# Foreword

The entry into force of the Lisbon Treaty poses anew the question of whether, from now on, it will be more likely for the European Union to use this mechanism, or, conversely, the new institutional, jurisdictional and decision-making framework may act as a containment of favourable trends in the development of variable integration formulas.

In reality, flexible or differentiated integration instruments, within or outside of the framework of the EU, alongside strictly intergovernmental cooperation between certain EU countries, have existed since the beginning of Community integration.

The difference in the pace of the integration process between Member States already underlies certain provisions of the EU Treaties, such as the transitional periods established in each process of accession of new Member States. Subsequently, the two most typical examples of this enhanced cooperation that have sometimes been defined as "predetermined" in the Treaties were the Eurozone and the Schengen area. In both cases, certain shared goals and criteria were established that had to be met by the participating States in order to be admitted, while the door was left open to other Member States, within a strategy of various speeds.

The mechanisms of cooperation and flexibility between the Member States at the margins of the Community process have included, for example, external cooperation in research projects and technological development (such as Airbus, Ariane, ESA or Eureka), or in the field of security and defence (through the Eurocorps, Eurofor, Euromafor or, more recently, the Eurogendfor, arising from the declaration of intent signed by the Defence Ministers of the five Member States with a military style police force - Spain, France, Italy, the Netherlands and Portugal - in 2004). The Schengen Agreements themselves, from 1985 to 1990, born at the margin of the Treaties with the initial participation of four States, were integrated into the Community system through the Treaty of Amsterdam of 1997. Also European Political Cooperation, born in the Hague Summit of 1969 as a fledgling exchange of information between European diplomatic services, was integrated into the Treaties as a result of the Single European Act, becoming the embryo of the current Common Foreign and Security Policy.

Flexible or differentiated cooperation has therefore been a constant feature of Community development, the effects of which have played heavily in favour of integration. The rhetoric of the threat of its use more systematically if the Lisbon Treaty did not eventually enter into force did not for that reason seem particularly convincing. It was difficult to determine which groups of countries and in which areas one might envisage new actions and policies of the EU between certain Member States wishing to move faster than others in the Community dynamics, and that would make use of either the enhanced cooperation mechanism already existing in the Treaty since Amsterdam or of intergovernmental cooperation outside of the Community sphere.

A "coalition of the willing" in this sense is particularly challenging to articulate because what this deals with in reality is the question of leadership or leaderships within the EU. The current asymmetry between foreign, security and defence policies, where Britain necessarily plays an inescapable role, and other possible "gravitational cores" of the EU, such as the Eurozone or cooperation in matters relating to the area of security, freedom and justice, has been present in nascent form after any attempt to implement enhanced cooperation that would apply the existing clauses in the Treaty. Experience shows that in fact the possibility of using the enhanced cooperation mechanism has only been used as leverage in negotiating issues requiring unanimity, rather than as a way to develop a specific policy under the Community method and jurisdiction. For example, the negotiations on the framework decision for the establishment of the European Arrest Warrant were blocked

for a long period of time by Italy, and the other Member States used the threat of introducing enhanced cooperation in this matter to ensure that eventually this country decided to adopt the proposed legislation.

Also the example of the Prüm Treaty, signed in 2005 between seven Member States (France, Germany, Netherlands, Belgium, Luxembourg, Spain and Austria), and which aimed at closer cooperation in combating terrorism, cross-border crime and illegal immigration, shows that although these materials could have been the specific subject-matter of a "formal" enhanced cooperation, the participating States preferred to implement this outside of the framework of the Treaties, because of the difficulties in achieving the minimum quorum of countries required, the opinion required from the Commission on the possible impact of the proposed cooperation on existing Community policies, as well as the complications of the established authorization procedure.

One of the objectives of the Lisbon Treaty in this area was indeed to obtain a more operational mechanism. The structure of the EU now without pillars that the Lisbon Treaty has introduced leads to enhanced cooperation also without pillars that has been regulated in two different parts of the new Treaty. The general provisions and those relating to principles are contained in the new renumbering in Article 20 of the TEU, while the implementing and procedural provisions are found in the new renumbering in Articles 326 to 334 TFEU. In the Treaty of Lisbon, the explicit aim of closer cooperation is to "further the objectives of the Union, protect its interests and reinforce its integration process". A consequence of this pro-integration principle is that the enhanced cooperation that can be established will be open to all Member States wishing to participate at the time of commencement, and that it will remain open so that "at any time", more States can participate in it. In fact, it is established that both the Commission and the Member States participating in enhanced cooperation shall endeavour to encourage the widest possible participation of Member States. Another basic principle is that enhanced cooperation is configured as a last resort, when the conclusion has been reached that the objectives of such cooperation cannot be attained within a reasonable time frame by the EU as a whole.

