

# ENHANCED COOPERATION IN THE EUROPEAN UNION FROM ITS ORIGINS TO THE LISBON TREATY

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**Abstract.** *In the research literature there is the opinion according to which among the principles governing the community competencies, along with the principles of subsidiarity and proportionality, there is also the principle of flexibility or of the enhanced cooperation<sup>67</sup>. In terms of the appearance of this principle in the European construction, the opinions are divided. Thus, contrary to a widespread idea, that this principle would be a recent one, some authors<sup>68</sup> believe that the principle of flexibility has made its appearance along with the adoption of the constitutive Treaties of the European Communities. In the following we will try to bring relevant and necessary arguments in support of the latter idea.*

*In the present text we analyzed the problem of the enhanced cooperation in the European Union from its origins to the Lisbon Treaty. There are four major concerns that we have approached. The first part of the text is dedicated to the history of the evolution of the enhanced cooperation. Here we presented the connection between integration and enhanced cooperation, the principle of flexibility, and the way it is perceived by the Treaties of the European Communities (Treaty of Rome, the Single European Act, Treaty of Maastricht, Treaty of Amsterdam, and Treaty of Nice).*

*The second part of the text is dedicated to presenting the regime of the enhanced cooperation. In this context we made reference to the general terms of the*

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<sup>67</sup> Claude Blumann, Louis Dubois, *Droit Institutionnel de l'Union Européenne*, Editions du Juris-Classeur, Paris, 2004, p. 274.

<sup>68</sup> H. Labayle, “Amsterdam ou l'Europe des coopérations renforcées: Europe mars et avril 1998”, in Claude Blumann, Luis Dubois, *op. cit.*, p. 275.

*enhanced cooperation, but also to the special clauses or additional conditions relating to the rights and obligations of the states.*

*The last two parts of the text are centered on presenting the enhanced cooperation in practice – and here we referred to the intervention of the enhanced cooperation in each of the three European Pillars; and also the prospects stipulated in the Lisbon Treaty regarding enhanced cooperation – its principles and the procedures provided by the Treaty on the Functioning of the European Union.*

**Keywords:** enhanced cooperation, principle of flexibility, European integration, “concentric circles”

### **1. Introduction**

Since the late 60's, Willy Brandt<sup>69</sup> has put the issue of introducing the idea of “differentiation” between Member States of the European Communities. Thus, in order to illustrate the idea seemingly simple, that of a “differentiated Europe”, there were used a plurality of metaphors, among which: “Europe with variable geometry, flexible Europe, the Europe of the Olympic circles, the Europe of concentric circles, the two-speed Europe and so on”. The theory of the “flexible Europe” was introduced in 1994, by John Major, in a speech given at Leyden, in the context of which he exhibited the vision on a Europe in which the commitment of the States has as sole basis the respect for the Single Market. Accordingly, the participation of the States to the other EU policies is negotiated from one case to another. This vision on the European construction is obviously based on the example offered by the United Kingdom which obtained waivers both in the monetary field and in the social one. The theory leads to a complete lack of the idea of integration and it is meant to be an obstacle to the political construction at the European level<sup>70</sup>.

Going back to the meanings given to the concept of “differentiated Europe”, the Schäuble-Laners document from September 1994 enrolls into a totally different perspective. It suggests to the

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<sup>69</sup> The French Minister of Foreign Affairs of that time.

<sup>70</sup> Institut pour la démocratie en Europe, *Pour une coopération renforcée dans le domaine économique et monétaire*, 2000, 7, <http://www.i-d-europe.org/rap-cooprenf.htm>.

participants in the third stage of EMU to begin the European integration, especially in Pillars II and III of the Treaty of Maastricht. Jacques Delors pushed this logic to its confluence with the idea of “Little Europe / Great Europe”, based on the monetary integration followed by the coordination of the foreign policy and common security, meaning the achievement of a real “Federation of nation States”<sup>71</sup>.

In order to present the Union's institutional logic there were established three of the most important principles of the enhanced cooperation. Thus, enhanced cooperation must serve the objectives of the T.E.U., it must develop within the single community institutional system, and to always be “opened” to non-participating states, without the possibility to be blocked by the veto of any of them. In the following I will insist particularly on the history of the emergence of the enhanced cooperation in the European Union, by analyzing the link between it and the European integration process, I will also insist on the regime and on the process of implementation of the enhanced cooperation according to the provisions of the Community Treaties.

## **2. Brief history of the enhanced cooperation in the European Union**

**2.1. The connection between integration and enhanced cooperation.** As Liviu-Petru Zăpârțan noted<sup>72</sup>, the founders of the European integration desired to create an “opened” community so that any other European States which share the fundamental values that are at its basis, to be encompassed, at some point within the Union. Hence, the founding States of the European Union have created, within the framework of the enlargement process, mechanisms for accession and integration to which the future Member States must submit, obviously each of them in its own rhythm and “way of seeing the evolution” towards the integration.

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<sup>71</sup> *Idem.*

<sup>72</sup> Liviu-Petru Zăpârțan, *Construcția Europeană*, Ed. Imprimeriei de Vest, Oradea, 2000, p. 237.

The processes of integration and enhanced cooperation are not mutually exclusive through isolation<sup>73</sup>. The European Communities considered that the only real way to solve both international and European problems is the widening through the acceptance of some new European countries that share the values and philosophy which formed the basis of the European construction<sup>74</sup>. Thus, the States that understood the need for the accession to the European Union have started the accession negotiations, signing to this effect treaties concerning the integration of the community *acquis* into their internal legislation. All this complex mechanism set up upon the future Member States is based on the desire of Communities to avoid creating a divided Union, in which each State has a different rhythm of development.

