

# 1 Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation

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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

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## 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<sup>1</sup>.

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*<sup>2</sup>: 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<sup>3</sup>. 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.

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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<sup>4</sup>.

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<sup>5</sup>. Thus, flexibility could be the answer to the old dilemma of deepening versus widening<sup>6</sup>, 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<sup>7</sup>. However, the United Kingdom, which had recently torn from the Member States its opt-

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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<sup>8</sup>; 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<sup>9</sup>, 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<sup>10</sup> of enhanced cooperation, which was disciplined<sup>11</sup>, 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<sup>12</sup> 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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<sup>8</sup> MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Ámsterdam" op. cit., p. 38.

<sup>9</sup> ELHERMANN C.D.: "Differentiation, flexibility, closer cooperation..." op. cit., p. 269.

<sup>10</sup> 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, E.: "Le Traité d'Amsterdam et la coopération 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.

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

<sup>12</sup> 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<sup>13</sup>. 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 excluding core. Therefore, the final model recognized the possibility that a single State could veto its launching, 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<sup>14</sup>.

First, as commentators had demanded<sup>15</sup>, 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.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> This is a widely shared opinion, a good indication of which is the title of JANNING *Flexibility in a straightjacket*, JANNING J.: "Dynamik in der Zwangsjacke: Flexibilität in der Europäischen Union nach Amsterdam" *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<sup>16</sup>. 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<sup>17</sup>:

*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

<sup>16</sup> 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.

<sup>17</sup> 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 protocole sur l'application des principes de la subsidiarité et de la proportionnalité*, *Revue Trimestrielle de Droit Européen*, 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<sup>18</sup>. 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<sup>19</sup>, 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<sup>20</sup>.

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<sup>21</sup>.

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

<sup>19</sup> PONS RAFOLS, R.: “Las potencialidades de las cooperaciones reforzadas...” op. cit., p. 646 and 647.

<sup>20</sup> THYM D.: “Europa a varias velocidades...” op. cit., p. 592.

<sup>21</sup> 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

## 5. Regulation up to Lisbon: specific provisions

Any enhanced cooperation must meet all the conditions described above, but there are also specific provisions applicable to the Community pillar, to the Common Foreign and Security Policy and Police and Judicial Cooperation. This is because the authorization procedures for enhanced cooperation and eventual accession of new states differ depending on the subject.

Articles 11 and 11A set out the procedure for authorization to proceed with enhanced cooperation in the first pillar. States that wish to establish enhanced cooperation – we assume, once the attempt to do so in the general framework of the Treaty has failed – shall address their request to the Commission which may submit a proposal to that effect to the Council. One should highlight here the decisive role of the Commission, which ensures that enhanced cooperation is directed towards the Community interest. The Commission, which in this case acts at the behest of the States promoting the cooperation, may examine whether the substantive requirements are met and evaluate the initiative with a wide margin of discretion, because if it decides in the end not to submit any proposal, the Treaty simply requires communication of the reasons to the States concerned.

Authorisation is granted by the Council by qualified majority, after consulting the European Parliament, except where it concerns an area of co-decision in which case - since the Nice reform – it will require the assent of the European Parliament.

As noted above, the Nice Treaty eliminated the right of veto originally planned in Amsterdam, because it did not seem reasonable that the State or States that had prevented the undertaking of a project with the participation of all Member States could then prevent the supporters of moving it forward through enhanced cooperation. However, Nice provided for a final brake that could delay the process by allowing any Member State to request that the matter be referred to the European Council. Once the matter is raised before the European Council, the Council may decide by majority vote. Thus, referral to the European Council may have a political impact and no doubt cause delay to the process, but ultimately may not prevent the authorization of the cooperation if it has the support of a sufficient majority in the Council.

Article 11 A contains the participation process applicable where a Member State wants to join in with enhanced cooperation that has already started. One should remember that the Treaty establishes an *essential principle of openness*<sup>22</sup> of enhanced cooperation, under which such is open to all Member States at any time provided they comply with the initial decision and the decisions taken within such framework. A State wishing to participate shall notify its intention to the Council and Commission, to which is confers a decisive role, since it presupposes a favourable attitude and is also required to encourage the widest possible participation of Member States (43 B TEU). The Commission may also decide on specific arrangements as it deems necessary.