Along with the strict conditions established for the launch of enhanced cooperation, and that in some respects represent a simplification in comparison to that envisaged in the Treaties of Amsterdam and Nice, the Treaty of Lisbon, following the Draft Constitutional Treaty, introduces the possibility of specific cooperation - "structured cooperation" - on defence.

This present work, carried out within the framework of the research project awarded by the European Commission to the Institute of European Studies at the CEU San Pablo, aims to examine the state of affairs regarding the instrument of enhanced cooperation after the entry into force of the Lisbon Treaty, in order to analyze the potential of the new system in a number of areas where there is some question as to the development of this mechanism in the medium to long term. Thus, after examining the evolution of the legal form of enhanced cooperation clauses in the Treaties and detailing the specific innovations of Lisbon, we study the possible development of enhanced cooperation in the areas of energy, foreign policy, security and defence, and from a broader perspective, enhanced cooperation and differentiated integration formulas in the areas of economic governance, social policy and the area of freedom, security and justice.

The fresco obtained after this analysis of possible developments of Community policies is thus an image full of light and shadow, and with it questions are raised of enormous importance to the future of the dynamics of integration.

**José María Beneyto**
Director of the Institute for European Studies
of CEU San Pablo University

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**José María Beneyto**
Director of the Institute for European Studies
of CEU San Pablo University

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# The regulation of enhanced cooperation and its reform in Lisbon: Towards a model of differentiation that is closer to the community method

**Belén Becerril**

Deputy director of the Institute for European Studies and Professor of the Law School of CEU San Pablo University

## 1. First steps: differentiation in the history of european integration

Flexibility in European integration is not a novel phenomenon of the nineties. Quite the contrary, the European construct since its inception was characterised by an idea of progression, a successive gradual achievement of objectives, which could also be considered in a sense an expression of flexibility, and that in any event would not prove incompatible with some degree of differentiation. In this connection, it is appropriate to recall the famous Schuman Declaration, under which "Europe will not be made all at once, or according to a single plan: It will be built through concrete achievements." Thus, in a gradual integration, the existence of some flexibility would not be unusual and could even be considered *inseparable* from the community system[1].

Indeed, if we mean by flexibility a differential treatment of the Member States within the Union, we can note the existence of many different and early cases in Community law, both primary and secondary law. Certainly, since their original drafts, the Treaties contained clauses with safeguards and which allowed for authorization of provisional exceptions. Also, the enlargement processes have developed progressively through transitional periods that have allowed temporarily easing of entry conditions for the new Member States. Another example of flexibility is that of the directives, which can contemplate different periods of implementation for individual Member States, thus introducing a new element of temporal differentiation.

Alongside these and other community forms of differentiation, which have been present for years in the community arena, we must note the existence of what some have called *old flexibility*[2]: extra-EU agreements signed by some Member States on those occasions on which they have not wanted or have not been able to have recourse to the EU framework. Thus there has been implementation in the past of projects such as Airbus, ESA, Ariane, JET and Eureka, in the field of research, or the WEU, Eurocorps, Eurogroup, Eurofor and Euromafor, in the field of security and defence[3]. But perhaps the most outstanding example are the Schengen Agreements of 1985 and 1990, extra-community agreements that were originally signed by four Member States, but which ended up being integrated into the acquis communautaire on the occasion of the Amsterdam Treaty.

From these classical forms of differentiation, in the early nineties, when European integration began to move towards the achievement of political objectives, in an attempt to overcome a purely economic perspective, the debate and the expressions of differentiation multiplied. The signing of the Maastricht Treaty in 1992 was a major qualitative change in this area. Both the Social Protocol, the signing of which was initially rejected by the UK, and the asymmetrical design of the Economic and Monetary Union, introduced clearer and more relevant indications of differentiation to the EU scene, which far exceeded all previous manifestations.

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1 PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas en la Unión", in MARTÍN Y PÉREZ DE NANCLARES J. (coord.): *El Tratado de Lisboa, la salida de la crisis constitucional*, Iustel, AEPDIRI, 2008, p. 628. Also, MANGAS MARTÍN, A.:"La cooperación reforzada en el Tratado de Ámsterdam", *Comunidad Europea Aranzadi*, no. 10, October 1998, p. 27.

