President: Jacques DELORS

A NEW MECHANISM OF ENHANCED CO-OPERATION FOR THE ENLARGED EUROPEAN UNION

Eric PHILIPPART

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Eric Philippart

Research Associate at the Belgian National Fund for Scientific Research (FNRS) and Senior Associate Fellow at the Centre for European Policy Studies (CEPS), Eric Philippart teaches at the Political Science Department of the Université Libre de Bruxelles. He is also visiting professor at the College of Europe (Bruges) where he gives the seminar on evaluation methods applying to EU policies. He is the author or co-author of several books and reports on EU external relations and new modes of governance. On the latter topic, he has participated in research projects conducted by the University of Cambridge, the European Commission, the Stiftung Wissenschaft und Politik (Berlin) and the Netherlands Scientific Council for Public Policy (WRR, Den Haag). He is currently rapporteur general of the study initiated by the Commissariat Général du Plan (Paris) on various forms of co-operation among EU Member States (mission 'Coopérations renforcées'), as well as member of the taskforce set up by the CGP on European co-operation in the fields of police & justice and chaired by G. Canivet.

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FOREWORD

The enlargement negotiations were concluded last December and, at the time of writing, the drafting of the new Treaty project has been completed. While of course it still needs to be signed and ratified, which is reliant on the agreement of the 25 European governments and their citizens, it is not just rhetoric to say that the 'Enlarged Europe' already exists, a fact which brings me great pleasure. We now have a clear mind to seriously consider the smooth running of this enlarged Union and the way in which it can overcome the double challenge of number and diversity which, like all challenges, contains its share of difficulty and potential.

Who is unaware that, on a number of important points, we do not all - yesterday at 15, tomorrow at 25 – share the same vision of the speed and the objectives of European integration? I have put a lot of energy into trying to illustrate what could be a reasonable framework for a common project for Europe with 25 member states and later with 30: installing an active area of peace, promoting the economic and social conditions for sustainable development, deepening the dialogue which allows us to enrich our spiritual and cultural diversity. If I understand correctly what is being said, it does however seem that this is a project which is too limited for some, while too ambitious for others.

How then can we deal with these differences in a way which avoids frustration: frustration for those who are rushed into going faster and further than they would wish, but also frustration for those who have to keep pace with those going slowest. How can we respect each other and live with our differences in a spirit of conciliation? It is the question of differentiation of the Union and it is not something we consider without some reticence. With the Convention currently underway, it is natural that we are more keen to focus on those things which unite us rather than on those which highlight our structural or temporary differences. However, it would be dangerous to ignore this question, as we would then find ourselves without dynamic rules guiding our relations.

The current constitutional debate will propose techniques which can be used to allow those who so wish to strengthen the links that unite them, without forcing others to follow. This is why I wanted *Notre Europe* to produce a contribution, not on the general question of

differentiation, but on that of enhanced cooperation, which constitutes the most concrete element of the “acquis communautaire” in this domain. To tackle this subject with the necessary thought and rigour, it was hard to find a better guide than Eric Philippart, who is an authority on the matter.

I am grateful to him for having undertaken this task with a consideration for precision which can sometimes appear complex, but which will prevent many misunderstandings. In this study, each stage of the process is discussed and firmly based on the construction of the previous stage. The paradox is that this concern for detail starts from a considerably simplified and coherent vision of the current treaty provisions, which was one of the requests made to the author.

This was important as I also wanted this work to conclude with a suggested drafting of the corresponding future constitutional treaty articles. Not to try to impose a definitive vision - I have too much respect for the work of those at the Convention for that - but simply to show that the exercise is feasible, as it was achieved by our author, for which I congratulate him.

Too much silence up to now has overshadowed all serious discussions on the hypothesis of one or several possibilities for enhanced cooperation. We are forgetting that, in the past, the construction of Europe has often progressed as a result of differentiation. It is now time for a dispassionate reflection and debate to begin.

Jacques Delors

CONTENTS

INTRODUCTION: DIFFERENTIATION AND FLEXIBILITY IN THE EU – A NEW APPROACH TO INTEGRATION *

Should the development of new policies always involve all Member States? The Community orthodoxy has long been to say that all States must do the same thing at the same time. At that point, the only official type of flexibility allowed was transition periods and exemption from the common rule accounted for by an objectively established difference in situation (differentiated application of a common set of rights and obligations).

Over the last two decades, a new approach has progressively emerged. Dealing with sensitive fields that were purely national up to then, negotiated by governments split over the aims to be reached, the Maastricht Treaty opened a large breach in Community orthodoxy regarding the management of diversity. In certain areas it offered the possibility of an *à la carte* (opt-in and constructive abstention), even a permanent decoupling ('opt-out').

The Intergovernmental Conferences (IGC) of 1997 and 2000, called to prepare the Union for an enlargement in many regards unique, turned the Maastricht exception into a precedent. Indeed, the treaties of Amsterdam and Nice not only added a dose of flexibility in one EU policy or another. They introduced and lightened the use of a general mechanism of 'enhanced co-operation' allowing a group of Member States to use the EU framework to develop new policies that only bind the participating Member States. Flexible integration has since become one of the main organizing principles of the Union.

This study sets itself in the perspective of the drafting of a Constitutional Treaty for a European Union at 25 and more. Three main questions related to enhanced co-operation are dealt with here: Does the European Union need a general principle organizing this type of co-operation? What is the current system worth? Can it be improved, and in that case, how is it to be improved?

The first part of this study argues that the mechanism of enhanced co-operation is, above all, a necessary answer to general problems weighing on the Union's functioning. Certainly this mechanism is only one answer among others. Nevertheless it is interesting insofar as many alternative solutions are either out of reach or contain important risks for the Union as a whole. Moreover, the actual system has already proven its usefulness several times since the signing of the Nice Treaty. Owing to all the above but also to the great uncertainties that weigh on the development of a Union at 25 and more, the general mechanism of enhanced co-operation appears to be an indispensable safety valve, and as such, must be part of the Constitutional Treaty that is being elaborated. Before suggesting the inclusion of the current mechanism of enhanced co-operation, it is opportune to ensure that it cannot be improved. The last section of this first part deals with the ideal qualities of a general mechanism of enhanced co-operation and suggests three main standards of evaluation.

* This study was nourished by conversations with decision-makers, officials and researchers that are too numerous to mention individually. I wish to thank them collectively. This study benefited particularly from the comments and suggestions from Renaud Dehousse, Jean Nestor and Ben Ghali. The views expressed here are purely personal. The original text was written in French and translated by Katya Long with the help of Eric Philippart.

The second part of the study offers a detailed evaluation of current arrangements and alternative formulae for 'enhanced co-operation'. Insofar as the terminology of current treaties is potentially confusing, this second part begins with a quick overview of another type of co-operation, i.e. co-operation between Member States in areas of EU competence but developed outside of the Union's framework, and referred to as 'closer co-operation'. The next sections are dedicated to the analysis of intra-EU co-operation or 'enhanced co-operation'. This analysis mainly follows the steps of the launching and development of an instance of enhanced co-operation: initiator, recipient and contents of the request; admissibility of the request (substantial and procedural requirements); authorisation procedure; enhanced co-operation's membership and operating mode. In the case of an element of the current system needing improvement, a new formula is suggested. Insofar as the mechanism of enhanced co-operation introduced by the Nice Treaty for the Common Foreign and Security Policy (CFSP) does not deal with the development of new policies but with the implementation of a common policy of the Union (mandate logic), this component is handled in a separate section, the last one of the second part.

The third part closes this study by presenting in the form of Treaty articles the propositions for improvement made in the second part.

PART I: ON THE UTILITY OF THE ENHANCED CO-OPERATION MECHANISM

There are several motives for wishing to have a general mechanism of enhanced co-operation within the Union. Some see it as a means to serve a certain vision of European integration – where the Union should go and how it should arrive there. Thus, commenting on the debate preceding the adoption of the Treaty of Amsterdam, John Palmer rightly observed that: " President Chirac, Chancellor Kohl and Prime minister Major each support 'flexibility'. Each means something different" (Financial Times, 11 December 1996). Some, alarmed by the apparent decline of the Franco-German motor, were looking for an *avant-garde* mechanism. Others, apprehensive of the impact of the past and coming enlargements, endeavoured to equip the Union with a stable and solid base thanks to a hard core system (*Kern Europa*). Others still, worried by the integrationist *engrenage* (ratchet mechanism) if not wishing to reintroduce intergovernmental methods, were striving for a mechanism that would contribute to break any federalist dynamism and prepare the ground for a Union *à la carte*[1]. Differences of opinion are no smaller today, with the *avant-garde* conception advocated by Jacques Delors, the relatively defensive approach of Tony Blair and the de-structuring ambition of the intergovernmentalist camp.