The specific provisions on police and judicial cooperation in criminal matters are contained in Articles 40, 40 A and 40 B TEU and are very similar to those of the first pillar. Initially the particular purpose of any cooperation undertaken in this matter is specified: “to enable the Union to develop more rapidly into an area of freedom, security and justice” (Art. 40.1 TUE).

For its implementation, the Member States concerned shall forward a request to the Commission, which may submit a proposal to that effect. If it does not do so, the Commission must communicate the reasons to the States concerned. So, unlike the first pillar, the States concerned themselves may request the Council to authorize enhanced cooperation (Art. 40 A).

Permission is granted by the Council by qualified majority after consulting the European Parliament. As with the first pillar, any State may request that the matter be referred to the European Council, but ultimately the Council may decide by majority vote. The previous unanimity here has also been suppressed<sup>23</sup>.

Very different are the procedures provided for in the specific provisions for the Common Foreign and Security Policy (Articles 27 to 27e TEU), an area hitherto closed to enhanced cooperation.

<sup>22</sup> 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

<sup>23</sup> The participation process provided for subsequent accession of Member States is contained in the Art. 40 B TEU. The Member State concerned shall notify its intention to the Council and to the Commission, which shall submit to the Council within three months from the date of receipt of the notification, an opinion accompanied, where appropriate, by a recommendation concerning any particular provisions it may deem necessary. The Council shall rule on the request within four months from the date of receipt of the notification. The decision shall be deemed approved unless the Council, by qualified majority and in that same period, decides to hold it in abeyance, in which case the Council shall state the reasons for its decision and set a deadline for re-examination of it.



Interestingly, the particular purpose which any enhanced cooperation must have in the ambit of the CFSP is to “safeguard the values and serve the interests of the Union as a whole by underlining its identity as a coherent force in the international arena”. To this particular purpose is also added a very special emphasis on consistency with all Union policies, a guarantee of coherence which had already been sought under Article 45 TEU, but that figures prominently in the special provisions of the CFSP (Art. 27a TEU).

Enhanced cooperation in this field may be established to implement a joint action or common position but in no event may relate to matters having military or defence repercussions. Therefore this does not allow definition of principles and general guidelines for the CFSP, nor common strategies.

For its implementation, the States concerned shall send a request to the Council, not the Commission. The Council shall forward it to the Commission which shall give its opinion, particularly on consistency of the enhanced cooperation with EU policies. It shall also transfer it, for information purposes only, to the European Parliament. The Parliament’s role is thus more limited than in the Community pillar (consultation or assent) and the criminal police and judicial pillar (consultation). Authorisation is granted by the Council, and a State opposing it may refer the proposal to the European Council for a decision by unanimity. The veto that was eliminated during the Nice reform from the other pillars persists therefore in the CFSP.

For its part, the obligation to ensure that the European Parliament and all Council members are fully informed is borne by the High Representative for Common Foreign and Security Policy<sup>24</sup>.

## 6. Lisbon: the enhanced cooperation model moves closer to the community method

The European Convention that drafted the Constitutional Treaty introduced significant changes to the enhanced cooperation arrangements that would later be incorporated into the Reform Treaty, signed in Lisbon in December 2007<sup>25</sup>. It should be noted that this was modifying for the second time a mechanism for enhanced cooperation that had never been used. Once more it could be said that despite not having been implemented, or perhaps precisely because of it, a new review of its regulation took place.

The structure and realignment of the provisions on enhanced cooperation require a preliminary comment. The new Lisbon provisions are basically the same as those of the Constitutional Treaty, which contained a general article on enhanced cooperation in Part I (I-44) and detailed technical regulations in Part III (Articles III 416 to 423). In a single constitutional Treaty, there was no sense in including a general provision in Part I, more understandable to citizens, and then a long list of technical provisions in Part III. The Lisbon Treaty took up this approach and established a general article in the TEU (Art. 20 TEU), and more detailed regulations in the Treaty on the Functioning of the European Union (Arts. 326 to 334 TFEU).