The differences between the Member States still persist, however, after the integration of the new Member States. This is the reason why, in the accession Treaties there were established transition periods, in which the newcomer States have the obligation to accomplish, as best as possible, the European requirements. All this for the achievement of the supreme objective, namely: the creation of a homogenous Union. The time that each country spends for the achievement of this objective differs from one Member State to another.

European integration implies the consent of the States to align to the conditions imposed by the EU's basic Treaties and by their modifying Treaties. In this context, the new States voluntarily surrender certain powers in favor of the Community. Hence, there it takes place a conventional transfer of national competences in various areas such as: freedom of movement, freedom of establishment, trade policy, agricultural policy, and single currency, etc. According to the research literature, the concept of "transfer of competences" is nothing else than an imperfect translation of the idea of integration, because the

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<sup>73</sup> Jean Paul Jacqué, *Droit Institutionnel de l'Union Européenne*, 2e édition, Dalloz, Paris, 2003, p. 29.

<sup>74</sup> Liviu-Petru Zăpârțan, *op. cit.*, 2000, p. 238.

transferred national competences do not find themselves identically within the community system<sup>75</sup>.

Thus, as J. P. Jacqué considered, one of the main starting points of cooperation is represented by the issue of the division of competences. Unlike the Federal States where the federal powers are ed by the fields falling within the competence of the Federated States and that are the subject of a tight cooperation between the Federation and Federated States, the European Union is not a Federation, but however, the cooperation between its Member States is essential to its existence<sup>76</sup>.

**2.2. Principle of flexibility – enhanced cooperation.** In the research literature there is the opinion according to which among the principles governing the community competencies, along with the principles of subsidiarity and proportionality, there is also the principle of flexibility or of the enhanced cooperation<sup>77</sup>. In terms of the appearance of this principle in the European construction, the opinions are divided. Thus, contrary to a widespread idea, that this principle would be a recent one, some authors<sup>78</sup> believe that the principle of flexibility has made its appearance along with the adoption of the constitutive Treaties of the European Communities. In the following we will try to bring relevant and necessary arguments in support of the latter idea.

## **2.3 The principle of flexibility in the Treaties of the European Communities**

**2.3.1 Short presentation of the situation previous to the Treaty of Amsterdam.** In this context, the evaluation of the existence of the principle of enhanced cooperation within the watermark of the previsions of the Community Treaties, prior to the Treaty of

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<sup>75</sup> Marie-Françoise Labouz, *Droit Communautaire Européen Général*, Bruylant, Bruxelles, 2003, p. 32.

<sup>76</sup> J. P. Jacqué, *op. cit.*, p. 29.

<sup>77</sup> Claude Blumann, Louis Dubois, *op. cit.*, p. 274.

<sup>78</sup> H. Labayle, *op. cit.*, p. 275.

Amsterdam, is absolutely necessary. So, from the detailed analyses of the stipulations of the Article 306 C.E. we can see the acceptance of the Member States to allow the regional unions established prior to the Treaty of Rome<sup>79</sup> to maintain themselves after the signing of the constitutive Treaties of the European Communities. The principle of flexibility was also found within the layer of the provisions of Article 49 from the Treaty of Rome, regarding the special regime applicable to the Member States or to the ones which were in the course of accession. These ones, in the virtue of the community stipulations, enjoyed transition periods in order to assume the community *aquis* and to achieve the European Community integration process. In order not to endanger the Common Market, during the transition periods, the Member States could invoke, to this effect, based on the provisions of the Article 226 from the Treaty of Rome<sup>80</sup>, some safeguarding clauses.

The most eloquent example for the existence of the enhanced cooperation, even if not in an express manner, during that period was given in 1985 by the conclusion of the Schengen Agreement. The objective of the five Member States that signed the Agreement was to create a space of the free movement, by suppressing the border controls between the signatory States and by reinforcing the police cooperation between them. Having as a background a classical intergovernmental agreement and being totally outside the community law, the Schengen Agreement was much later introduced in the community life of the member states<sup>81</sup>. Later on, The Single European Act brought its contribution to the problem of the enhanced cooperation, filling in the Treaty of Rome with new safeguarding clauses related to the creation of the Internal Market, foreseen in Articles 100A and 100B of the Treaty<sup>82</sup>.

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<sup>79</sup> It's about Benelux and about Belgium - Luxembourg Union.

<sup>80</sup> Today Article 226 from the Treaty of Rome does not exist anymore because it was repealed by the Amsterdam Treaty.

<sup>81</sup> J.-F. Akandji-Kombe, "Accords de Schengen, Rép. Dalloz droit communautaire", 1er vol., 2002, in C. Blumann, L. Dubois, *op. cit.*, p. 275.

<sup>82</sup> J. P. Jacqué, "L'Acte unique européen", *R.T.D.E.*, 1986, p. 599; J. C. Masclat, "La libre Circulation des marchandises dans les Communautés européennes", *R.T.D.E.*, 1986, p. 246.