Besides visionaries pursuing their own systemic conception of the Union, there are those who present themselves as pragmatists. To them the mechanism of enhanced co-operation is of interest only if it can help solving immediate sectoral issues. They put forth two particularly urgent questions: How to develop and reinforce the Euro's flanking policies? How to develop a European defence policy? In their minds, it is a matter of having a mechanism that, on the one hand, makes possible a formal extension of the proceedings of the Euro-group via the establishment of a Euro Council and, on the other hand, overcomes the neutralist and Atlanticist objections to the development of a European Common Defence Policy.

[1] On this debate and its subsequent evolution, see de La Serre Françoise & Wallace Helen (1997), *Les coopérations renforcées: une fausse bonne idée?*, Etudes et Recherches, No 2, Notre Europe, Paris, septembre ; Philippart Eric & Edwards Geoffrey (1999), 'The provisions on closer cooperation in the Treaty on European Union - Politics of multi-faceted system', *Journal of Common Market Studies*, Vol. 37, No 1 (March), pp.87-108 ; and Stubb Alexander (2002), *Negotiating Flexibility in the European Union*, Palgrave, Hampshire & New York.

I - Addressing four general and recurrent problems

The mechanism for enhanced co-operation may also be designed as an answer – even if it is a partial one – to large and recurrent difficulties that weigh on the Union's functioning. Many supporters of the introduction of such a mechanism are indeed alarmed by the Council's diminishing capacity to decide, the anarchic use of flexibility in the Union, the next to nearly continual revision of the constitutional framework of the Union, and the development of extra-EU co-operation in areas of Union competence.

Certainly, after Amsterdam and Nice, fewer decisions require unanimity. The required threshold for a great number of majoritarian votes is still problematically high[2]. A small minority of Member States is sufficient to block a development seen by the European Commission as necessary to reach Union goals and corresponding to the general interest, and that the parliament is ready to back. With future enlargements, slowness and even jamming, induced by unanimity or the high majority threshold in the Council, are bound to increase. There will be indeed a great number of sectoral configurations in which a minority will have the power to block any decision either because some Member States will not have the means to take part in the proposed measures, will differ on the path to take, or – while acknowledging a policy's added value for the Union as a whole – will consider that the suggested approach is in their case premature or unsuitable.

The last decade has witnessed an increase in the number of *ad hoc* regimes, sometimes of Byzantine complexity – the Schengen protocols of 1997 – or poorly improvised. These important variations from one sector to another are not only difficult to explain and justify, but costly to manage and risky from a systemic viewpoint[3]. If the Union needs the flexibility provided by special regimes, the current situation certainly calls for some streamlining.

Between 1985 and 2003-2004, the treaties will have undergone no less than five major revisions, as well as minor revisions introduced by the membership treaties. The revision exercise tends to be practically continual as a result of the lengthening preparation of intergovernmental conferences and occasional difficulties during ratification. Considering the human and financial resources required for Treaty revision, such frequency is a matter of concern. These multiple revisions were pursuing several goals: enlarging the scope of the Union; redefining the powers of the Union; reforming decision-making procedures and re-organising the institutional framework. They also have been the opportunity to set up derogatory regimes without which new policies could not have been developed within the Union. Indeed the Council and the Parliament did not have the power to grant formal opt-out

[2] In years to come, the qualified majority will waver between 71% and 74%. In national political systems such a threshold is considered to be intrinsically defensive and is generally only required for constitutional revisions. This is a means of entrenching fundamental norms, their modification being possible only in very exceptional political circumstances (regime change). Admittedly the Union and the Member States are different political systems with different requirements (see Quermonne Jean-Louis, *La question du gouvernement européen*, Etudes et Recherches n°20 - Notre Europe, November 2002). Still it remains that majority voting with such a threshold can hardly be considered as a rule made for daily management of a system.

[3] The height of complexity has undoubtedly been reached with the solutions envisaged to answer the request by Denmark to get around the 'opt-out' this country got in 1997 in asylum policy. The EC would have to negotiate with Island and Norway a protocol allowing Denmark to take part in the Agreement between these two countries and the Union for the implementation of the Dublin II and Eurodac regulations –OJ series L N° 93 of 3 April 2001, p.38.

and opt-in through secondary law. They used to require a Treaty base (primary law)[4]. This necessity has also contributed to increasing the frequency and complexity of constitutional negotiations.

Last but not least, in the 1980's and 1990's, new extra-EU co-operation had been set up in areas where the Union has responsibilities, causing substantial monitoring and task duplication problems, as well as tensions owing to the exclusive nature of some of these instances of co-operation. Their number is decreasing (cf. integration of the 'Schengen acquis' in the field of justice and police, of a large part of the WEU *acquis* in defence matters and of the Bologna process in education matters). Instances of extra-EU co-operation are still numerous and new developments are not improbable[5].

II - Enhanced co-operation: a useful and necessary answer

For some of these difficulties, the enhanced co-operation mechanism is only one answer among others. In particular, there are many ways to deal with the relative paralysis of the Council. In many cases no doubt, the best option consists in banning decision-making modes resting on unanimity, introducing a system of reinforced majority for a limited number of very sensitive questions and generalising a system of majority with a significantly lower threshold than that of the current qualified majority[6]. Resorting to different proceedings of convergence (open method of co-ordination …) and increasing EU funds aimed at compensating Member States exposed to the highest adjustment costs may also contribute to reviving integration by uniformisation or harmonisation. On the side of integration by flexibility, an alternative to enhanced co-operation is to broaden the scope of constructive abstention[7].

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[4] The most complex systems of exemption or exclusion have usually been set up through protocols annexed to the Treaties, defining beforehand the aims, measures to be taken, the institutional and procedural framework of the policy concerned ("predetermined flexibility").

[5] The areas concerned are education, professional training, youth, culture, public health, tourism, energy, civil protection, trans-European networks, industry, research and technological development, co-operation for development, business legislation, energy (fiscal systems trying to promote or discourage the use of certain types of energy), environment, as well as various aid policies linked to the Economic and Monetary union (EMU) such as the rules of banking surveillance, business taxation, the rules of financial markets and stock markets, and so on. Regarding foreign affairs, security and defense issues, see for instance the listing of the joint Franco-German proposal to the European Convention (22 November 2002). In the area of the freedom, security and justice and police, rules of readmission and extradition as well as the right of pursuit are perhaps most concerned.

[6] Considering current political realities, a substantial but not destabilizing change would be to consider an act as adopted if it is backed by a majority of Member States representing the majority of the Union's population (referred to as the « double simple majority » by the Commission's Communication of 4 December 2002; incidentally, this denomination is rather strange insofar as it is not a matter of achieving a simple majority but an absolute majority (50%+1) at both levels; it would therefore be more correct to speak of « double absolute majority »).

[7] Constructive abstention means that, when abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration, in which case the member is not compelled to apply the decision, but accepts that the decision commits the Union. This type of abstention has been introduced in the field of Common Foreign and Security Policy (article 23 TEU).

Difficulties resulting from the erratic use of flexibility may be met by banning opt-in and opt-out for the future as well as suppressing existing ones[8]. This solution may seem very radical, even if the E system has become unreasonably accommodating for champions of the status quo and/or intergovernmentalism. The constitutional revision should and must be the opportunity to "re-examine the relevance"[9] of complicated, difficult to manage and at times unfair derogatory regimes[10]. If the banning of opt-outs and opt-ins proves to be impossible, the problems induced by the high frequency of constitutional changes could be partially addressed by establishing a shorter procedure for Treaty revision which would no longer require unanimity.

However, not all alternatives to the mechanism of enhanced co-operation seem within reach of the Convention or the IGC (substantial increase in the Union budget, abrogation and banning of any opt-out). Among the ones within reach, some may have very damaging consequences for the Union as a whole or only partially meet the difficulties mentioned above. Uniformising and harmonising without compensating can generate powerful strains. The repeated use of the majority vote without the Union having the means to intervene when the adjustment costs are not equally distributed, may quickly become unbearable to those who are regularly in the minority. By comparison, broadening the field of constructive abstention reduces tension, but is potentially very risky for the *acquis*. This flexibility method might indeed lead to a very fragmented policy output, each measure concerning a different group of Member States[11]. The methods of convergence offer much fewer systemic risks but are far from being a panacea. Their pace is slow and results are often uncertain[12].