While the reason for this new structure is understandable, the truth is that the reading of the new provisions of the Treaty is more confusing than the previous version, with its clear division between general limits and principles in the TEU and specific requirements and procedures in the corresponding provisions of the three pillars. As explained by RAFAEL PONS<sup>26</sup>, one cannot understand why certain provisions are in the TEU and others in the TFEU. Indeed, the general principles and substantive limits for commencing enhanced cooperation are now divided between the two Treaties (TEU and TFEU).

<sup>24</sup> Article 27 E establishes the procedure for participation, applicable in the event that a Member State wants to join a partnership in this area. The State will notify its intention to the Council and will report to the Commission. The Commission will provide the Council with an opinion within three months from the date of receipt of the notification. Within four months from the date of receipt of the notification, the Council shall decide on the application, as well as on any specific provisions it may deem necessary. The decision shall be deemed approved unless the Council by qualified majority and within that same period decides to hold it in abeyance, in which case the Council shall state the reasons for its decision and set a deadline for re-examination of it.

<sup>25</sup> On the innovations of the Treaty of Lisbon in relation to enhanced cooperation, please see PONS RAFOLS, X.: “Las potencialidades de las cooperaciones reforzadas...”, op. cit. p. 641, URREA CORRES M.: “La efectividad del derecho de retirada, el sistema de reforma y las cooperaciones reforzadas: una incógnita que condiciona el proceso de integración de la Unión”, in MARTÍN Y PÉREZ DE NANCLARES (coord.), *El Tratado de Lisboa: la salida de la crisis constitucional*, Iustel, Madrid, 2008, p. 687-703 and ALCOCEBA GALLEGU A.: “La integración diferenciada en el Tratado de Lisboa o la ampliación de la Europa a la Carta” in FERNÁNDEZ LIESA, C and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, 2008, p. 313.

<sup>26</sup> PONS RAFOLS, X.: “Las potencialidades de las cooperaciones reforzadas...”, op. cit. p.641. Likewise, ALCOCEBA GALLEGU A.: “La integración diferenciada en el Tratado de Lisboa...”, op. cit. p. 313; and URREA CORRES M.: “Mecanismos de integración y (des) integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa”, *Cuadernos Europeos de Deusto*, no. 39, 2008, p. 178.

Another consequence of the new structure of the Treaties and of the removal of the pillars has been the exclusion of particular provisions which referred to the purpose of enhanced cooperation in judicial and police cooperation and in the CFSP. Indeed, the purpose of any enhanced cooperation will remain “to further the objectives of the Union, protect its interests and reinforce its integration process”, as is defined by the new Article 20 TEU, but with a loss of precision in relation to two important matters<sup>27</sup>.

As regards substantive changes, the Lisbon Treaty introduces several innovations.

Firstly, it changed the threshold necessary for commencement of enhanced cooperation by establishing the condition that at least nine States would have to participate in it. This is the only substantive change to the general system of reinforced cooperation introduced by the Treaty of Lisbon, since in the previous version resulting from Nice, the number is only eight. The Constitutional Treaty had envisaged the establishment of a relative threshold, one third of Member States - which in an EU of twenty-seven States would be nine States - but the Lisbon version opted for an objective minimum of nine. With the prospect of further enlargement in the future, the fixed threshold of nine will be easier to achieve than that of one third. However, it is noted that at present the threshold is eight, so this change cannot be considered to facilitate the implementation of enhanced cooperation.

Secondly, the Lisbon Treaty removes the possibility for a Member State to request that the authorization of enhanced cooperation shall be referred to the European Council. While such a referral could not ultimately hinder the approval if the cooperation had the support of a sufficient majority in the Council, the process is simplified by eliminating an obstacle that could have a political impact and that in any case delayed approval.

Thirdly, it increases the participation of the European Parliament by requiring that the implementation of enhanced cooperation requires its consent, except for the CFSP. Before this, Parliament was only consulted (except in cases in which the co-decision procedure applies where - even today - its consent is required).

