treaty the enhanced cooperation «is open to all Member States» of the EU. This provision should be interpreted in conjunction with the provision of Article 43 of the Nice Treaty, which gives more detailed regulation, namely: the enhanced cooperation in its establishment is open to all MSs and is still open to them at any time in accordance with Articles 27.E and 40.B of this Treaty and Art. 11A of the Treaty establishing the European Community. Moreover, the European Commission and the Member States participating in enhanced cooperation, sought to encourage the participation of a larger number of MSs in advanced areas of cooperation. Under the TEU and the TFEU, it is expected that all European Union MSs will sooner or later become parties to enhanced cooperation. Thus, paragraph 1 of Art. 20 of the TEC states that «the enhanced cooperation is open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.» This article specifies that the enhanced cooperation in its establishment is open to all Member States, with the qualification about the necessity to comply with certain conditions. The Commission and the MSs that participate in enhanced cooperation care about promoting the participation of as many Member States as possible. Paragraph 2 of Art. 20 of the TEC stipulates that a decision authorizing the enhanced cooperation shall be adopted by the Council as a last resort, where the Council determines that the objectives pursued by the data collaboration, as a whole cannot be achieved by the Union within a reasonable time. Moreover, this paragraph establishes a quantitative benchmark for such cooperation, namely, “that it involves at least nine Member States”.

2. The enhanced cooperation in accordance with Art. 43 (1) (a) of the Nice Treaty was “intended to contribute to achieving the objectives of the Union and the Community to protect and ensure their interests and advance their integration process.” According to paragraph 1 of Art. 20 of the TEC, “the enhanced cooperation is intended to contribute to achieving the objectives of the Union, protect its interests and reinforce its integration process.” Article 334 of the TFEU provides that the Council and the Commission ensure the consistency of actions undertaken in the framework of enhanced cooperation and also provides the consistency of such activities with the policies of the Union, and cooperate for this purpose.

3. The enhanced cooperation is carried out by using European Union institutions. Article 43 (1) of the EU-Nice provides that the European Union MSs which intend to implement the enhanced cooperation can use institutions, procedures and mechanisms that are covered by this Treaty and the TEC, on the condition that the planned cooperation “respects ... a single institutional framework of the Union.” Paragraph 1 of Art.e 20 of the EC Treaty provides that Member States that wish to establish enhanced cooperation between themselves within the framework of non-exclusive competence of the Union can make use of its institutions.

4. Areas in which the enhanced cooperation defined in the TEU and the TFEU. Thus, in accordance with paragraph 1 of Article 329 of the TFEU, the scope is stipulated by the contract, except for areas of exclusive competence of the Union. Procedures for the implementation of enhanced cooperation are defined in Articles 329-331 of the TFEU.

These arguments in favor of the acts of enhanced cooperation are not acts of European law, but have certain features that allow them to continue to be incorporated into the law of the EU, and thus become part of European law. Thus, the enhanced cooperation acts are special acts that are formed along with the traditional European law and required only for a certain range of the

European Union MSs. It is possible to imagine the picture of the bubbles in the bulk material, which then exist separately from each other and from the substance, then merge with each other but not with the substance, and then suddenly burst and disappear, or dissolve in the substance (if all MSs of the EU join the advanced group and acts of enhanced cooperation become part of the acquis), or disappear at all – unnecessary, obsolete or unclaimed, like light smoke on the substance carried by the wind. Acts of enhanced cooperation contribute to the formation of the vanguard in the framework of the Union, which may be called "unions in the Union" (Shaikhutdinova, 2007).

If there was not a mechanism for flexible cooperation in the European Union, its expansion would not possibly be happening so rapidly and the membership of states that have recently joined the European Union would be highly problematic. The principle of flexibility ensures the interests of the European Union member states, which do not participate in enhanced cooperation. Such states have the opportunity not to engage in deep integration temporarily, but remain the members of the Union; they can join enhanced cooperation at any time later, when there will be fully mature economic, social, political and other conditions. Moreover, the non-participating member states may apply to the European Court of Justice in case of disagreement with the establishment of enhanced cooperation policy if they deem that such situation violates the provisions of the founding treaties of the Union. For instance, the United Kingdom has repeatedly filed cases in the Court on annulment of the EU Council decisions on authorizing enhanced cooperation. One of the latest cases reviewed by EU Court concerned the requirement of the UK to cancel the Council Decision 2013/52/ EU of 22 January, 2013 authorizing enhanced cooperation in the area of financial transaction tax. The Council Decision on the establishment of enhanced cooperation in the area of the unitary patent also faced the opposition on the part of the non-participating EU member states – Spain and Italy, which filed cases on annulment of this decision in the EU Court of Justice.

The European Union's appeal to the principle of flexibility and its legal regulation in the main founding documents of the Union is caused by a number of reasons. First, there strengthens the contradiction between the European Union Member States committed to the integration and those seeking to preserve the traditional interstate relations without deepening the integration (Leruth, Lord, 2015: 754) . There is no consensus between EU member states on the prospects of integration and consequently the Union's objectives. Secondly, the enlargement of the European Union requires a flexible approach in view of the significant differences between member states in the economic, social, cultural and other spheres. It should, on the one hand, enable the member states of the European Union which will and are able to integrate further and deeper to do so and, on the other hand, ensure the rights and interests of non-participating member states. The principle of flexibility, on the one hand, creates the mechanism that can preserve the European Union as an integrative formation; on the other hand, it is a way to ensure the sovereignty and national interests of the European Union member states. Thus, the principle of flexibility solves the dual task: it provides unity and diversity within the European Union.