The adoption of the Treaty of Maastricht represents a highly important moment on the path followed by the principle of flexibility. To this effect, it is relevant the structuring the European Union on the three Pillars that are inspired from the *ratione materiae* diversity between the Member States, each one of them having its own rhythm of reaching the supreme objective of accomplishing the Union. Hence it appears the idea of the “concentric circles” in which the participation of encompassing Member States is inevitably unequal<sup>83</sup>. According to this concept, the European Union Member States could be grouped into several “circles” based on their level of integration. Some experts mention the “circle of the common law” (EU Member States), the “adjacent circle” (non-EU countries involved in the accession process) and “more tight circles” in which cooperation is deepened (Schengen, Euro, etc.)<sup>84</sup>. *Per a contrario*, other experts believe that the vision of the concentric circles having in their center a hard core composed of the EU countries, which gradually encompasses outer circles (a vision also found in the I. Wallerstein’s theory of relations between center and periphery), proves particularly ambiguous and inconsistent with the spirit of solidarity that was the basis of the founding of the Union. However, it is generally accepted that we could talk about “interest groups” who intersect but do not overlap<sup>85</sup>.

**2.3.2. Classifications of the principle of flexibility.** In the attempt to conceptualize the principle of enhanced cooperation, in the European research literature there were systematized several classifications based on various criteria.

Thus, depending on the form that diversity takes, we can distinguish between<sup>86</sup>:

- forms of diversity within the Union and

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<sup>83</sup> C. Blumann, L. Dubois, *op. cit.*, p. 276.

<sup>84</sup> Uniunea Europeană, *Glosar de termeni*, No. 31, March 2007, p. 3, [www.infoeuropa.ro](http://www.infoeuropa.ro).

<sup>85</sup> Liviu-Petru Zăpârțan, *op. cit.*, pp. 103-104.

<sup>86</sup> P. Manin, J.-V. Louis, *Vers une Europe différenciée...*, Pedone, Paris, 1996; C.-D. Ehlermann, “Différenciation accrue ou uniformité renforcée in La CIG 1996”, *R.M.U.E.*, 1997, p. 51.

- forms of diversity outside the Community framework.

The first refers to the enhanced cooperation within the Community Pillar and the second to the enhanced cooperation undertaken within Pillar III – the intergovernmental Pillar. The criticism brought against this classification concerns the fact that this would lead to the thought that diversity would be much easier to accept within the intergovernmental frame than within the community Pillar. In reality, it appears indeed that the great forms of enhanced cooperation<sup>87</sup> currently take place within the Community framework.

Then, depending on the degree of freedom preserved by the Member States, some authors<sup>88</sup> believe that we can distinguish three types of “variable geometry”, namely:

- “regulated variable geometry”, supported by the provisions of the EU treaties. According to it, the Member States have relatively little freedom, limited by the transition periods established in their task in order to integrate;
- “opened variable geometry”, according to which Member States enjoy the autonomy of action<sup>89</sup>;
- “variable geometry outside the treaties” according to which the single existing limit to the enhanced cooperation is the respect for the exclusive competence of the European Communities and of the Community law<sup>90</sup>.

This classification was also exposed in the research literature under another form<sup>91</sup>. Thus, we can talk about:

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<sup>87</sup> Here we are referring to the Euro, to the European citizenship, to research programs, and to the Schengen Area.

<sup>88</sup> P. Manin, *La Révision du traité sur l'Union: perspectives et réalités*, Pedone, Paris, 1996, p. 28.

<sup>89</sup> To this effect, it is relevant the example offered by the Great Britain which has a special status within E.M.U.

<sup>90</sup> The most eloquent example of enhanced cooperation in the sense of the “variable geometry outside the treaties” is the Schengen Area.

<sup>91</sup> Alexandre Stubb, “The semantic indigestion of differentiated integration: the political rhetoric of the pre-IGC debate, Collège d'Europe, 1995”, in C. Blumann, L. Dubois, *op. cit.*, p. 278.



- “*ratione materiae* diversity” or about “Europe à la carte”;
- “*ratione temporis* diversity” or the “Europe of multiple speeds”. This would correspond to the transitional regimes granted to the new Member States and to the safeguard clauses that can be invoked in times of transition. In this case, the objective is the same, but what is different is the rhythm of accomplishing it from one state to another.
- “spatial diversity - *ratione loci*” or “Europe with a variable geometry”. In this last case, the new States accepted within the European Communities see themselves as “excluded States”, without their will, from certain Community policies such as the Euro and the Schengen Area. Usually this exclusion is determined by the need for the Member States to fulfill some much more complex conditions of adherence. It is obvious that the period of time necessary for the fulfillment of these additional requirements varies from one state to another, depending on certain internal factors within each of them.

### **2.3.3. The Treaty of Amsterdam and the enhanced cooperation.**

The Treaty of Amsterdam is the founding act in the field of encoding enhanced cooperation. Hence, the new Title VII, introduced by it in the T.E.U. creates an unprecedented regime – the one of the “enhanced cooperation”. The provisions of Articles 43-45 T.E.U. present the advantage of the general character, thus having the vocation to apply to all the Union’s Pillars, which explains the establishment of the additional stipulations within the Community Pillar (Articles 11 and 11a T.E.C.), within the intergovernmental Pillar (Article 40 - 40B from the T.E.U.) and then, though the Treaty of Nice within the Pillar II – regarding F.P.C.S. (Articles 27A - 27E from the T.E.U.). The new situation created by the Treaty of Amsterdam is governed by three essential features<sup>92</sup>:

- the voluntary nature,
- the institutional nature and

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<sup>92</sup> C. Blumann, L. Dubois, *op. cit.*, p. 278.

- the generality nature – that we have already mentioned.

In the following we will focus on what each of these features imply.