Fourthly, the Treaty of Lisbon facilitates as much as possible the participation procedure, because it seems that under Article 331 TFEU, once notified by a Member State of its intention to participate in enhanced cooperation already under way, the Commission can do no more than ascertain whether the conditions for participation are complied with, without having any political discretion. In the previous version, the scope for the Commission seems greater, Article 11a TEC stating that, once the participation by a Member State is requested, the Commission “shall decide”. Finally, if the Commission considers that the conditions are not met, and after reconsideration deem that they still remain unfulfilled, it shall report to the Council, which would therefore have an essential role in the participation process.

Fifthly, the Lisbon Treaty enables a ‘bridge’, which will have to permit States of the enhanced cooperation to introduce majority voting in an area where unanimity was specified. Indeed, Article 333 TFEU states that when a provision of the Treaties which may be applied within the framework of enhanced cooperation stipulates that the Council must act unanimously, the Council may unanimously adopt a decision stipulating that it will decide by qualified majority. This possibility could have a very significant potential for promoting greater cooperation. Those States in favour of advancing in an area where unanimity is envisaged not only may do so through enhanced cooperation, without reluctant States being able to veto their progress, but can then continue to move forward by qualified majority. Similarly, another bridge provides for the passage from a special legislative procedure to the ordinary legislative procedure. None of these bridges, however, will apply to decisions having military or defence repercussions.

The Lisbon Treaty also substantially alters the provisions applicable to the Common Foreign and Security Policy and Police and Judicial Cooperation. Very briefly - since these matters are dealt with separately in other chapters of this book - we can note, first, that much of the third pillar is incorporated in the new Title V of the TFEU implying a shift towards the ordinary legislative procedure and application of qualified majority, and second, that the ban on using enhanced cooperation in matters having military or defence repercussions is gone, with a new permanent cooperation structure in this matter being regulated.

Does this again mean a more flexible approach to flexibility? Probably, the innovations in the arrangements applicable to the Common Foreign and Security Policy and Judicial and Police Cooperation have the effect of facilitating enhanced cooperation in these areas, where the possibilities - for example on defence - are significant.

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<sup>27</sup> PONS RAFOLS laments the disappearance of such references which he considers *relevant*: “Las potencialidades de las cooperaciones reforzadas..”, op. cit., p. 641

With regard to the general regime, leaving aside the amendment relating to the threshold, two major changes are foreseen in the authorization procedure: elimination of the transfer of the authorization of enhanced cooperation to the European Council and request the consent of the European Parliament. While it seems clear that the procedure is facilitated by avoiding referral to the European Council, one cannot consider that the greater involvement of the European Parliament will necessarily facilitate the implementation of enhanced cooperation, since it may well be that Parliament thinks that a particular proposal, for example, does not serve the aim of deepening the integration process. In reality this is a new filter to pass through<sup>28</sup>. However, both eliminating the referral to the European Council and Parliament's involvement are signs of movement towards the Community method, towards the classical Community's institutional balance itself. This communitarisation of enhanced cooperation is further strengthened by communitarising the arrangements applicable to Police and Judicial Cooperation and therefore deserves, in our view, a positive assessment.

Thus, the process carried out to domesticate or discipline<sup>29</sup> the differentiation is consolidated, bringing the overall enhanced cooperation mechanism closer to the Community method. This reinforces the idea that the enhanced cooperation model enshrined in the Treaties is guided by the idea of integration. It has been rightly said that it would have been more appropriate to call the enhanced integration *reinforced cooperation*<sup>30</sup> or that it is a *supranational differentiation*<sup>31</sup> model which does not contradict the orthodoxy of the Community method. As already mentioned, Nice took a step forward in clarifying the differentiation model, in saying that enhanced cooperation must strengthen the integration process. Lisbon is a further step in the communitarisation of differentiation.