The important question is the interrelation of enhanced cooperation and state sovereignty. Enhanced cooperation is the realization of the state sovereignty of the European Union member states, and it involves a choice – to participate or not to participate in a treaty regulating the issues of cooperation in certain areas. Enhanced cooperation indicates not only the pragmatic approach to European integration but often the reluctance of member states to renounce their national sovereignty. The essence of the enhanced cooperation is twofold. On the one hand, this cooperation is "for selected ones", for a limited number of European Union member states, so that in the issues of integration they are not decelerated with the slow movement of the other member states. On the other hand, this collaboration aims to promote the interests of the Union as a whole and the gradual involvement of all member states in such cooperation. Enhanced cooperation is not the mechanism of separation, it is the mechanism of integration. A certain temporary isolation of a number of European Union member states from the specific policy takes place in order to maintain the development strategy of the Union as a whole and presupposes association with the other member states at subsequent stages of the integration.

The practice of interstate relations on a global scale indicates the practical application of enhanced cooperation and its prospects. The European law has already formed a system-wide institution of enhanced cooperation, which permeates virtually all of its branches and is a set of interrelated legal standards. The enhanced cooperation of states can subsequently grow into a system-wide institution of international law, because not only the EU refers to the mechanism

of enhanced cooperation (Warleigh-Lack, 2015: 871) but also the states within the Commonwealth of Independent States. The practice of enhanced cooperation of states is being formed, the first regional agreements are being concluded, but there is no formed international legal framework for enhanced cooperation of states yet, namely the set of interrelated international legal norms in this area. As being legally formalized in the system of international law enhanced cooperation could find a place along with such recognized system-wide institutions of contemporary public international law as the institution of international legal personality, the institution of international representation, international rule-making institution, the institution of international legal responsibility, the institution of settling international disputes. "...There are so-called supra institutions penetrating several sub-branches or branches" of international law, as Professor D. Feldman wrote in his monograph "The system of international law". System-wide institutions permeate all branches and sub-branches of contemporary international law, they are cross-cutting. The institution of enhanced cooperation will be able to permeate all branches of international law the same way. Enhanced cooperation is possible in any sphere of international relations, if the subjects of international law wish so.

4. Results

After constitutionalisation of the principle of flexibility in the Treaty of Amsterdam and the Treaty of Nice it was never used in practice (Kroll, Leuffen, 2015: 353). And only after the adoption of the Lisbon Treaty there were two examples of enhanced cooperation in the EU, namely enhanced cooperation in the area of the law applicable to divorce and legal separation and in the area of the creation of unitary patent protection. Recently the third example, the Council Decision of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, was adopted.

The conditions of close and enhanced cooperation provided for in the founding treaties of the European Communities and the European Union turned up to be very difficult to comply with.

The main difficulty is a quantitative condition on the minimum number of member states, which can form an advanced group. Under the Treaty of Amsterdam the minimum number of participating states was at least the majority of the EU member states. In 1999 the majority was formed by eight member states. The Treaty of Nice did not change this condition and stated clearly that the minimum number of participating member states should be eight. The Constitution for Europe has slightly changed the above condition: it stated that the number of participating states should be at least one third of all member states, that meant nine member states. Under the Treaty on European Union, the minimum number of participating states is the same - nine member states. For example, Prum Convention – Schengen III is not considered to be an act of enhanced cooperation because it unites only seven European Union member states. The elimination of the condition on the minimum number of European Union member states, which form the enhanced cooperation group, would serve the benefit of the case.

Another point, that causes the difficulty of implementation of the principle of flexibility in practice is the attitude to it as to the "last resort". It would be expedient not to consider the principle of flexibility the "last resort", but to consider it a kind of peculiar alternative mechanism of the European Union integration.

5. Conclusion

1. The principle of flexibility was more widely used in the practices of the European Union before its constitutionalisation in the EU founding documents: the Schengen agreements, adaptation provisions of the treaty of accession of new member states to the EU, the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it, etc. After constitutionalisation of the principle of flexibility in the Treaty of Amsterdam and the Treaty of Nice it was never used in practice.
2. There are only three examples of implementation of the principle of flexibility in the EU, which took place after the adoption of the Lisbon Treaty: in the area of the law applicable to divorce and legal separation, in the area of the creation of unitary patent protection, in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property

regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships.

3. The arguments for reluctance of the EU member states to use the mechanism of flexible cooperation can be found in the rather strict regulations of this mechanism in the founding documents. One clear obstacle for formation of the enhanced cooperation group is the condition for the minimum number of participating states. Under the Treaty on European Union, at least nine member states form such group. The other obstacle is the attitude to the mechanism of enhanced cooperation as to the last resort, when all other means are unsuccessful.

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