Accordingly, the mechanism of enhanced co-operation appears to be useful, as a substitute or as a complement. Many dispute this usefulness by invoking the fact that, since May 1st 1999 (the day the Amsterdam Treaty came into effect), the enhanced co-operation mechanism has not yet been used. This argument is weak insofar as it mistakes non-use and lack of impact. The fact that voting is still rare, years after introducing the majoritarian system does not prove this system is useless. The existence of this voting option has indeed profoundly

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[8] The so-called Document 'Penelope' suggests simplifying and rationalising the current system by starting with the Byzantine mechanisms that do not even reflect divergence over the policy contents. *Feasibility study – Contribution to a preliminary draft Constitution of the European Union*, Working Document of the European Commission (working party under the responsibility of F. Lamoureux), Brussels, 4 December 2002 (Document 'Penelope'), pp.XIV-XV.

[9] European Commission, *Communication from the Commission – A project for the European Union*, COM(2002)247 final, 22 May 2002. See also *Feasibility study…* and European Commission, *For the European Union – Peace, freedom, solidarity – Communication of the Commission on the institutional architecture*, COM(2002)728 final, 4 December 2002.

[10] For example, how is it possible to justify the fact that, in one area, the participation in enhanced co-operation is open to all and, in another, it is managed on a nearly discretionary base by the participant Member States? This is the case of the Schengen protocol that goes against the right for a Member State to join the group provided that it accepts and implements the *acquis*.

[11] See comparative evaluation of different forms of flexibility in Philippart E. and Sie Dhian Ho M. (200), 'From Uniformity to Flexibility – The management of diversity and its impact on the EU system of governance', in de Búrca Graine and Scott Joan *Constitutional change in the EU: From Uniformity to Flexibility*, Hart Publishing, Oxford, pp.299-336.

[12] See Hodson Dermot & Maher Imelda (2001), 'The open method as a new mode of governance', *Journal of Common Market Studies*, Vol. 39, No 4 (November), pp.719-46 ; Scharpf Fritz W., The European social model: coping with the challenges of diversity, *Journal of Common Market Studies*, Vol. 40, No 4 (November), pp.645-70 ; and Philippart Eric (2002), 'The "Lighter Touch" in EU Governance: a multi-criteria evaluation of the methods of open coordination', 1st Pan-European Conference on European Union Politics, Bordeaux, 26-28 September.

affected decision-makers' behaviour. Thus, the fact that a mechanism has been used or not is not always the best criterion to determine its impact and usefulness. Concerning the enhanced co-operation mechanism, it can be said that the perspective of being isolated and singled out may have an impact on Member States' attitudes. For that matter there are a number of examples in which bringing up the option of resorting to enhanced co-operation has been a decisive factor in escaping from the dead ends tied up with unanimity requirements[13].

Moreover, the inclusion of general rules for enhanced co-operation appears to be the best way of benefiting from the lessons of past experience with flexibility. Thanks to theoretical research and practical experience over the last ten or fifteen years, we know which formulas are not viable and which are dangerous. We more or less know what minimal leeway must be given to groups wishing to move forward, what minimum level of protection must be offered to non-participants, but also what limitations must be imposed to safeguard the basis of the Union. The difficulty lies in the relatively weak institutional memory of the Union (staff rotation at all decision levels is very high in most of its institutions). In order to preserve the wisdom gained from previous experience, it is essential to translate it into a set of general rules. This is exactly what would offer the inclusion of a general mechanism of enhanced co-operation in the Constitutional Treaty. In fact, this mechanism does no more than setting a working framework and basic rules over which specific schemes can be built.

Finally, the mechanism of enhanced co-operation seems indispensable on account of uncertainties weighing on the future of European construction and because of constitutional 'recipes' that all political systems wishing to last should follow. It is very difficult to predict the development of a number of elements, such as the speed and extent of Europeanisation in the new members or the strength of centripetal and centrifugal dynamics within this Union about to become continental. However it is obvious that risks brought about by future enlargements are great. Accordingly, the Union needs to keep in its toolbox the most advanced instrument of integration through flexibility, next to instruments designed for integration through standardisation and harmonisation.

Even if the Union's horizon was made up of certainties, the enhanced co-operation mechanism would still prove to be just as vital. Today the Union wants to endow itself with a lasting Constitution. And yet there is no lasting Constitution without safety valves. Constitutionalists agree that safety valves should not be designed – solely – by reference to current or foreseeable risks. The Treaty of Rome was equipped with such a provision for the operation of the common market (article 308 TEC). The project of article 16 (labeled 'flexibility clause') of the Constitutional Treaty presented by the Praesidium to the Convention on 6 February 2003 goes further by stipulating, in very general terms, that the Council acting unanimously can take the appropriate measures if action proves necessary to attain one of the Union's objectives, without the Constitution having envisaged the powers

[13] The most manifest case is that of the 2000 unlocking of the regulation concerning the European Company Statute introduced in 1970 (!) by the European Commission (EC Regulation n° 2157/2001, Council of 8 October 2001) and the directive 2001/86/CE completing this status with regard to workers' involvement. The final breakthrough happened after the presidency asked the legal services of the Council to inquire into the possibility of enhanced co-operation in this area. This unlocking is even more remarkable by the fact that, at the time, the enhanced co-operation mechanism was under particularly drastic stipulations for authorisation. The perspective of enhanced co-operation to implement a European arrest warrant was one of the ingredients that contributed to a change of attitude on the part of the Berlusconi government in December 2001. The use of this mechanism was also brought up in areas such as energy taxation (European Commission and Swedish presidency in 2001) or the common code of company taxation matched (Commission suggestion of 23 October 2001), without this bringing about major concessions on the part of those unwilling to accept it.

needed to that effect[14]. With a mechanism of enhanced co-operation the Union would have a second safety valve, just as general but of much easier use.

III - Optimising the mechanism of enhanced co-operation: terms and conditions

Showing why it is in the Union's interest to have a mechanism of enhanced co-operation does not prove that the existing arrangement is beyond improvement. As a reminder, this mechanism is expected to provide an answer, sometimes partial, to several important problems weighing on the EU's development. If it is not the only answer possible for these difficulties, it seems to be useful and necessary to tomorrow's Union, because of the limits inherent to other methods. This mechanism will be more or less useful depending on its capacity to meet some managerial and systemic requirements. Before embarking on the evaluation of current arrangements and alternative approaches, such evaluation criteria need to be made explicitly defined.

The optimal system is one that will contribute to:

- reinforce the Council's decision-making capacity by encouraging Member States not to use their veto,
- make extra-EU schemes less attractive, in order to preempt new initiatives in that direction and encourage the 'repatriation' of existing ones,
- rationalize the use of flexibility within the Union by laying down basic rules that can apply to all its sectors of activity,
- and put at the Union's disposal new and far-reaching modes of flexibility that do not require Treaty revision.

This should be done:

- efficiently (i.e. quickly and at the lowest cost for the Union),
- by meeting the European Convention's aspiration for institutional and procedural simplicity and readability,
- and without endangering the basis of the European Union and its inclusive dynamic.

[14] Note from the Praesidium to the Convention, *Draft of Articles 1 to 16 of the Constitutional Treaty*, European Convention, The Secretariat, Brussels, CONV 528/03, 6 February 2003.

PART II: EVALUATION OF CURRENT ARRANGEMENTS AND ALTERNATIVE APPROACHES

The merits of existing arrangements are compared with alternatives approaches. The elements of the enhanced co-operation mechanism laid in the consolidated versions of the Treaty on European Union (TEU) and of the Treaty establishing the European Community (TEC) are evaluated in turn[15]. This assessment is compared with the pros and cons of alternative approaches. When it appears that an element can be improved (that is, made more operational and/or simpler without jeopardising the basis of the Union – cf. evaluation criteria presented *supra*), a new formula is suggested.

One component is dealt with separately insofar as it is of a different nature. Enhanced co-operation pursuant to CFSP only relates to implementation of a joint action or a common position. This of course barely corresponds to what enhanced co-operation is supposed to do, i.e. to develop new policies that only bind a limited number of Member States. The provisions introduced by the Nice Treaty for the second pillar are rather close to the logic of a mandate entrusted by the Union (maître d'ouvrage) to a taskforce (maître d'œuvre) having a certain degree of autonomy. It is therefore suggested to use another denomination to designate that approach and to place it somewhere else than under the general article dealing with enhanced co-operation. Three alternative entry points are proposed.