### **2.3.3.1. The optional nature of the enhanced cooperation.**

According to Article 43 from the T.E.U., “Member States may refer to the institutions, procedures and mechanisms provided by the present Treaty (...)” if they intend to establish an enhanced cooperation between them. It is, in other words, about a way to suggest the fact that to the other forms of existing diversity it is added the one of the enhanced cooperation on the model established by Title VII of the T.E.U.

Thus, nothing can suppress the freedom of the Member States to exercise their capacity to conclude agreements both within the European Union and beyond it. The limit imposed to this respect is not to establish an enhanced cooperation in the fields of exclusive competence of the Communities. On the other hand, in areas of concurrent competence of the Community, enhanced cooperation is always submitted to comply with the Community law in its entirety. The principle of loyal cooperation, established in Article 10 from the T.E.C. is applicable; otherwise there is the concern that the actions of the Member States could become anti-Community<sup>93</sup>.

The optional nature of the enhanced cooperation appears just as well from the clauses of “opting out” established by the Treaty of Amsterdam, according to which the Member States have the right to decide whether to participate or not to a form of enhanced cooperation in a particular field, through the signing of a Protocol which expressly provides cooperation measures which are not applicable to certain signatory Member States. It is more than obvious that the clause of “opting out” is attached to the sovereign power of each Member State. Also under its sovereign powers, any Member State who has invoked the clause of “opting out” may give it up by a simple notification sent to the Commission. It should also be noted the fact that for the beneficiary State of the clause of “opting out”, the act establishing enhanced

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<sup>93</sup> *Ibidem*, p. 279.

cooperation retains its nature of international law act, and not the one of Community law act, thus following the legal regime applicable to the international acts<sup>94</sup>.

### **2.3.3.2. The institutional nature of the enhanced cooperation.**

According to the Treaty of Amsterdam, this character is the most relevant feature of the enhanced cooperation. The implementation of the possibility to cooperate is not devoid of legal consequences. Hence, Article 140 T.E.C. gives the Commission the opportunity to promote enhanced cooperation between Member States in the social field. This formula that established the Commission's task to reinforce cooperation between the Member States was used in the process of enlarging the powers provided both by the T.E.U. and by the Treaty of Amsterdam<sup>95</sup>.

In these situations we can observe a good application of the principle of subsidiarity, the Community having a complementary intervention in the exploitation of the Community institutional apparatus within the forms of enhanced cooperation<sup>96</sup>. It is both the case of cooperation organized in Titles V and VI from T.E.U. and of the enhanced cooperation provided in Title VII which transforms into a joint cooperation. Therefore, it is entirely submitted to the provisions of the constitutive Treaties and therefore it must respect the unique institutional framework of the Union. The consequence is that from now

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<sup>94</sup> J. P. Jacqu , *op. cit.*, pp. 152-153; We inform the reader that important authors such as Liviu-Petru Z p r an believe that opting out clauses has their origin long before the Treaty of Amsterdam, and rightly so, his opinion is supported practically by the attitude of the countries that during 1990-1991 were demanding community memberships while requiring numerous exceptions to the Community *acquis*. Such was the case of Denmark which at the Edinburgh European Council requested and obtained the permission not to participate to the third stage of E.M.U., restrictions to the European citizenship, the possibility not to recognize Community procedures in the field of internal security; and which based on these reasons remained in the field of cooperation, not in the field of integration as demanded by the T.E.U. - For more details, see: Liviu-Petru Z p r an, *op. cit.*, pp. 243 and the following.

<sup>95</sup> J. P. Jacqu , *op. cit.*, p. 29.

<sup>96</sup> *Ibidem*, p. 31.

on, the Community institutions have won a decisive role in creating a form of the enhanced cooperation<sup>97</sup>.

### **2.3.3.3. The universal vocation of the enhanced cooperation.**

The Treaty of Amsterdam integrated within the EU law the third Pillar, the Schengen Agreement. From now on, it is presented as a type of tight cooperation which is based on its own rules<sup>98</sup>.

Concerning the enhanced cooperation within F.P.C.S., the Treaty of Amsterdam did not bring many innovations. The gap was, however, covered, at least partially, by the Treaty of Nice which cautiously introduced within F.P.C.S. the enhanced cooperation under Title VII. *Stricto sensu*, within F.P.C.S., it can only act upon the “implementation of an action or upon making a common position”, and that is because of the limit established in Article 27A of the T.E.U., according to which “enhanced cooperation cannot act upon matters with military implications or upon the field of defense”.

The adoption of the draft Constitutional Treaty would have represented, at least in this point of view, a step forward for the introduction of cooperation within F.P.C.S. Article I-40 § 6 and 7 authorizes “Member States that meet the criteria of high military capabilities and that made commitments in this field” to establish a “structured cooperation” within the E.U. Further more, Article I-40 § 7 of the draft, directly establishes a close cooperation between some Member States in matters of mutual defense<sup>99</sup>.

## **3. The general regime of the enhanced cooperation**

In the Treaties, enhanced cooperation is based on certain general clauses provided in the T.EU, certain special provisions set out in the T.CE, and the provisions of Titles V and VI from T. EU concerning F.P.C.S. and police and judicial cooperation in criminal matters.

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<sup>97</sup> C. Blumann, L. Dubois, *op. cit.*, p. 280.

<sup>98</sup> To this effect see: Article. 1 of the *Protocol no. 4 on the integration of the Schengen acquis*.