However, one cannot reflect on the regulation of enhanced cooperation in the Lisbon Treaty without at least indicating that this reform also includes other forms of differentiation, such as differentiation through protocols. The most striking case is the introduction of a case of differentiated integration in relation to the Charter of Fundamental Rights, in respect to which the UK and Poland will have a special legal position<sup>32</sup>. Once again we see how the enhanced cooperation mechanism does not prevent the development of other forms of differentiation that may be less consistent with the Community method and spirit.

## 7. Final thoughts: an integration mechanism that is necessary and better than the alternatives

The efficacy of the enhanced cooperation mechanism is unknown. Today, more than a decade after its inclusion in the Treaty, despite the passionate political and legal debate, and the successive reforms of the statute, the fact is that the enhanced cooperation mechanism has not yet been used.

Its inclusion in the Treaty in the mid-nineties unleashed a storm. Many highlighted the risk that this new mechanism posed to cohesion and to the principle of unity in a Community in which, except in very rare cases, the same law, the same rules, were applicable to all. Some argued that this mechanism could only lead to disintegration, to the division of the Union into two groups<sup>33</sup>. For others, a flexible Europe meant the bankend of solidarity: with this mechanism a group of States could, without the necessary qualified majority, *do their own thing*, under the promise to those left behind that they might join - in later<sup>34</sup>. Others indicated that flexibility meant complexity, just at a time when the EU was constantly seeking to simplify and reach out to citizens. In short, for many, enhanced cooperation would be an obstacle to the advancement of all, which would have less pressure to move if supporters could engage in their own enhanced cooperation.

<sup>28</sup> This was indicated by JULIO BAQUERO CRUZ in the seminar *El futuro de la cooperación reforzada* which took place in the European Studies Institute of the CEU San Pablo University on 29 April 2009.

<sup>29</sup> URREA CORRES uses the term *discipline* in URREA CORRES, M.: "Mecanismos de integración y (des)integración..." op. cit., p.172.

<sup>30</sup> A. MANGAS MARTÍN, "La cooperación reforzada en el Tratado de Ámsterdam", op. cit., p. 29, and J. MARTÍN PÉREZ DE NANCLARES, "La flexibilidad en el Tratado de Ámsterdam...", op. cit., p. 231.

<sup>31</sup> THYM, D.: "Europa a varias velocidades..." op. cit., p. 572.

<sup>32</sup> A. ALCOCEBA, "La integración diferenciada en el Tratado de Lisboa..." p. 317.

<sup>33</sup> DE AREILZA, J.: "The reform of enhanced co-operation rules: Towards less flexibility?", op. cit., p.38.

<sup>34</sup> WEILER, J.H.H.: "Ámsterdam, vuelva usted mañana", *El País* newspaper, 2 October 1997.

Today, criticism of the enhanced cooperation mechanism is more nuanced and the general assessment by commentators seems to us more positive, or at least more resigned. For most, this mechanism is essential<sup>35</sup> in an enlarged, more heterogeneous EU, in which the linear model of integration appears to be exhausted and at the limit of its possibilities<sup>36</sup>.

Enhanced cooperation may be a way forward, an alternative to avoid the paralysis that can be caused by the veto in an extensive and diverse EU, in which several Member States do not share the desire to deepen the integration process. Thus, this mechanism may allow the deepening to continue, at least in some areas, and overcome the veto of the reticent, allowing progress for those States wishing to do so. This is perhaps the greatest virtue, the great promise of flexibility.

But there are other reasons that may tilt the balance in favour of the enhanced cooperation mechanism. First, commentators have indicated - and facts have proven - that the mere existence of enhanced cooperation may in itself be a driving force for integration. Indeed, the possibility that some States may begin enhanced cooperation may encourage reluctant States to join, if the alternative is that others take the journey in their absence. Experience so far shows that States seem inhibited by the idea of opting out<sup>37</sup>.

Moreover, even if this momentum is not enough, and some States are left behind, the previous experiences of differentiation show that sometimes the vanguard may end up attracting the reluctant and allowing progress of all in integration. The UK opt-in to the social protocol or the Schengen Treaty - the communitarisation of which would be achieved later - shows that enhanced cooperation could be a mechanism for advancing the vanguard, and could end up producing a general strengthening of the integration process.