Analysis of enhanced co-operation is preceded by a short evocation of what current Treaties call 'closer co-operation' between Member States or 'regional unions', that is co-operation between Member States in areas within the jurisdiction of the Union (shared competences) but developed outside the framework of the Union. In order to distinguish clearly between these two types of co-operation, it is suggested to insert in the future constitutional treaty a general article on "closer co-operation", right before the article on "enhanced co-operation".

The different formulae reviewed in this Part are evaluated in the perspective of a Union redesigned to work with 25 members or more. The study postulates that the 2003 IGC will follow the main orientations currently taken by the European Convention, i.e. that the Union should have a Constitutional Treaty replacing all existing Treaties; that the new Treaty should transcend the current pillar structure (among other things by creating the position of High Representative for CFSP and Commissioner in charge of external relations); and that it should have three parts respectively devoted to the constitutional architecture of the Union, the policies and implementation of the Union's actions, and the general and final clauses[16].

[15] The consolidated versions take into account the provisions introduced by the Treaty of Nice that entered into force on 1 February 2003.

[16] Cover Note from the Praesidium to the Convention, *Preliminary draft Constitutional Treaty*, European Convention, The Secretariat, Brussels, CONV 369/02, 28 October 2002.

IV - Extra-EU ' closer co-operation'

The issue of "closer co-operation" is dealt with in different parts of the current Treaties. As regards the Community pillar, article 306 TEC stipulates that the treaty's provisions 'shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty'. Other regional unions are mentioned in accession Treaties – Finland and Sweden indicate their intention to carry on the Northern co-operation (declaration N°28 annexed to the accession Treaty of Austria, Finland and Sweden). As regards the second pillar, Title V of the TEU specifies that the establishing of a common foreign and security policy does not prevent the development of closer co-operation on a bilateral level, in the framework of WEU and NATO, 'provided such cooperation does not run counter to or impede' provided for in the Treaty (Article 17 TEU §4). Since TEU article K7 has been repealed, no such provision exists for police and judicial co-operation in penal matters, the third pillar of the Union. It does not prevent Member States to develop many instances of extra-EU co-operation in these fields.

In the past, extra-EU co-operation has contributed to further European integration (for example on border control with the Schengen agreements in 1985). From the Union point of view, this possibility should be maintained. The prospect of extra-EU cooperation may indeed encourage some Member States to adopt more conciliatory positions and to allow the development of new policies inside the Union.

The revision of the Treaties should at least be the opportunity to do away with the anachronistic reference to Benelux. In the logic of forsaking the pillars, existing articles should be merged in one general principle on closer co-operation. This is a matter of confirming the fact that intergovernmental co-operation among a number of Member States is authorised, but that Union membership implies certain obligations as far as the scope and content of this co-operation is concerned[17]; The document 'Penelope' suggests a general clause 'allowing closer cooperation between Member States working towards objectives that cannot be reached by applying the Constitution, on condition that the co-operation in question respects the Constitution'[18].

Is it enough for the Constitutional Treaty to state the general principle or should it specify the obligations of Member States taking part in a "closer co-operation?" The palette of conceivable obligations is naturally very large. Should these States report regularly to the Union's institutions? Answer any request for information on the latter's part? Offer observer' status to the Union or even grant it full membership (cf. Council of the Baltic Sea States)? *A priori* it is preferable to avoid highly intrusive methods on account of national sensitivities, as well as those straining the institutional resources of the Union. Presumably a simple information obligation should suffice.

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[17] See de Witte Bruno (2000), '"Old flexibility": international agreements between Member States of the EU', in de Búrca G. and Scott J (eds.) *Constitutional change in the EU: From Uniformity to Flexibility*, Hart Publishing, Oxford, pp.31-58.

[18] *Feasibility study…*, pp.XIV-XV.

V Enhanced co-operation using the Union's framework

The review of enhanced co-operation schemes follows a quasi chronological order, from the request for using the Union's framework to enhanced co-operation's mode of functioning, through the request's admissibility, the authorisation procedure and the rules of participation.

V.1 Request for using the Union's framework

This sub-section addresses three issues: who is qualified to introduce a request, who should be the recipient and what should be specified by the request.

V.1.1 Initiator and recipient of the request

In the current system, the request is introduced by interested Member States. Two questions arise at this level. Firstly, no requirements are made with regard to the number of States presenting the request. Must there be a minimum threshold? The only reason for doing so would be to prevent a couple of Member States from multiplying requests in order to block the work of the Union. Probabilities of such filibustering tactics being rather small, there is no obvious need to impose minimum requirement at that level. Secondly, the request may only be introduced by Member States. Is it necessary to open up the system by giving a right of initiative to the Commission? The stimulating report prepared by G. Canivet and Jean-Luc Sauron for the Commissariat général du Plan (think tank of the French prime Minister) thinks so. As of today, the Commission has the right to withdraw a proposal if it reckons that negotiations lead nowhere or take the wrong direction. It is suggested that the Commission should have the liberty to invite interested Member States to resort to enhanced co-operation for adopting and implementing the measure proposed and withdrawn[19]. The added value of such a suggestion is not obvious. On one hand, by doing so, the Commission runs the risk of appearing as mounting an attack against 'unwilling' Member States. On the other hand, it is highly unlikely that the Commission would take any formal initiative without having contacted some Member States beforehand. Why not then leave the formal initiative to the interested Member States? Besides, granting such a right to the Commission would create a procedural problem: if the Commission takes the initiative of a request, it will not be in a position to decide whether this request is admissible (see V.2). Consequently, the current provision should be kept.

At present, the recipient of the request is the Commission for the 1st and 3rd pillar, the Council for the 2nd pillar. This difference has a symbolic and political meaning, namely to assert the undivided control of the Council over the CFSP. In the double hating hypothesis (appointment of a High Representative for the CFSP and vice-president of the Commission in charge of external relations), this difference would no longer be justified. Procedures must then be simplified by lining up on article 11 TCE which corresponds to the standard distribution of roles between the Council and the Commission: 'Member States which intend to establish enhanced cooperation among themselves … shall address a request to the Commission'. If the request concerns foreign, security or defence policy, the request will quite logically be handed to the High Representative for CFSP and vice-president of the Commission in charge of external relations.

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[19] *Les coopérations renforcées en matière de justice et affaires intérieures: un outil d'intégration*, rapport pour le Commissariat Général du Plan, Mission Coopérations renforcées, Atelier Police – Justice (président: Guy Canivet ; rapporteur: Jean-Luc Sauron), janvier 2003 http://www.plan.gouv.fr/publications/canivet.htm.

V.1.2 Contents of the request

In the system set up by the Amsterdam Treaty, this question was implicitly settled by the inclusion of a "last resort" clause. Enhanced co-operation could only be used where the objectives of the Treaties "could not be attained by applying the relevant procedures laid down therein" (TEU article 43, §1, c). This meant that enhanced co-operation could only be set up to adopt and implement one measure (regulation, directive, action plan, …) proposed by the Commission, negotiated within the Council, submitted to vote and rejected. Consequently, the object of the co-operation was entirely predefined: interested Member States just had to specify the measure they intend to 'rescue'.

The Nice treaty revised the last resort clause, stipulating that enhanced co-operation "may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties" (TEU article 43a). Instead of having to wait for the legal rejection of a specific measure, enhanced co-operation only needs the recognition by the Council of a political impossibility (see V.2.2.2). Apparently, member States interested by some policy development but convinced that they would not get the necessary support in the Council, just have to define the objectives of the development they envisage and ask the Council to pass a motion confirming the lack of support they were foreseeing. The wording chosen in Nice however is not without ambiguity.

The constitutional treaty should confirm this approach which offers greater liberty to States keen to further integrate. The new provision should accordingly invite the initiating group to specify in its request the objectives of the enhanced co-operation as well as the legal basis concerned. Their request should not go any further, for example by enclosing legislative proposals or action programs. That would be encroaching on the Commission's monopoly of proposition, which must be protected for functional and systemic reasons.

V.2 Admissibility of the request

In order to be taken into consideration for authorization, a request must satisfy a number of conditions. This sub-section examines these substantial and procedural prerequisites as well as the procedure for verifying that the request is admissible.

V.2.1 Substantive requirements

There are about fifteen substantive conditions that a request must fulfill in order to be taken into consideration for authorization. They specify what enhanced co-operation should aim at, what it should not entail and what is out of its scope of action.