<sup>99</sup> C. Blumann, L. Dubois, *op. cit.*, p. 280

**3.1. General terms of the enhanced cooperation.** The general regime of the enhanced cooperation is subject to Title VII of the T.EU, in this respect the Article 46 T. C.E. provides a juridical control in compliance with the provisions of this title<sup>100</sup>. Article 43 of the T. C.E. establishes general principles governing enhanced cooperation, exposing, as stated in the research literature<sup>101</sup>, the philosophy of this institution.

**3.1.1.** *The principle of favoring the achievement of the objectives established by the Union and by the Communities and of strengthening the integration process.* According to the research literature<sup>102</sup>, from this principle there can be drawn two ideas. First, enhanced cooperation should be a mean of progress; and secondly, that it is placed within the competences of the Union, but it is not a mean of extending them.

**3.1.2.** *The rule of the respect for the principles established in the Treaties and of the single institutional framework.* The most obvious explanation of this principle rule is found in the very institutional character of the enhanced cooperation. It appears as an action of general interest, which emphasizes the institutional character of the provisions of Title VII of the T.EU<sup>103</sup>.

**3.1.3.** *The principle of respecting the *acquis* and the measures taken under the Treaties and that are applicable to Member States.* In relation to this principle there was expressed a point of view<sup>104</sup> according to which this principle is not one of a real concern. The justification is that enhanced cooperation undertaken between some Member States does not encompass within the Community *acquis*. Therefore, the substance of such cooperation cannot be imposed to the future Member States which did not participate to its establishment. The exception is represented by

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<sup>100</sup> We are talking about Articles 43-45 T.EC.

<sup>101</sup> C. Blumann, L. Dubois, *op. cit.*, p. 281.

<sup>102</sup> J. P. Jacqu e, *op. cit.*, p. 154.

<sup>103</sup> *Idem*; C. Blumann, L. Dubois, *op. cit.*, p. 281.

<sup>104</sup> C. Blumann, L. Dubois, *op. cit.*, p. 282.

the forms of enhanced cooperation established by the Treaties (for example, Schengen Area, Euro) which were integrated into the Community law.

**3.1.4.** *Enhanced cooperation should comply with Community law.* The principle in question refers to the Treaty as a whole and not only to the principles established by them, as originally foreseen by the Treaty of Amsterdam<sup>105</sup>. To this respect, a good example is Article 14 of the Treaty of Rome, as amended by the Treaty of Nice in the sense that enhanced cooperation cannot affect Internal Market or the cohesion of the Economic and Monetary Union. The rule seeks the proper functioning of the Internal Market in the context of some forms of enhanced cooperation undertaken by the Member States.

**3.1.5.** *Enhanced cooperation shall not affect the stipulations of the Protocol of integrating the Schengen acquis into the Treaty, because this might be the subject of a clause of “opting out”.*

**3.1.6.** *The principle according to which enhanced cooperation cannot intervene within matters that are the subject of the exclusive competence of the Community.* The arguments for supporting this principle lose their relevance when invoking the fact that is designed as an action of the Union, the more so the field of the powers of the Community and the Member States is a complex one and it is still quite unclear.<sup>106</sup>

The Treaty of Amsterdam and the one of Nice have different approach on the subject. The first dissociated the general conditions set out in T.EU and the special additional conditions for each Pillar of the European Union; in exchange, the Treaty of Nice proceed to a regrouping of terms, making them substantially identical. Hence, a synthetic approach allows us to distinguish two types of conditions: conditions that are meant to protect the Union as a whole and conditions pertaining to the rights and obligations of the Member States.

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<sup>105</sup> *Ibidem*, pp. 282-283; J. P. Jacqué, *op. cit.*, p. 154.

<sup>106</sup> C. Blumann, L. Dubois, *op. cit.*, p. 282.

Regarding the conditions of protecting the Union, they were already exposed, being summarized in principles underlying the enhanced cooperation<sup>107</sup>. In the following, we will refer mainly to the special additional conditions, meaning to the conditions on the rights and obligations of the States.

### **3.2. Special clauses or additional conditions relating to the rights and obligations of the States**

**3.2.1.** According to the Treaty of Nice, in order to avoid the dispersion of the interest of the Member States towards insignificant aspects, enhanced cooperation must concern at least eight Member States.

**3.2.2.** According to Article 43, section a) of the T.EU, enhanced cooperation may lead to extending the powers of the Union and of the Community. It “should not affect the rights, obligations and interests of Member States which do not participate to it”. The Treaty of Nice eliminated this condition; the rights of the non-participating states will be respected through the “clause of opening” established in Article 43, paragraph 1, letter g) from the T. EC. Hence, in virtue of this clause, any non-participating state may join the group at any time, only as a subject to acceptance the initial act and all its modifying conditions<sup>108</sup>.

The opening that any form of enhanced cooperation established between certain Member States must keep refers to the possibility granted to other Member States too, that in the future to opt to participate at a certain enhanced cooperation in a specific area. In addition to this rule, Article 43A limits the possibility of initiating enhanced cooperation procedures, considering that it should be the last solution to which the Member States resort in resolving their problems.

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<sup>107</sup> *Ibidem*, p. 281

<sup>108</sup> In this context, non participants need to rally as soon as possible to the conditions imposed on the form of cooperation that they choose, without having to fulfill further conditions except the procedural ones.

Hence, the rule in question endows the Council with the obligation to try to find a solution involving all the Member States and only if such a solution does not appear, the procedure of participating to a form of cooperation could be initiated<sup>109</sup>. The rule is justified, especially by the fact that the acts and the decisions made in the framework of enhanced cooperation are not part of the Community *acquis*<sup>110</sup>.