2 DE WITTE, B.: "International Agreements between member states of the EU", DE BURCA G. and SCOTT, J. (eds.): *Constitutional change in the European Union*, Hart, 2000, p. 31-58.

3 For a more detailed analysis of cases of differentiation, see EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation: the new provisions of the Amsterdam Treaty", *European Law Journal*, Vol. 4, No. 3, September 1998, p. 247.

Thus, cases of differentiation prior to the regulation of enhanced cooperation in the Treaty of Amsterdam are many and varied. There have been various attempts at categorization in academic doctrine, distinguishing especially between those cases in which differentiation affects variable speed from those which affect variable substance[4].

Indeed, in a whole series of cases differentiation affects only the *speed*, i.e. the *time* variable, so that all Member States share the goals to be achieved, but some are not yet able to do so. This is the case for example of the transitional periods in the accession procedures of the directives with various implementation dates for different Member States, or the Economic and Monetary Union in connection with those States that do not yet meet the criteria laid down.

It is generally considered that this model reflects the idea of a multi-speed Europe in which all States share and accept the same goal.

In other cases, however, Member States do not share the final goal, and the difference affects the *substance*. There is therefore a political differentiation: some states reject some goals. This is the case of the former British opt-out from the social chapter, or the opt-outs of the UK and Denmark from the EMU. Other cases that show a differentiation that affect targets beyond the time factor are the Protocols of the Treaties which set out different arrangements or directives which provide for a different treatment for different Member States. It is generally considered that these cases are a closer manifestation of the idea of a *variable geometry Europe*, which allows some degree of differentiation, or even a step further, a *Europe à la carte*, an idea that emphasizes the liberty of Member States to choose freely which commitments they *want* to take on board.

## 2. Amsterdam: the constitutionalisation of enhanced cooperation

Against this background, during the mid-nineties, at a stage in which the European Union faced the challenge of advancing with political integration and at the same time completing an enlargement towards Central and Eastern Europe of an unprecedented scale, enhanced cooperation ranked primordial for the first time at the heart of European debate.

Of course, the first contributions to this debate were much older, dating back to the seventies, when WILLY BRANDT and LEO TINDEMANS saw flexibility as a way to respond to the economic differences between Member States - that is, an expression of the idea of *multi-speed Europe* - but it was the publication in 1994 of the report of two prominent German politicians, WOLFGANG LAMERS and KART SCHÄUBLE, which moved the debate into the realm of politics, unleashing a storm by proposing the creation of a hard nucleus for Europe, a core Europe, that would include only five Member States: France, Germany and the three Benelux countries.

The idea of differentiation was positively received by French and German politicians in the nineties, although they sought to show a more inclusive character than Lamers-Schäuble, not discounting the involvement of non-founder Member States. For them, with the prospect of enlargement and after the experience of the opt outs from the UK and Denmark in Maastricht, progress by all towards a policy of federal integration would not be possible. The standoff produced by the reluctance of some States could only be overcome by a *centre of gravity*, a *pioneering group* of States that would want to move further or faster than the others[5]. Thus, flexibility could be the answer to the old dilemma of deepening versus widening[6], given the magnitude of the new expansion planned and the risk of dilution that could result from the increasing heterogeneity of its Member States.

In the UK, for its part, the idea of flexibility was met with interest as it was interpreted according to its image of a *Europe à la carte*, a vision that emphasizes the freedom of states to determine their level of participation in European projects[7]. However, the United Kingdom, which had recently torn from the Member States its opt-

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4 EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation…" op. cit., p. 248. On the categorization of differentiated integration, please also see STUBB, A.: "A categorisation of Differentiated Integration", *Journal of Common Market Studies* 34, 1996, p. 283 et seq.

5 See the joint letter of HELMUT KOHL and JACQUES CHIRAC of 6 December 1995. Subsequently, the discourse of JOSCHKA FISHER in the Universidad Humboldt of Berlin of 12 May 2000 and the response of JACQUES CHIRAC in the Bundestag of 27 June 2000 were especially relevant.

6 WEATHERILL, S.: "Flexibility or Fragmentation: Trends in European Integration", in USHER, J. (ed.): *The States of the European Union. Structure, Enlargement and Economic Union*, ed. Longman, London 2000, p. 10.