To be admissible, enhanced co-operation must aim at furthering the objectives of the Union, protecting and serving EU interests, and reinforcing the process of European integration. It is *a priori* only logical to restrict the use of the Union's framework to endeavours that are pursuing objectives endorsed by all. After all, that framework 'belongs' to and is financed by all Member States. What seems less logical is the requirement made to enhanced co-operation in the field of CFSP to serve the Union's interests by «asserting » the Union's « identity ». Indeed this suggests that the group of Member States engaged in enhanced co-operation acts as an agent of the Union, while it is said elsewhere that enhanced co-operation's measures do not commit the Union (see V.5.2). The contradiction is the direct result of a regrettable *mélange des genres* introduced in Nice. Authorising the development of a new policy that binds a limited number of Member States and giving a mandate to

implement the Union's common policy are of course two different things requiring different treatments. These two logics should be dealt with under different names at different places in the Treaty (see VII). In the case of the first logic (enhanced co-operation *stricto sensu*), the reference to the identity of the Union does not make sense and should be scratched. Besides the current provisions should be improved at a formal level. As of today, the conditions regarding enhanced co-operation's aims are listed in three articles, each under a different Title of the TEU (TEU article 27A, 40 and 43). What is more, these lists are redundant. From an editorial point of view, one can also wonder if it is really necessary to specify that enhanced co-operation must aim at furthering the objectives of the Union and serving its interests. Is it possible to achieve the Union's aims without serving its interests? This set of conditions should be rephrased to eliminate needless repetition and only be listed once in the Constitutional Treaty.

The list of what enhanced co-operation may not entail is rather long. A first set of conditions aims at preserving the Union's cohesion, the coherence of its policies and readability of its institutions. It provides that an enhanced co-operation must respect the Treaties, the single institutional framework of the Union, the *acquis* of the Union as well as the consistency between the whole of the Union's policies and its external action. A second set aims at protecting non-participating countries. Some of these dispositions also answer operational (internal market) and systemic concerns (social and economic coherence). It stipulates that an enhanced co-operation may not undermine the internal market or the social and economic cohesion (point introduced at Nice in order to quiet certain concerns about enhanced co-operation becoming a club of the 'selfish rich'); not constitute a discrimination or an obstacle to trade, nor distort competition. Broadly speaking, both from a functional and/or systemic point of view, there are sound reasons behind all these prohibitions and stipulations. Consequently they should be maintained.

The remaining substantial requirements list the areas or sectors in which enhanced co-operation is forbidden (negative list). The alternative would have been to list areas or sectors in which enhanced co-operation is authorised (positive list). One thing going against the latter approach is that it is very difficult to predict today, once and for all, in which domains Member States will at some point reach an impasse. Opting for this approach either means difficult negotiation over long and very detailed lists or means the obligation to amend the constitutional treaty each time a forgotten area comes forward. The negative list option should thus be maintained.

The list of forbidden areas is relatively short: enhanced co-operation is prohibited where the Union has no competence, in fields that come under the exclusive competence of the Union and on issues with military and defence implications. The shorter the list the more the mechanism of enhanced co-operation contributes to strengthen the Council's decision-making capacity and to diminish the need for resorting to extra-EU co-operation. On these grounds, the list should ideally be the shortest possible.

The first prohibition finds its most solid justification in democratic theory. Any transfer of powers requires the formal consent of the authority which relinquishes its right. The mechanism for enhanced co-operation should not be used by European institutions to by-pass national or regional parliaments.

For other reasons, it is just as logical to ban the establishment of enhanced co-operation in areas under exclusive competence of the Union, i.e. in areas in which a Member State may no

longer act since its powers have been transferred completely to the Union. In such a case, what applies to Member States taken individually also applies to a group of Member States. For instance, it would indeed be nonsensical to develop enhanced co-operation in matters of international trade or monetary policy. The Union is indeed either speaking with one voice at the OMC or is not. Likewise, it is impossible to have two monetary policies for the same currency, even less so two 'single' currencies. But what about the case where the Union has exclusive competence but does not use it? On this point, the Court of Justice's jurisprudence follows two paths. On one hand, the Court does not rule out the possibility for Member States to intervene, as long as the latter act on the basis of the Community's specific authorisation. On the other, the Court indicates that Member States may only «act as administrator of the common interest in collaboration with the Commission», implying control of their unilateral action[20]. This is in fact very close to the idea underpinning enhanced co-operation. Why then not allow the development of enhanced co-operation, this as long as the Union has not exercised its competence?

If it is easy to understand why enhanced co-operation should remain within the limits of the powers of the Union and should not concern areas falling within exclusive EU competence, it is however not obvious why this has to be explicitly stipulated in the future Constitutional treaty. The general obligation to comply with the Treaty's provisions should indeed be sufficient. We therefore suggest to drop the reference to these two conditions.

The third prohibition, forbidding enhanced co-operation on issues with military and defence implications, is less justified and most certainly regrettable. Enhanced co-operation would certainly be particularly useful in these areas. The Franco-German proposition of 22 November 2002 aims at enabling the development of enhanced co-operation in the field of multinational forces, armament, human resources management, training and common doctrines' development[21]. To do away with this prohibition would increase the problem-solving capacity of enhanced co-operation regarding the weak decision-making capacity of the Council, the proliferation of untested types of flexibility, the frequency of Constitutional revisions and the development of extra-EU co-operation in areas of Union competence.

V.2.2 Procedural requirements

The actual system lays down three procedural conditions, related respectively to the participation's threshold, the situation of last resort and the degree of openness of enhanced co-operation. The first two requirements are examined here, the degree of openness being reviewed under V.5.

Minimum threshold for participation

The Treaty of Amsterdam stipulated that enhanced co-operation had to concern at least a majority of Member States. At Nice, it was decided to fix the minimum threshold for participation to eight Member States. On both occasions, the need for a minimum threshold and the level of the current threshold were questioned. We will therefore look first at the possible reasons for fixing a minimum participation threshold and evaluate if those reasons

[20] Jacqué Jean Paul (2001), *Droit institutionnel de l'Union européenne*, Dalloz, Paris, pp.116-7.

[21] *Contribution by Mr Dominique de Villepin et Mr Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy*, The European Convention, The Secretariat, Brussels, CONV 422/02, CONTRIB 150, 22 November 2002. The contribution also acknowledges some areas covered by the Letter of Intent and the OCCAR (security of supplies, organisation of exportations, dealing with sensitive information, relinquishing mutual compensations and mutual opening of markets).

apply in the present case. We will then examine if other formulas would not reach the same outcome at a lower cost.

There are five possible reasons for fixing a minimum participation threshold: (1) ensuring that enhanced co-operation is large enough to produce the desired outcome (critical mass); (2) limiting the costs for the Union; (3) preventing the development of parallel or competing policies in the Union's framework and creating a centripetal effect in favour of enhanced co-operation instances; (4) establishing enhanced co-operation's legitimacy; (5) and minimising the risk of institutional tension.

(1) The issue of critical mass, if not present in all areas, may be crucial in some fields open to enhanced co-operation (environment, defence, etc.). Making sure that an instance of enhanced cooperation is large enough to function properly is therefore a goal worth pursuing. However the fact is, that the threshold differs from one area to another. In many cases, the minimum threshold set by the Treaty will be too high or too low. The best thing to do would be to examine the critical mass issue on a case-by-case basis and, whenever appropriate, to integrate this parameter in the authorisation proposal.

(2) It is essential for the Union to control the costs induced by enhanced co-operation. Under the current scheme, participating Member States are to pay for all operational expenditures unless the Council, acting unanimously, decides otherwise. Administrative costs are borne by the Union, which is not negligible for a small budget already under great strain (cf. among other things, secretariat, policy units in charge of programming, monitoring and evaluation, translation and interpretation services, meeting rooms). A very effective way of keeping costs down is to make sure that the Union will only have to manage a limited number of enhanced co-operations. In an enlarged Union, a minimum threshold set at eight Member States cannot guarantee that. A first solution would be to raise the participation threshold significantly, but this would have a very detrimental effect at operational level. A second solution would be to set a maximum number of enhanced co-operations. The problem here is that there is no obvious base for determining that number. A third solution would be to decide that, as soon as one group of Member States has been authorised to develop enhanced co-operation in a specific area, no other request shall be taken into consideration (in the manner of the standstill or status quo clauses sometimes found in free trade agreements)[22]. The introduction of a standstill clause would certainly contribute to limiting the number of enhanced co-operation instances. However this competitive logic of « first come, first served » poses several problems reviewed below. Only to mention here that it goes against the Union's ethos and has consequently little chance to be ever included in the mechanism of enhanced co-operation. All things considered, the best option seems to let budgetary authorities to decide what is financially unbearable for the Union. These authorities should therefore have or keep a decisive influence on the authorisation of enhanced co-operation.