Moreover, any step forward in the European construction must be carried out according to common law procedures of the Treaties. Only in case of their failure it can be passed on to group initiatives. The rule is also based on the desire, or rather, on the need to respect the basic principles of the Community law: the unity and equality of treatment between the Member States<sup>111</sup>.

This allows emphasizing the link between enhanced cooperation and the rules of the unanimous voting. Hence, it can be seen that, in practice, enhanced cooperation develops most frequently in areas where the vote is taken by unanimity, because in these areas progress is slow, as a natural consequence of the right to vote of each Member State. Thus, because of the implications of the mechanism, the Treaty of Nice has named the Council as “the court” that can appreciate the failure of the normal decision-making procedures. Furthermore, it was considered necessary to establish a reasonable time between the moment of failure and the moment of launching the enhanced cooperation<sup>112</sup>.

#### **4. Enhanced cooperation in practice**

**4.1. The onset of the enhanced cooperation.** As mentioned above when referring to the basic principles of cooperation, it is the subject to the institutional procedures of the European Union, and depending on the Pillar in which it starts, we can see many differences.

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<sup>109</sup> J. P. Jacqué, *op. cit.*, p. 155; C. Blumann, L. Dubois, *op. cit.*, p. 281.

<sup>110</sup> J. P. Jacqué, *op. cit.*, p. 156.

<sup>111</sup> Christine Guillard, *L'intégration différenciée dans l'Union européenne*, Thèse, Tours, 2003, p. 399.

<sup>112</sup> C. Blumann, L. Dubois, *op. cit.*, p. 282.



#### **4.1.1. Enhanced cooperation in Pillar I – Community Pillar.**

Within this Pillar, the legal acts related to enhanced cooperation are adopted in accordance with the rules and procedures that are specific to the fields in which it is triggered<sup>113</sup>. The Commission retains its monopoly position. Therefore, Member States have the initiative of the initiative, being able to request the Commission to submit a proposal to this regard. But the Commission is not obliged to comply with the request of Member States. By virtue of Articles 192 and 208 from T.EC, in case of a negative response, the Commission must communicate to the Member States the reason of the refusal to initiate a proposal for the enhanced cooperation. Under the Treaty of Amsterdam, the powers of the European Parliament within the procedure of enhanced cooperation are limited to an advisory opinion on this. The Treaty of Nice has sensitively increased its power, replacing its advisory opinion with a notice of compliance in those instances where enhanced cooperation intervenes in areas related to the cooperation procedure. Thus, for triggering enhanced cooperation, the European Parliament decides in plenary, without counting the participating or non-participating states. The final decision is made by the Council, which under the stipulations of the Treaty of Nice, decides with qualified majority<sup>114</sup>.

**4.1.2. Enhanced cooperation in the third Pillar – intergovernmental Pillar.** The general procedure is identical, but the intergovernmental inspiration gives more power to the Member States and the Council. After the amendment of the Treaty of Amsterdam, in which the initiative belonged only to the Member States, along with the Treaty of Nice it is shared between the Commission and the Member States. The role of the European Parliament increases from simply

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<sup>113</sup>*Ibidem*, p. 285.

<sup>114</sup>*Ibidem*, p. 284. It should be noted that at the deliberations of the Council have the right to participate all Member States, but only the participants to the respective cooperation form may vote. In an ambiguous form Article 44 § 1 T.EU states that “the proportion of votes of the members of the Council as the one presented in Article 205 § 2 of T. EC”.

“informed” to the one of a consultant. The final decision for the purposes of initiating enhanced cooperation belongs to the Council, acting with a qualified majority. According to the provisions of the Treaty of Nice, in the case of important reasons of national policy it can be asked for the intervention of the European Council<sup>115</sup>.

**4.1.3. Enhanced cooperation in Pillar II - F.P.C.S. Pillar.** Unlike the first two Pillars of the European Union, in Pillar II - F.P.C.S., Member States have the initiative monopoly. Besides the Commission which has an advisory role, the European Parliament which is only informed about the initiation of enhanced cooperation, there appears a new actor – the High Representative for the F.P.C.S., who has the role to inform the European Parliament and the Member States. The final decision belongs to the Council which this time states unanimously. But its decision may be paralyzed by invoking “the clause of the important national political reasons”<sup>116</sup>.

**4.2. The paradox of the enhanced cooperation.** In the presented context we can talk about the problem of the “institutional” conciliation of the enhanced cooperation with the “fragmentation” to which any action of the Member States drives to. Under these conditions, the optimal solution envisaged by the Treaty was that of creating tools that allows non-participating states to join partnerships<sup>117</sup>.

Thus, according to Article 44 § 2 of the T.EU, the content of an enhanced cooperation shall bind only the participating states. The fact that, as expected, the non-participants are not bound by any obligation under the partnerships gave birth in the research literature to the idea of the existence of the “concentric circles” in the European construction<sup>118</sup>.

Still, it should be noted that in the task of the non-participating Member States inevitably arises the negative obligation “to do nothing”

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<sup>115</sup> *Ibidem*, p. 285.

<sup>116</sup> *Idem*.

<sup>117</sup> *Ibidem*, 286.