7 See the speech of JOHN MAJOR at the University of Leiden on 7 September 1994, which can be consulted in *Agence Europe*, no. 3372, of 10 September 1994.

out in the Maastricht reform, aware of the dynamism of European integration and its contagious effects on the reticent, was circumspect in the Nice negotiations, demanding unanimity, as we will see, for the establishment of enhanced cooperation.

Some other non-founder States, including Spain, were also cautious, fearing that a general clause on enhanced cooperation would allow for the exclusion of some, and consolidate a stable core, as had been openly proposed by Lamers-Schäuble.

These considerations and reservations explain in a large measure the result of the reform of Amsterdam, which would eventually enshrine, cautiously, a general clause on enhanced cooperation. Thus, it was finally possible for a majority of Member States to undertake a project within the framework of the European Union, but without the participation of all.

Without doubt, the substantive and procedural safeguards established by the Treaty were many, so many that it has been observed that to a large extent this new instrument seemed designed to avoid being workable[8]; but the inclusion of this mechanism was in itself a significant and probably irreversible step towards the recognition and generalization of differentiation. As many advised then[9], if the conditions subsequently proved too rigid, there would be time to soften them in the next IGC.

The introduction of the general clause on enhanced cooperation was perhaps the most significant innovation of the reform of Amsterdam. This meant a fundamental change in relation to previous forms of differentiation. Before this, cases of differential treatment were rare, and were expressly provided for in the Treaties, which guaranteed that they had been agreed by all Member States. Amsterdam led to the constitutionalisation[10] of enhanced cooperation, which was disciplined[11], regulated in detail in the Treaties, and it gave the possibility of its generalization, as the door was now open to establishing cooperation that had not previously been specified in the Treaties, on various issues and for various Member States.

As DANIEL THYM[12] has explained, the new enhanced cooperation mechanism differs fundamentally from most previous cases of flexibility. From a legal perspective the majority of the examples of flexibility mentioned above have one thing in common: the legal instruments in question are in principle applicable to all, their legal effects being merely suspended or modified with respect to certain Member States. Think for example of the case of directives which provide different treatment for different Member States, or of the transitional periods themselves, which suspend the application of Community law in the new Member States for a period, after which Community law is automatically applied. In these cases the laws are adopted by all States and apply to everyone, but their content introduces some differentiation.

Instead, as THYM goes on to say, the new enhanced cooperation follows a different pattern: the differentiated legal effects do not derive from the content of the legal rule in question, but are the direct result of its failure to be applied to some States. There is thus, firstly, a limited geographical scope, and secondly, a suspension of voting rights for those States not participating in the enhanced cooperation. This new template had already been introduced differently in the European scenario with the opt-out of the UK and Denmark in monetary union, and then, with the differential development of the area of freedom, security and justice in Amsterdam. The general mechanism of enhanced cooperation generalizes this method of differentiation, allowing the adoption of rules that are characterized (1) by their limited geographical scope and (2) by the corresponding suspension of the voting rights of non-participants. Ultimately, some States may participate in the adoption of laws which apply only to them.

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8 MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Ámsterdam" op. cit., p. 38.

9 ELHERMANN C.D.: "Differentiation, flexibility, closer cooperation…", op. cit., p. 269.

10 As SHAW, J. has explained, "Amsterdam may be a key constitutional moment in the history of flexible integration in the EU with its formal acceptance of differentiation into the core of the constitutional order and with its attempt to systematise constitutional principles of closer cooperation", see "Relating Constitutionalism and Flexibility in the European Union" in DE BURCA, G. and SCOTT, J. (eds.): *Constitutional change in the European Union*, op. cit., p. 352. Amsterdam has also been referred to as the moment of *constitutionalisation* of enhanced cooperation by other authors such as CHALTIEL, F.: "Le Traité d'Amsterdam et la cooperation renforcée", *Revue du Marché Commun et de l'Union Européenne*, no. 418, May 1998, p. 289., SHAW J.: "Relating Constitutionalism and Flexibility in the European Union" in DE BURCA G. and SCOTT J.: *Constitutional change…* op. cit., p. 352 or URREA CORRES M.: La cooperación reforzada en la Unión Europea, Colex, Madrid, 2002.