(3) Preventing the emergence of parallel or competing policies in the framework of the Union and creating a centripetal effect will be essential or counter-productive depending on the role assigned to an enhanced co-operation. If the objective is to develop through that mechanism what will eventually become the policy for the entire Union, it is essential to have but one enhanced co-operation per area. A majority threshold guarantees not only that, but also a strong centripetal effect. Reluctant Member States know that their capacity to influence policy development is inversely proportional to the size of the group engaged in enhanced co-

[22] Jörg Monar suggested the idea in order to avoid the proliferation of competing enhanced co-operations, in the hypothesis of the withdrawal of a minimum participation threshold.

operation. The standstill clause produces the same result without having to bear the extra-operational cost that usually comes with large groups. The flip side, of course, is that more Member States are likely to vote against enhanced co-operation's authorisation. With such a clause indeed, initiators ask to be the only group to have the benefit of the Union's framework.

If the objective is to experiment with new ideas or set up sub-regional schemes, banning the development of parallel or competing policies in the Union's framework is potentially counter-productive. Enhanced co-operations could be used as 'laboratories' for the EU. Considering that it is at times preferable to opt for simultaneous experiments, a majority threshold or an automatic standstill clause should be banned insofar as it would deprive the EU of that option. It should also be banned because it would prevent enhanced co-operation being used to develop projects for a limited number of Member States (sub-systemic group defined on a functional or geographical basis)[23]. The best solution would be to examine the merits of multiple experiments or parallel sub-systemic co-operations on a case-by-case basis, i.e. to have some system of optional standstill, as suggested by the Canivet-Sauron report. Here again the simplest thing would be to leave this assessment in the hands of the institutions involved in the authorisation procedure.

(4) Ensuring that a new mode of governance is regarded as legitimate is, no doubt, important. It is also true that Western liberal democracies attach great importance to ratios. Many groups derive their legitimacy from being the majority at one level or another. Enhanced co-operation's legitimacy would undoubtedly be greater each time it involves the majority of Member States. Defining the minimum participation threshold by an absolute number is, in that respect, problematic. As early as 2004, enhanced co-operation would only require the participation of one third of the Member States. After the entry of the Balkan States and other potential Western and Eastern candidates, the proportion will fall below one quarter. Should the Union reinstate the majority threshold despite the possible operational cost of such a measure? It is argued here that there is no need for that because the legitimacy derived from other sources is strong enough (cf. the explicit recognition that enhanced co-operation serves the interests of the Union; the fact that its authorisation has to be proposed by the Commission, decided by the Council and approved by the Parliament; and the fact that all its measures are subjected to EU procedures). The size of the group is therefore not of paramount importance.

(5) Should the Union strive to minimise the risk of institutional tensions European Union? According to some, the EU needs crises and the opportunities they bring about to move forward. Obsessive search for consensus means lack of interest on behalf of EU citizens and gives the impression that the Union is dominated by colluding elites. According to others, the Union remains a fragile political system, faced with the rise of neo-nationalism in several Member States. In such a context, the scenario of a creative crisis is too hazardous and risks of tension must be minimised. We share that view.

Major tensions could arise if, within the European Parliament, the Commission or the Court of Justice, those who originate from non-participating Member States were seen as obstructing systematically enhanced co-operation development. In the current system, all

[23] The example of the USA shows that it can be in the interest of the European Union to get involved in sub-systemic co-operations. The US federal government for instance is directly involved in – 'intergovernmental' – co-operative schemes between the States of the Union that have a border with Mexico (cf. the so-called compacts).

members of the Council take part in the deliberations, but only those representing Member States participating in enhanced co-operation take part in the adoption of decisions. No other change has been introduced in the composition or functioning of EU institutions (see V.5.1). A small size enhanced co-operation would therefore have to work with a Commission, a Court of Justice and a Parliament dominated by nationals from non-participating Members States. Some fear that the European Parliament in particular could play an obstructive role[24]. Others object to the participation of the entire Parliament as a matter of principle. They consider that MEPs from non-participant countries should not have the right to approve or reject measures that will not apply to the constituents[25]. The main issue here is democratic representation. It should, for instance, not be possible for governments involved in the enhanced co-operation to pass measures against the will of 'their' MEPs, thanks to the vote of MEPs 'from' non-participating countries[26].

Specifying that enhanced co-operation shall always involve Member States representing a majority of the Union's population would minimise the risk of institutional tensions. The European Parliament being less likely to be obstructive, there should be less tension over its involvement in the development of enhanced co-operation. Functionally speaking however, this option would be very costly. Consequently, we suggest looking for more effective and efficient approaches to solve that problem (the option of a variable geometry European Parliament is discussed in V.5.2).

From this review of the main reasons for fixing a minimum participation threshold and of the relevance of the current threshold's level, we draw three main conclusions. First of all, there is no universally valid participation threshold (the choice is necessarily arbitrary and thus potentially problematic from a functional point of view). Secondly, there are better ways for controlling costs and, if need be, preventing the development of parallel enhanced co-operations. Thirdly, the current threshold (eight Member States) is of no use as far as the risk of institutional tensions is concerned. Raising the participation threshold (at least up to the majority of the population of the Union) would dramatically reduce that risk, but to the detriment of the system's versatility. Therefore it is suggested to suppress the minimum participation threshold,[27] to introduce other means to meet the objectives above-mentioned and to accept the risk of institutional tensions.

Last resort

The Union's main ambition, its *raison d'être*, is to develop common policies. When a problem comes up, the Member States and the institutions of the Union try to solve it

[24] This fear is implicitly based on the following postulates. On one hand, the vote of MEPs from participating countries are determined by the political divide between majority and opposition found at national level (assuming Germany is part of the enhanced co-operation group, a MEP from CDU-CSU would systematically vote against propositions backed by the Schröder government). On the other hand, MEPs from countries not taking part in enhanced co-operation would be exclusively determined by their national origin (assuming Great Britain resolves not to join, the MEPs of this country, irrespective of their political orientations, would vote as one on enhanced co-operation measures). The second postulate especially seems simplistic and, as a matter of fact is not confirmed by the voting pattern of MEPs from Member States that benefit from opt in an opt out (social policy, Economic and Monetary Union, asylum and immigration notably).

[25] This amounts to say that MEPs represent their country, a definition strongly opposed by many observers and most MEPs. The European Parliament, they insist, consists 'of representatives of the peoples of the States brought together in the Community' (article 189 TEC). This point is developed in V.5.2.

[26] Point emphasized by Renaud Dehousse.

[27] The Canivet-Sauron report also argues in favour of the elimination of the participation threshold (*Les coopérations renforcées en matière de justice et affaires intérieures: un outil d'intégration*, op.cit.).

collectively. In order to underline that principle, the Amsterdam Treaty stipulated that enhanced co-operation could only be undertaken as a 'last resort', when the Union's objectives 'could not be attained by applying the relevant procedures laid down' by the Treaties (article 43, §1, c) TEU). This system used by the legal services of the Council to verify that impossibility was quite straight. A specific measure (let's say a directive on energy taxation) had to have been proposed by the Commission, negotiated within the Council and unsuccessfully put to vote. That negative vote was sufficient to consider the last resort stipulation as met.

The 'last resort' definition chosen in Amsterdam has several major drawbacks. First drawback, it means that a group wishing to develop the *acquis* in a given sector must request an authorisation for each measure to be taken. This is naturally laborious and lengthy. Additionally it places Member States which wish to move forward at the mercy of unwilling Member States, giving the latter the opportunity to repeatedly put a price on their vote in the authorisation procedure. Second drawback, this formula imposes a sub-optimal working base for enhanced co-operation – namely a proposition altered to rally uninterested Member States which finally reject the measure. Why force willing States to work on such a basis instead, for instance, of giving them the opportunity to go back to the initial proposal of the Commission? Last drawback, this formula might lead to problematic level of variable geometry. In a system that allows Member States to opt-out on a case-by-case basis, nothing guarantees that the group of participants will not vary from one measure to the other.

The treaty of Nice amended the last resort stipulation at two levels: firstly, it explicitly entrusts the Council with the verification of the last resort stipulation (see V.2.3); and secondly, it replaces the reference to the objectives of the treaties, by a reference to the objectives assigned to the enhanced co-operation[28]. This new formulation seems to indicate a switch to a logic based on the political recognition of a foreseeable impasse. It would no longer be a question of establishing that a measure, having been the object of a detailed proposition and having been debated by all, has been rejected. This would be a matter of a group of Member States, concerned by the stagnation in a sector, envisaging to resort to enhanced co-operation, defining its objectives (with a reference to the Treaty articles concerned but stopping short of detailing future measures), and asking the Council to acknowledge the impossibility to reach these objectives in a reasonable time limit[29].