<sup>118</sup> Liviu-Petru Zăpârțan, *op. cit.*, pp. 103 and the following.

to prejudice the established forms of cooperation. Moreover, this negative obligation is expressly provided in Article 44 § 2 T.EU. The stipulations of this Article must imperatively be interpreted in conjunction with Article 10 of the T.EC which establishes a basic principle of the Community law, namely, the principle of fidelity or the principle of the loyal cooperation. Somehow arrived to give a more dynamic character to the relationships between the participants and non-participants, it requires that the Member States take all necessary measures to implement their obligations towards the European Community, so implicitly towards all the encompassing Member States, and to do nothing to prejudice its good functioning<sup>119</sup>.

**4.3. Some considerations regarding the jurisdictional control of the principle of flexibility.** The justness of the principle of enhanced cooperation results from the framework provisions concerning the jurisdictional control of the Article 46, section c) from T.EU.

In the research literature, there was born the issue of opposing the CJEC' decisions pronounced in the process of interpreting or validating the general rules of the common law towards the states non-participating to the forms of enhanced cooperation in which the formers are involved. Before exposing the solution found by the research literature to this effect, we believe that some clarification is needed. First, within the jurisdictional control of the principle of flexibility, the CJEC must take into account the incomplete participation of the Member States to the enhanced cooperation. Secondly, CJEC must consider the different status of each of the Pillars of the Union. According to the opinion expressed in the research literature, the CJEC' decisions are partially opposable to the non-participating Member States. The justification is based on the fact that in the situations in

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<sup>119</sup>M. Blanquet, *L'article 5 du T. C.E.E.: recherches sur les obligations de fidélité des Etats membres de la CEE*, L.G.D.J., Bibl. De droit international et communautaire, Tome 108, 1994; J. Auvret-Finck (dir.), *L'Union européenne carrefour de coopérations*, L.G.D.J., 1998, in C. Blumann, L. Dubois, *op. cit.*, pp. 65; 286.

which the non-participating Member States notify enhanced cooperation measures which they considers illegal or contrary to their rights and interests, they have the right to contest them in front of the CJEC.

## **5. Prospects stipulated by the Treaty of Lisbon**

Subsequent to the ratification by Member States of the Lisbon Treaty, the Treaty on the Functioning of the European Union brings innovations which consist mainly in synthesizing and reorganizing the stipulations concerning enhanced cooperation. Hence, Articles 27A - 27E, Art. 40 - 40B, Art. 43-45 of the T.EU and Articles 11 - 11A of the T.EC will be replaced with a new Article 10 encompassing "Stipulations on enhanced cooperation forms". According to paragraph 1 of this Article, "Member States that wish to establish between them a form of enhanced cooperation within the Union's non-exclusive competences, can make use of its institutions and can exercise these competences by applying the relevant stipulations of the Treaties, within the limits and in accordance with procedures under this Article and but also under Articles 280A - 280I of the Treaty on the Functioning of the European Union". In the following we will try a short presentation of a list of principles and procedures underlying the enhanced cooperation under the regulations laid down in the TFUE.

### **5.1. The functioning principles of the enhanced cooperation stipulated in the TFUE**

We inform the reader that the new European Union treaty takes into account the purpose for which the forms of enhanced cooperation can be established. Hereby, according to Article 10 paragraph 1, Section 2, the goal of establishing a form of enhanced cooperation is that of favoring the accomplishment of the Union's objectives, of defend its interests and of helping to the strengthening of the integration process. To this effect, in the same text, it is expressly provided the universal character of the forms of enhanced cooperation, which are opened towards the states ready to join the partnership, and which according to

Article 280C, are willing to comply with the conditions of participation established by the authorizing decision and with the conditions mentioned in all the documents adopted within the form of cooperation in which integration is desired. In order to achieve the supreme objective, the Commission and the Member States participating to a form of cooperation ensure the promotion of the participation of a number as large as possible of Member States. The Commission has the role of informing regularly the European Parliament and of the Council regarding the evolution of the forma of enhanced cooperation – obviously concerning the forms of cooperation from Pillars I and III, and also the High Representative of the Union for Foreign Affairs and Security Policy – for the forms of enhanced cooperation undertaken under Pillar II.

In the order preferred by the authors of the *TFUE*, on the first place there are three conditions which in order to lead to the initiation of a form of enhanced cooperation must be cumulatively fulfilled. Thereby, the initiation of a form of enhanced cooperation is always authorized by the Council, through a Decision. Then, it should be noted that the Council authorization may only intervene when it considers that the objectives of the proposed cooperation cannot be attained within a reasonable period of time by the Union as a whole, and only if there are at least nine Member States that wish this<sup>120</sup>.

The Council decides in accordance to the procedure regulated in Article 280D. The debates are open to all members of the Council, but will vote only the members of the Council representing the Member States participating to a form of enhanced cooperation. In a more detailed analysis of the legal texts, it can be seen that in terms of how to vote in the Council, in order to obtain a correct and consistent solution, we must take into account the stipulations of Article 10 paragraph 3, in conjunction with the ones of the Article 280E, to which the first makes reference, and which contains a definition of the “unanimity”<sup>121</sup>,

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<sup>120</sup> Article 10, section 2 from the *TFUE*.

<sup>121</sup> According to Article 280E, paragraph 2, of the *TFUE*: “Unanimity is build only through the votes of the representatives of the participating Member States”.

expressly indicating that “qualified majority” in this case is defined in accordance with Article 205, paragraph 3, but also with Article 280H which contains stipulations relating to the situations in which the Council decides by unanimity or by a qualified majority<sup>122</sup>.