11 MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Ámsterdam" October 1998, p.29.

12 THYM D.: "Europa a varias velocidades: las cooperaciones reforzadas" in BENEYTO J.M. (dir.) MAILLO J. Y BECERRIL B. (coords.) *Tratado de Derecho y Políticas de la Unión*, Aranzadi, 2009, p.582. Also, THYM D.: "United in diversity- the integration of Enhanced Cooperation into the European Constitutional Order", *German Law Journal*, vol. 06, no. 11, 2005, p. 1732 and 1733.

This distinction may seem irrelevant from a policy perspective, from which what is essential is the asymmetrical treatment of the Member States, namely the implementation of projects in which not all of them have to participate. But from a legal perspective this difference is crucial and is also a manifestation of the quantum leap that has occurred in regard to the possibilities of differentiation in the European Union. Undoubtedly, Amsterdam marked a major step forward in differentiation.

## 3. Nice: in search of a more flexible model of flexibility

Although the mechanism of enhanced cooperation had not been used, or rather precisely because of this, the provisions of the Treaty that regulated it were changed during the Nice reform. The aim of this reform was to facilitate its implementation, to design a more flexible model of flexibility, responding to the criticisms of many commentators on the initial design of the distrusted model.

In Amsterdam, the discussion had focused on two issues: first, the consensus needed to launch enhanced cooperation and secondly, the areas in which this mechanism could be used[13]. The reluctance shown by some States, and also initially by the Commission and European Parliament, necessitated the adoption of numerous precautions to prevent this mechanism resulting in a hard, stable and exchiding core. Therefore, the final model recognized the possibility that a single State could veto its lauching, demanding the participation of a majority of Member States and carefully limiting the areas where closer cooperation could begin.

In Nice, these limitations and caveats, which many considered too rigid and to which were attributed - at least in part - the fact that the enhanced cooperation mechanism had not been used, were relaxed[14].

First, as commentators had demanded[15], the right of veto enjoyed by Member States regarding the implementation of enhanced cooperation was removed, except for the area of foreign policy. This was made necessary because it did not seem reasonable that precisely the State or States which had prevented the undertaking of a project with the participation of all Member States could then prevent its supporters from moving towards it through enhanced cooperation.

However, it included an *emergency brake*, which envisaged the possibility that a Member State could raise the matter - namely, the authorization of the enhanced cooperation – at the European Council. Finally, once the issue had been addressed by the European Council, the Council could decide by majority vote, so that there would only be a delay, but certainly this referral might hinder the implementation of the enhanced cooperation.

Secondly, the number of States required to initiate an enhanced cooperation went from a majority up to 8, regardless of the number of EU Member States. With the prospect of enlargement to 25 and then to 27, this change meant a very significant reduction in the number of States required to initiate an enhanced cooperation.

Thirdly, the possibility of using enhanced cooperation was extended to the formerly-excluded area of the Common Foreign and Security Policy, except for anything that had military implications or in the ambit of defence.

Moreover, the Nice Treaty clarified the regulatory principles and conditions in certain horizontal provisions applicable to the three pillars, to which must be added some specific provisions for the first pillar, for the Common Foreign and Security Policy and for police and judicial cooperation in criminal matters.

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13 On the Amsterdam negotiation see DE AREILZA J.M. and DASTIS A.: "Flexibilidad y cooperaciones reforzadas ¿Nuevos métodos para una Europa nueva?", in *Revista de Derecho Comunitario Europeo*, 1997-1, p. 9-28 et seq. Also DE AREILZA, J.M., "The Reform of Enhanced Co-operation Rules: Towards Less Flexibility?" Intersentia, p. 28– 29.

14 For an evaluation of the Nice reform in relation to the enhanced cooperation mechanism, see PONS RAFOLS, R.: "Las cooperaciones reforzadas en el Tratado de Niza",*Revista de Derecho Comunitario Europeo*, 2001, p.149-196; MANGAS MARTÍN, A.: "Las cooperaciones reforzadas en el Tratado de Niza" in MOREIRO C. (coord.) *Tratado de Niza, Análisis, Comentarios y texto*, Colex, Madrid 2002, p.67-82; MARTÍN Y PÉREZ DE NANCLARES, J.: "La cláusula de cooperación reforzada a la luz del Tratado de Niza: Crónica de una modificación necesaria", *Noticias de la Unión Europea*, n.218, 2003, p. 95-109.