Despite its ambiguity, the new formula is lighter, leaves more liberty to the willing and is less fragmenting. Provided that uninterested States have not decided to play the clock, it is no longer necessary to wait for the end of very long legal procedures. This of course makes a big

[28] Enhanced co-operations may only be set up 'when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties (article 43A TEU).

[29] This is the reading Hervé Bribosia makes of the last resort condition revised by the Nice Treaty (article 43A TEU). Very justly so, he adds that the wording of the Treaty is still « extremely ambiguous ». Bribosia Hervé (2001), 'Les coopérations renforcées au lendemain du traité de Nice', *Revue du Droit de l'Union Européenne*, Nº 1, pp.111-171, p.135. This new formula reminds, *mutatis mutandi*, the one used in the 'Schengen' case. The Franco-German couple was concerned with the slow progress of the European Community in terms of free movement of persons. Together with the Benelux countries, these States set themselves to abolish controls at their internal borders, then progressively defined the measures and created the tools necessary to reach this objective. All that however was developed on an intergovernmental basis. The Council was therefore not asked to acknowledge the impasse at EC level or to give its blessing to the new co-operation.

difference for domains for which time is of the essence, such as peace enforcement[30]. The simple reference to a number of objectives also gives the flexibility needed for developing a new policy. Finally, authorisation to co-operate granted to a given group for a given sector is way less fragmenting than the Amsterdam case-by-case approach.

All in all, it seems important to have a provision emphasizing the subsidiary nature of enhanced co-operation. For that matter, the formulation of TEU article 43 is clear enough. However the words 'last resort' are a possible source of confusion. Insofar as they are not indispensable to indicate that priority should always be given to the development of common policies, they should be dropped.

V.2.3 Verifying the admissibility

Who is qualified for verifying whether the substantive and procedural requirements are met? The Amsterdam treaty was silent on this point. The Nice Treaty only deals very partially with this issue by specifying that it is up to the Council to establish whether hat the last resort stipulation is fulfilled (article 43A TEU).

We deduce from the silence of the Treaties that, apart from the last resort stipulation, it is the duty of the one who proposes the authorisation to verify the request's admissibility. This silence also means that institutions called upon to give their opinion or to rule on the request may conduct their own verification and decide on that basis.

Insofar as the procedure for proposing the authorisation of an enhanced co-operation varies from one pillar to another, we must consider that each pillar has its own verification procedure. For a request concerning the first pillar, the proposition power belongs to the Commission. The Commission is therefore expected to start by verifying that all requirements are met. In the present system, if the verification is not conclusive, the Commission points at the problem and submits no proposal. In other words, its assessment of the request's admissibility, if negative, is final insofar as it means the end of the authorisation procedure. The consequence of a positive assessment by the Commission is less clear. In the absence of any specific provision, does it deny the Council the right to conduct its own verification and to refuse authorisation on that ground? In the second pillar, the Commission is only invited to give its opinion on the request. It is therefore the Council which has the final word on the admissibility of the request. In the third pillar, enhanced co-operation can be authorised on a proposal from the Commission or, failing that, on the initiative of at least eight Member States. In other words, interested Member States may ask the Council to disown the assessment the Commission makes of the request's admissibility. Here too the Council's assessment is final.

In the perspective of a merger of the current Treaties into a set of simplified rules, there is no place for such a baroque construction. Besides, considering that poor use of enhanced co-operation could undermine the foundations of the Union, the verification procedure should be in the hands of institutions whose vocation is to protect the Union's interests. *A priori* it seems preferable to give that responsibility to the Commission, as the guardian of the Treaties. In case of doubt and objection, any Member State, the Council or the European Parliament have the possibility to refer the matter to the European Court of Justice. This type of decision is indeed within the jurisdiction of the Court.

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[30] Cf. *Final report of Working Group VIII - Defence*, The European Convention, The Secretariat, CONV 461/02, Brussels, 16 December 2002, pts 53-55.

The previous reasoning cannot be applied to the last resort condition as revised in Nice (i.e. when it means that enhanced co-operation may be envisaged as soon as it appears that parties could not reach an agreement). This kind of assessment being highly political, the Council seems best placed to do it. In the current system, the Council by a majority of its members must declare that the objectives of the enhanced co-operation cannot be attained, within a reasonable period, by applying the relevant provisions of the treaties.[31] An alternative solution would be to entrust this task to the Council's Presidency. This is probably not a good idea because an individual is more vulnerable to pressure and accusation of national prejudice. It could be more difficult to start an enhanced co-operation, which would push interested States towards extra-EU co-operation. Maintaining collective responsibility seems preferable.

V.3 Procedure for setting up enhanced co-operation

Under the current scheme, use of the Union's framework to develop enhanced co-operation has to be expressly and formally authorised. The authorisation procedure consists of three stages: authorisation proposal, consultation and deliberation, adoption or rejection of the proposal.

V.3.1 Authorisation proposal

At the moment, the proposal procedure varies from one pillar to another. Depending on the topic, the Commission, the interested Member States, or the Commission and the interested Member States have the authority to submit a proposal (for more details, see V.2.3). Maintaining such a structure is hardly compatible with the ambition of a constitutional Treaty to transcend the pillar structure and simplify the functioning of the Union.

The simplest, most efficient and coherent solution would be to entrust the power of proposal to the Commission, with one exception. This responsibility already lies with the Commission for the development of most of the Union's policies. Apart from the institutional coherence that this procedural simplification would bring about, appointing the Commission is justified because it is better placed to carry out this task. It is more inclined to think in terms of what serves the Union's interests best and not just the interests of the Member States concerned. Thanks to its long multi-sector experience, it also better able to assess the appropriateness of proposing the establishment of parallel or competing enhanced co-operation projects (by way of reminder, after the 2004 enlargement, starting a process of enhanced co-operation will no longer require a majority vote of the Member States – cf. V.2.2.1). For foreign policy, security and defence matters, the power of proposal would be in the hands of the EU High Representative for CFSP and Vice President of the Commission in charge of external relations.

The Nice treaty stipulates that the Commission may include any particular provisions it deems necessary in its proposal. It seems necessary to specify what these particular provisions may deal with. We suggest that, among other things, these provisions could concern objective prerequisites for participating in the enhanced co-operation; aid to Member States wishing to participate but not having sufficient resources to do so; the distribution of

[31] Article 43A TEU does not specify the procedure to be followed to assess this impossibility ('when it has been established within the Council… that the objectives of such cooperation cannot be attained'). In the absence of any indication, the simple majority rule applies by default.

operational expenditures among Member States taking part in the enhanced co-operation; and/or operational expenditures that should be charged to the budget of the Union.

Is it wise to give the Commission a proposal monopoly when it appears to have second thoughts on the mechanism for enhanced co-operation? This unwillingness, it must be said, is rather recent[32]. The same Commission had a much more positive attitude in Nice and had actually suggested using this mechanism in 2001 and 2002. Should it be concluded that the Commission has suddenly discovered the futility of enhanced co-operation? Probably not. This sudden change of heart can no doubt be explained by internal disagreements, fads and possibly tactical choices when taking the future activities of the Convention into consideration. The Commission could therefore very well return to a more positive attitude towards enhanced co-operation. More to the point, institutional design should not be determined on the base of the (lack of) enthusiasm demonstrated by the persons in charge at a specific time.

Nevertheless, giving the Commission the possibility of not submitting a proposal is a step too far[33]. Article 11 of the TEC stipulates that, if the Commission does not submit a proposal, it must inform the Member States concerned of its reasons. The authorisation procedure ends there. This is of course problematic when the Commission takes such a decision because it reckons that the request albeit admissible is politically inopportune. It seems fair to allow the Council to examine the merits of the Commission's reasons and to give it the possibility, by unanimous vote, to authorise the start of enhanced co-operation. It is therefore preferable to stipulate that the Commission submit the proposal, while it is understood that it is free to decide upon its contents – in other words, that the Commission may propose not to authorise the setting up of enhanced co-operation.

V.3.2 Consultation and deliberation

Present consultation and deliberation procedures vary from one pillar to another. In the case of proposals relating to the first pillar, the European Parliament must always be consulted, except when the area concerned comes under the co-decision procedure (TEC article 251) in which case Parliament's assent is required. As far as the second pillar is concerned, the Council must invite the Commission to present its opinion, but has no obligation to involve the European Parliament in any way. Finally, the European Parliament is consulted on proposals dealing with the third pillar.