Enhanced cooperation may also be a better option than the alternatives. Indeed, many argue that *if it is not done inside, it will be done outside*<sup>38</sup>, i.e., if recourse to the enhanced cooperation mechanism provided by the Treaties is not possible, the States in favour of acting would find other extra-EU routes in order to move forward. The risk of using differentiation outside of the enhanced cooperation mechanism is that all the precautions and limitations provided for in detail under the Treaties simply would not apply. Nor would the participation of the European Parliament and the Commission be assured, which would respectively guarantee democratic control and defence of the common European interest. So much so that it has been suggested<sup>39</sup>, when evaluating the enhanced cooperation mechanism introduced by Amsterdam, that if Schengen is considered the model of differentiation outside of the Treaties, with its deeply undemocratic processes, then sacrificing some aspects of the principle of unity may be worth it in order to improve democracy.

The example of the Prüm Treaty, signed in 2005 by seven Member States to intensify cross border cooperation in the fight against terrorism, transnational crime and illegal immigration, showed that Member States may still be tempted to sign a non-EU Treaty instead of initiating enhanced cooperation. This would enable them to avoid the strict requirements set out in the Treaty, without ruling out that later - following the trail blazed by Schengen - the commitments made may be incorporated into the Community framework (as were some of its elements through the Council's decision in 2007).

Another method of differentiation, namely the use of specific Protocols to establish specific policies for certain States, could prove more damaging to the Community method and spirit. As AMPARO ALCOCEBA has explained, this type of differentiated integration, using the Protocols as an instrument of authorization, goes beyond any objective considerations of effects on the integration process and is the result of the balance of power, capacity of negotiation and political pressure exerted by the State concerned, which is threatening to veto the current revision of the Treaty in force<sup>40</sup>. The temptation that this mode of differentiation represents for Member States, closer to the idea of *Europe à la carte*, has become apparent in recent years, since it was first

<sup>35</sup> This is the view, for example, of URREA CORRES, M.: *La cooperación reforzada en la Unión Europea*, Colex, Madrid, 2002. It also tends to be classified as *inevitable* or *necessary*, for example, FERNÁNDEZ LIESA C. and ALCOCEBA GALLEGU, A.: "La cooperación reforzada en la Constitución Europea" in ÁLVAREZ CONDE, E., and GARRIDO MAYOL, V.: *Comentarios a la Constitución Europea, Tirant Lo Blanch, Consejo Jurídico Consultivo de la Comunitat Valenciana*, p. 490.

<sup>36</sup> MARTÍN Y PÉREZ DE NANCLARES "La flexibilidad en el Tratado de Ámsterdam..", op. cit. p. 208". Likewise, for FERNANDO MARIÑO it constitutes an alternative to a linear unitary notion of integration: MARIÑO FERNÁNDEZ, E.: "La integración diferenciada. La cooperación reforzada", in OREJA AGUIRRE, M. (dir.), *El Tratado de Ámsterdam: análisis y comentarios*, Madrid, 1998.

<sup>37</sup> THYM, D.: "Europa a varias velocidades..." op. cit., p. 589.

<sup>38</sup> EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation..." op. cit. p. 250.

<sup>39</sup> SHAW J.: "The Treaty of Amsterdam: challenges of flexibility and legitimacy" en *European Law Journal*, Vol. 4, no. 1, 1998, p. 84.

<sup>40</sup> ALCOCEBA GALLEGU, G.: "La integración diferenciada en el Tratado de Lisboa..." op. cit., p. 315.



used on the occasion of the Maastricht Treaty. The Lisbon Treaty, once again, resorts to the Protocols, this time in connection with such sensitive matters as fundamental rights. Again, enhanced cooperation seems a better alternative, for which reason some have suggested that the future of the Union could lie in increasing the use of enhanced cooperation and gradually reducing the areas of this *Europe à la carte* which allow self-exclusion and which it has been necessary to tolerate in the past in order to move forward, whether in monetary union, social policy, or now, in fundamental rights<sup>41</sup>.