15 This is a widely shared opinion, a good indication of which is the title of JANNING *Flexibilty in a straightjacket,* JANNING J.:"Dynamik in der Zwangsjacke: Flëxibilität in der Europäischen Union nach Ámsterdam" *Integration* 1997, 285., cited by THYM D.: "Europa a varias velocidades…" op. cit., p. 596. Along the same lines, GAJA, G.: "How flexible is flexibility under the Amsterdam Treaty?", *Common Market Law Review*, n.35, 1998, p. 855-870.

These provisions modify and qualify the conditions and requirements that were originally established[16]. Noteworthy among these innovations is the reference to the requirement for enhanced cooperation to strengthen the integration process. This indication, which might not be considered particularly important, seems to us however very significant. If one thinks of the various manifestations of differentiation in the history of integration, from the cases mentioned in the original Treaties to the enhanced cooperation contained in Nice, it appears that none of the models proposed by academic or political commentators has been implemented in its entirety. The community differentiation model (from the transitional periods for new accessions, through the Maastricht opt-outs, and even including the general mechanisms of enhanced cooperation) does not fit fully within *multi-speed Europe*, nor *Europe à la carte*, nor the 'hard core', but seems more a result of various particular commitments, agreements which resolved the specific challenges that were raised. As so often in the history of integration, the end result - with all its sharp edges and ambiguities - does not match a predefined model, but rather is probably the only compromise that Member States could reach. The effort in Nice is therefore significant in trying to clarify the model of differentiation envisaged in the Treaties, linking it to a strengthening of the integration process. In doing so, progress is made in the definition of a particular model by which differentiation is permitted if it is done for the strengthening of the integration process. We will return later to this issue.

## 4. Regulation up to Lisbon: horizontal provisions

The Nice Treaty facilitated the implementation of enhanced cooperation, softening the rigid substantive and procedural requirements introduced in Amsterdam. Moreover, it clarified and systematized the provisions on enhanced cooperation, providing for certain horizontal provisions applicable to the three pillars (Articles 43 to 45 TEU), in addition to specific provisions for the first pillar (Article 11 and 11a TEC), for the Common Foreign and Security Policy (Articles 27 to 27e TEU) and police and judicial cooperation in criminal matters (Articles 40, 40a and 40b TEU).

Noteworthy among the general principles applicable to the three pillars are[17]:

*Reinforcement of integration* - Firstly, in terms of objectives, enhanced cooperation must aim to "further the objectives of the Union, protect its interests and reinforce its integration process" (Art. 43a TEU). As already mentioned, the enhanced cooperation mechanism was envisaged as an instrument of integration, not disintegration.

*Threshold of participants* - In regard to the participation of Member States, the Treaty establishes that enhanced cooperation must have at least eight Member States (Article 43.g TEU).

Non-participants - Concerning non-participating States, the Treaty establishes that enhanced cooperation must be open to all States (Art. 43.j TEU), not only when established, but at any time, subject to compliance with the initial decision and the decisions taken within such framework. The Commission and the participating Member States must also seek to encourage the widest possible participation of Member States (Article 43 B TEU). In any case, enhanced cooperation must respect the responsibilities, rights and obligations of Member States not participating in it (43.h TEU). The Treaty of Nice qualified and softened this requirement which in the previous version required that the enhanced cooperation "would not *affect* the powers, rights, obligations and interests of non-participants". The term *interests* also disappeared from the Nice version, because it could have become an instrument to prevent the implementation of almost any enhanced cooperation.

*Last resort* - It is also important to note that enhanced cooperation can be initiated only as a *last resort*, i.e. if it has been established within the Council that the objectives assigned to it cannot be attained within a reasonable time, by applying the relevant provisions of the Treaties (Art. 43 TEU). Cooperation is therefore the

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16 For a detailed analysis of the innovations of Nice in the enhanced cooperation mechanism, see the second chapter of URREA CORRES M.: *La cooperación reforzada en la Unión Europea*, op. cit., Madrid, 2002.