Article 10, paragraph 4 of the TFUE brings into question the principle according to which the acts adopted within a form of enhanced cooperation are integral parts of the Community *acquis*, so they are mandatory only for the participating Member States. In this context too, it is necessary to recall the rule stated in Article 280A, according to which the forms of enhanced cooperation must respect the provisions established in the Union’s Treaties and in the Community law. They cannot undermine the Internal Market or the economic, social and territorial cohesion. Moreover, the forma of enhanced cooperation cannot be a barrier or a means of discrimination in the trade between the Member States or produce a distortion of the competition between them. Also, in this context we recall the rules established in Article 280B according to which enhanced cooperation must take place with the respect for the competences, rights and obligations of the non-participating Member States. *Per a contrario*, it is the negative obligation of the latter not to do anything likely to hinder the development of the forms of enhanced cooperation in progress.

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<sup>122</sup> According to Article 280H, of the TFUE: “(1) In case a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt the act unanimously, the Council, acting unanimously in accordance with the requirements of Article 280E, may adopt a decision stipulating that it will act by a qualified majority. (2) In case a provision of the Treaties that can be applied in the context of a form of enhanced cooperation stipulates that the Council acts under a special legal procedure, the Council, acting unanimously in accordance with the conditions referred to in Article 280E, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament. (3) Paragraph 1 and 2 shall not apply to decisions having military or defensive implications”.

## **5.2. The procedures for the development of the enhanced cooperation provided by the TFUE**

**5.2.1. Creating a form of enhanced cooperation.** Regarding Pillars I and III, the initiative lies with the Member States which may contact the Commission by an application in this regard. The application in question shall include: the application domain and objectives followed by the form of the enhanced cooperation proposed. The Commission may submit a proposal to the Council, and in case of refusal, it informs the respective Member States about the reasons for doing so. The Council decides the authorization of the form in accordance with Article 280E, but only on a proposal of the Commission and with the approval of the European Parliament<sup>123</sup>.

Within the second Pillar, the initiative lies with the Member States which this time must be addressed through a request to the Council. The request is also transmitted to the High Representative of the Union for Foreign Affairs and Security Policy, who must give his notice on the coherence of the envisaged form of cooperation with the common foreign and security policy; and also to the Commission which, in turn, gives its notice on the coherence of the form of cooperation with other EU policies. Within F.P.C.S., the European Parliament acts as a simply “informed” about the desire of the Member States to initiate a form of enhanced cooperation. The Council receiving two notices decides unanimously, ruling in a decision of authorizing the form of the desired cooperation<sup>124</sup>.

**5.2.2. Joining a pre-existing form of enhanced cooperation.** Any Member State which wishes to participate to a form of enhanced cooperation in Pillars I and II, has to notify its intention to both the Council and the Commission. Under the law, within four months after receiving the notification the Commission has two possibilities. It either confirms the participation of the Member State concerned if it finds that the conditions of participation are accomplished, in which case it will

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<sup>123</sup> Article 280D, section 1 from the *TFUE*.

<sup>124</sup> Article 280D, section 2 from the *TFUE*.

adopt any transitional measures necessary for the application of the acts already adopted within the ongoing cooperation. Or it sets a deadline for re-examining the request for participation, indicating the measures to be adopted for achieving the previous ones. At deadline, the Commission proceeds to review the application and it may confirm the participation. If after reviewing it the Commission still considers that the conditions of participation are not met, the Member States may notify the Council to pronounce on the request. Finally, the Council shall act in accordance with Article 280E<sup>125</sup>.

Joining a form of enhanced cooperation within F.P.C.S. can be made by any Member State, by notifying its intention to the Council, to the High Representative of the Union for Foreign Affairs and Security Policy and to the Commission. The High Representative's role is to consult and to make proposals to the Council. The Council must confirm the participation of the Member State concerned, after consulting the High Representative. If the latter made proposals concerning transitional measures necessary for the application of the acts already adopted within the form of enhanced cooperation in progress, the Council will act accordingly, taking them into account. However, if the Council finds that the conditions for the participation are not fulfilled, it grants a period of time for reconsidering the participation request, while indicating the arrangements to be adopted to fulfill the conditions. The Council decides unanimously in this case also, in accordance with Article 280E<sup>126</sup>.

The Commission and the Council cooperate for ensuring the consistency of the actions undertaken within the forms of enhanced cooperation, and also of the consistency of such actions with the policies of the Union<sup>127</sup>. The expenses resulted from the application of a form of enhanced cooperation, others than the administrative costs necessary to the institutions, are the task of the Member States, unless the Council,

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<sup>125</sup> Article 280F, section 1 from the *TFUE*.

<sup>126</sup> Article 280F, section 2, from the *TFUE*.

<sup>127</sup> Article 280I from the *TFUE*.



acting unanimously after consulting with the European Parliament, decides otherwise<sup>128</sup>.

## 6. Conclusions

So, we can see without surprise that both now and in the future, enhanced cooperation is the safest way that the Member States can follow on the process of European integration. As Liviu-Petru Zăpârțan, said “the need of a Europe of peace, stability, freedom and prosperity requires a decisive action of rethinking the ways in which the European Union should strengthen its structures triggering the enlargement process, thus uniting the peoples of the continent under the sing of some into common values”. To this respect, the European Union must be true to the last both in front of the mondialization process and of the “dose of the unknown” that the European construction must overcome. The answer to these problems can be found only through intense political integration, “which highlights the collective, cultural, traditional and regional identities” through the forms of the enhanced cooperation<sup>129</sup>.

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<sup>128</sup> Article 280G from the *TFUE*.

<sup>129</sup> Liviu-Petru Zăpârțan, *op. cit.*, pp. 286-287.

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