In our opinion, enhanced cooperation is a necessary tool, which can contribute to the dynamism of the European Union, enabling those who want to move forward to act, and exerting a force of attraction on the rest, at a time when the reluctance of several States hinders the advancement of all.

In its current configuration, because of its multiple safeguards and requirements, enhanced cooperation has become consolidated as an *integration* mechanism, compatible with the Community method and spirit – even more so, after the Lisbon reform -, which ensures the participation of the supranational institutions that express interest and is open to non-participants who wish to join later. It is no wonder that instead of enhanced cooperation it has been said it could be called *differentiated integration*<sup>42</sup> or even *supranational differentiation*<sup>43</sup>.

Although it is true that differentiation mechanisms are not without serious risks, because the unity of objectives is broken, and the legal situation of the various Member States will be different, we can consider that in its current configuration, it is unlikely that the enhanced cooperation mechanism could become an instrument to consolidate a, stable and exclusive ‘hard core’, in the manner suggested in the nineties by Lamers and Schäuble. On the contrary, the experience of these years and careful legal regulation suggests that its expected use will be residual, pragmatically and specifically limited to those cases in which a vanguard that wants to act in a new area does not obtain the required consensus<sup>44</sup>. Probably it is a better alternative to non-EU Treaties or the opt-out Protocols that have been tolerated in the past.

In conclusion, we note that the study of the provisions on enhanced cooperation gives grounds for a degree of contained optimism, within the difficult political circumstances that the EU finds itself. The enhanced cooperation model enshrined in the Treaty has established itself as an instrument geared towards strengthening the integration process, which ensures the participation of the institutions that represent supranational interests. It is likely that enhanced cooperation will not be the key to dealing with all the challenges that the enlarged, complex and vacillating European Union faces in the twenty-first century, but it can be a tool to regain momentum in certain areas and allow those States that want to deepen integration to promote new projects.

Enhanced cooperation may be a key part of the future of the Union, a part that contributes - along with others - to defining its future. As MARIOLA URREA<sup>45</sup> noted, any reflection on flexibility cannot be separated from another two key issues: the regulation of the possibility of withdrawal from the EU by its Member States and the possible modification of the rules for revising the Treaties towards a system based on the majority. The combination of these pieces suggests a different future and allows us to imagine a new balance in the relationship between the States and the EU within the framework of which the least integrationist States have - through the right of withdrawal - the option of not pursuing progress in integration, but lack the power that they enjoy today to veto the progress of others in any review of the Treaties. Enhanced cooperation would, in this context, be a pragmatic tool to allow a certain degree of differentiation within the Treaties, compatible with the spirit and method of the integration process. However, this is another complex issue that without doubt requires a ... different ... handling.

<sup>41</sup> BROTONS REMIRO, A.: “Las suicidas cláusulas finales de los Tratados Europeos” in FERNÁNDEZ LIESA, C and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, 2008, p. 355.

<sup>42</sup> MANGAS MARTÍN, A.: “La cooperación reforzada en el Tratado de Amsterdam” op. cit., p. 29, and MARTÍN Y PÉREZ DE NANCLARES, J.: “La flexibilidad en el Tratado de Amsterdam...” op. cit., p.231.

<sup>43</sup> THYM, D.: “Europa a varias velocidades...” op. cit., p. 572.

<sup>44</sup> As suggested by, for example, Král David, *Multi speed Europe and the Lisbon Treaty-Threat or opportunity?*, Institut pro Evropskou Politiku, Europeum, 2008, p. 7.

<sup>45</sup> URREA CORRES M.: “Mecanismos de integración y (des)integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa”, *Cuadernos Europeos de Deusto*, no. 39, 2008, p. 169-190. See also URREA CORRES M.: “La efectividad del derecho de retirada, el sistema de reforma y las cooperaciones reforzadas: una incógnita que condiciona el proceso de integración de la Unión”, in MARTÍN Y PÉREZ DE NANCLARES (coord.), *El Tratado de Lisboa: la salida de la crisis constitucional*, Iustel, Madrid, 2008, p. 687-703.