17 Various proposals exist for systematising these general provisions, which some have called *the ten commandments of enhanced cooperation*, BRADLEY K.: "Institutional design of the Treaty of Nice", *Common Market Law Review* 38, 2001, 1095 – 1124, cited by THYM D.: "Europa a varias velocidades" op. cit., p. 590. ARACELI MANGAS distinguishes between general principles and material limits. MANGAS MARTÍN A. and LIÑÁN NOGUERAS D.: *Instituciones y Derecho de la Unión Europea*, ed.Tecnos, 5, Madrid, 2005, p.80-81. CONSTANTINESCO distinguishes between the conditions affecting the States and those that affect the background, CONSTANTINESCO, V.: *Les clauses de la coopération renforcée: le protocol sur l'application des principes de la subsidirité et de la proportionalité, Revue Trimmestrielle de Droit Europeén*, 1997, p. 751-767.

last option, once the impossibility of acting within the general framework is proven. It could be argued that its implementation recognizes the existence of a serious dispute or even a failure[18]. As noted by commentators, it will not be easy to tell when such impossibility is proven, since it does not require the formal failure of the legislative process.

Noteworthy in relation to the material limits to the use of enhanced cooperation are:

*Compliance with the Treaties and the acquis* - First of all, enhanced cooperation must "respect the Treaties and the single institutional framework of the Union" (Art. 43 b TEU). The Treaties must be respected in their entirety, not only in their principles (as was clear from the version prior to Nice). The single institutional framework shall also be respected, which does not prevent voting rights of non-participants being limited in the Council.

Enhanced cooperation must also respect "the acquis communautaire and the measures adopted under the other provisions of the Treaties" (Art. 43 c TEU). This reference to the acquis is significant because it reinforces the interpretation of the enhanced cooperation mechanism as an instrument for strengthening the integration process (as highlighted by Art. 43.a TEU), without affecting the achievements of the past, but permitting new projects to be undertaken which could not be implemented by all States.

*Compliance with the allocation of competencies* - Enhanced cooperation must remain within the limits of the competencies of the Union or the Community and therefore shall not serve to obtain new competencies that are not established in the Treaties. Nor may it relate to the areas which are the exclusive competence of the Community (Art. 43.d TEU), for all Member States must participate in such areas.

*Other material limits* – It must not undermine the internal market, or economic and social cohesion (Article 43 e TEU), or constitute a barrier to or discrimination in trade between Member States nor distort competition between them (Art. 43 f TEU). Nor must it affect the provisions of the Protocol integrating the Schengen acquis within the framework of the European Union (Art. 43 i TEU).

As noted by the doctrine, many of the substantive requirements contained in Article 43 are truisms, often redundant[19], or simply declaratory confirmations of general principles of Community law. The obligation to promote the objectives of the Union and protect its interests, to comply with the Treaties and the acquis, or the condition of remaining within the limits of Union competences are obvious features of European legislation that are familiar to any lawyer specializing in EU Law; what is different is the case of the limits contained in Article 43 TEU e and f, because this could indeed restrict the possibility of initiating enhanced cooperation in certain policy areas such as social, tax or environmental which have a clear economic dimension[20].

The Treaty also refers to the decision-making process and its funding:

*Decision-making* - within the framework of enhanced cooperation, while all States may participate in the deliberations, only the participants will take part in decision-making. A qualified majority will be defined as the same proportion of the weighted votes as those provided for in the Treaties and unanimity shall be imposed only for the States concerned for the cooperation.

The rules and decisions adopted within the enhanced cooperation framework will not be part of the acquis of the Union and shall be binding on - and where appropriate, directly applicable to - only the participating Member States. However, the Treaty also states (Article 44.2. TEU) that Member States not participating in such enhanced cooperation shall not impede its implementation by the participating Member States.

*Financing* - In principle the costs of the implementation of enhanced cooperation - other than administrative costs entailed for the institutions - will be borne by the participating Member States, unless the Council unanimously decides otherwise after consulting the European Parliament (Art. 44 TEU).

*Consistency* - Finally, the Council and the Commission must ensure the consistency of the enhanced cooperation and the consistency of such activities with the policies of the Union (Art.45 TEU). Cooperation must be used coherently and in a coordinated manner. As noted by Professor MANGAS MARTÍN it must not result in inconsistent and cluttered initiatives by groups of different States[21].

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18 MANGAS MARTÍN A. and LIÑÁN NOGUERAS D.: *Instituciones y Derecho de la Unión Europea*, op. cit., p. 80.

19 PONS RAFOLS, R.: "Las potencialidades de las cooperaciones reforzadas…" op. cit., p. 646 and 647.

20 THYM D.: "Europa a varias velocidades…" op. cit., p. 592.

21 MANGAS MARTÍN, A. and LIÑÁN NOGUERAS, D.: *Instituciones y Derecho de la Unión Europea*, op. cit., p. 81. Along the same lines, the Professor MANGAS MARTÍN cons