The mechanism of enhanced co-operation would benefit if this part of the launching procedure were rationalised and put in line with current institutional developments at EU level. To start with, if the High Representative for CFSP also becomes vice president of the Commission in charge of external relations and that he/she is responsible for proposing the authorisation, there would be no need to ask for the Commission's opinion. The Parliament's prerogatives are more difficult to define. The Parliament should always be at least consulted (there is no justification in today's Union for total exclusion of the European Parliament from any EU common policy). Should the procedure go beyond consultation? The last decades show that the Parliament and the Council are progressively put on an equal footing in various

[32] Differentiation is not one of the themes addressed in the document of 4 December 2002 presenting the institutional view of the Commission. The 'Penelope' working document suggests the pure and simple discontinuation of the enhanced co-operation mechanism, opting for a strong and integrated scheme, even at the price of an 'enhanced Union' (cf. possibility that the 'future constitutional Treaty may be implemented before being ratified by all Member States').

[33] Point emphasized by Jean Nestor.

matters. Extending the scope of the Parliament's assent would certainly be in line with that institutional evolution. That assent would most certainly be required every time the Commission proposes that enhanced co-operation's operational expenditure should be borne by the Union. Its assent would also be required if it was decided that Parliament should function on a variable geometry basis for adopting measures needed to develop enhanced co-operation (cf. V.5.2). *A priori* such extension should not complicate the launch of enhanced co-operation. Indeed it does not seem inconceivable to find a majority of Parliament for a request that the Commission sees as admissible and opportune, and one which a majority within the Council is ready to approve.

V.3.3 Adopting or rejecting the authorisation proposal

The Treaty of Amsterdam stipulated that the authorisation to use the framework of the Union to develop enhanced co-operation shall be granted by the Council acting by qualified majority unless one of its members declares its intention to oppose the granting of this authorisation, in which case no vote is taken. The Council could then decide to refer the matter to the European Council for decision by unanimity (solution known in the EU jargon as the *frein d'urgence* or emergency brake). Since Nice, this procedure only applies to the second pillar. It has been replaced in the first and third pillars by the possibility of a pause in the procedure. This *ralentisseur* or speed bump (to continue the automobile metaphor) is a two-step device: a Member State may ask for the authorisation proposal to be brought to the knowledge of the European Council; when this is done, the Council, acting by qualified majority, decides whether or not to grant the authorisation.

Several analysts have strongly criticised this obligation to obtain the Council's authorisation. The device introduced in Amsterdam is supposed to reinforce the Union's decision-making capacity and to further the progress of European integration, while decreasing the number of extra-EU co-operation agreements. Giving a veto to every Member State or a small group of Member States would seriously impede the potential of the new instrument at these levels.

It is however difficult to do without the Council's authorisation. This decision is an important guarantee for cohesion and loyal co-operation on both sides. The use of the Union's resources by a potentially very small group of states can hardly be conceived on the sole basis of the Commission's blessing as innovatively suggested by the Canivet-Sauron report[34].

This being said, the authorisation procedure could and should be more flexible. Maintaining the possibility of an individual veto seems to be not only incapacitating but also unjustified as it is not a matter of taking measures binding all Member States (the present system provides that the acts and decisions governing enhanced co-operation are not part of the Union's *acquis* – see V.5.2). Since the authorisation is only a procedural decision, the qualified majority requirement is not justified either. If the IGC does not manage to replace the myriad of qualified majorities by the double absolute majority, the latter should be introduced here. Authorisation to establish enhanced co-operation should be granted by a majority of Member States representing the majority of the Union's population. Such a threshold offers a satisfactory balance between the imperatives of efficiency and legitimacy. Besides, the possibility to suspend the authorisation vote in the Council and consult the European Council gives a last chance to stop the procedure and start developing a common policy instead.

[34] The Canivet-Sauron report considers operational enhanced co-operation dealing with justice and internal matters. Unbridling the procedure is entirely justified for this type and area of co-operation (as a matter of fact, the author of the present study took part in the proceedings that led to the Canivet-Sauron report). This is problematic when dealing with co-operation with legislative or regulatory objectives.

Considering that enhanced co-operation is likely to be a second-best choice in many cases, that opportunity should be maintained. This optimised authorisation procedure should apply to all fields open to enhanced co-operation.

The decision to authorise co-operation must enter into force immediately. The system offers a high level of protection for non-participating States and for the core elements of the Union (see V.2.1). Moreover, once the authorisation granted, it will take some time for Member States involved in enhanced co-operation to develop their new policy, define appropriate measures and have them approved by the European Parliament. In view of the foregoing, there is no justification for a referral procedure with suspensory effect. The existing possibility to refer the matter to the Court of Justice is fully satisfactory.

V.4 Participating in enhanced co-operation

The issue of participation in enhanced co-operation can be considered from three different angles: initial participation, subsequent participation (accession) and suspension, exclusion or withdrawal of a participant.

V.4.1 Initial participation

There are three different logics for defining which States will take part in an enhanced co-operation from the start. Managing the size and composition of the founding group may be left up to the initiators of the request who are free to decide whether or not to co-opt other States (discretionary logic). A second option is to give any Member State the right to join enhanced co-operation from the start if it meets certain objective criteria (logic of conditional openness). In the third option, this right is unconditional (logic of unconditional openness).

Amsterdam and Nice opted for unconditional openness – the most inclusive and consensual, but also potentially debilitating approach. The main benefit of this approach is to reassure those who fear that the mechanism of enhanced co-operation will help establish a 'club of the selfish rich' or a 'hegemonic core' within the Union. Since the inception of the European Communities, the development of new policies has been the opportunity for certain Member States to extract financial compensation (e.g. approval of the Economic and Monetary Union in exchange for the creation of cohesion funds). Stricken by aid fatigue, the richer Member States might be tempted to use enhanced co-operation to move forward without having to pay for some of the adjustment costs of less prosperous countries. Under the unconditional openness logic, Member States wishing to take part but which do not have adequate resources cannot be excluded. This logic is also highly reassuring for small(er) Member States. It does not allow large(r) Member States to control an instance of enhanced co-operation, exclude 'marginal' actors and turn it into a *directoire*[35].

The major drawback to unconditional openness is the risk resulting from the participation of weak Member States. In many cases, participation will be more a matter of political will or common ideas than of resources. There are nonetheless areas in which participation of certain Member States could not only seriously damage the sound development of a new policy, but also have major consequences for other members of the group (cf. co-operation in matters of border control, exchange of information in the fight against organised crime and terrorism, etc.). Many examples show how an inclusive approach (i.e. aimed at implicating all States

[35] See Philippart Eric and Sie Dhian Ho Monika (2000), *The pros and cons of 'closer cooperation' within the EU – Argumentation and recommendations*, Scientific Council for Government Policy, The Hague, pp.16-17.

potentially concerned from the start) can negatively affect the development of international regimes. The risk of having to co-operate with a 'weak link' will lead the initiating States to co-operate outside the Treaty's framework.

At the other extreme, there is the discretionary logic which offers great versatility but goes against the very model on which the Union was built. The quickest and most efficient way to develop a new regime is to start with a small number of States with similar views and progressively co-opt the States that have come to share the same views (the history of the European Communities and the Schengen co-operation scheme are two examples). A system leaving a fair amount of discretion to the initiators for managing the size and composition of the group could be interesting from a functional point of view. Functional or not, this logic is in direct contradiction to the spirit of the whole EU project which places a premium on the collective management of problems. The trouble with discretionary procedures is that they are open to abuse. Discretion very often turns into arbitrary, even sectarian decisions, along with unavoidable heightened tensions between the Member States.

Conditional openness combines inclusiveness and efficiency. Capacity criteria already exist for Member States wishing to join an existing enhanced co-operation (see V.4.2). Why not consider this possibility from the start? By analogy with systems set up for the Economic and Monetary Union and for the Schengen *acquis*, any Member State willing to join would be formally accepted ('pre-in') but would only fully participate in enhanced co-operation once it had met the capacity criteria ('in'). This would preserve the principle of openness while considerably strengthening the attractiveness of enhanced co-operation compared to co-operation conducted outside the EU.

Who defines capacity criteria and who ensures they are met? For reasons explained above (V.3.1), it should be up to the Commission to propose capacity criteria. It should also be up to the Commission to check that they are satisfied. This option seems to offer more guarantees than its main alternative, i.e. peer review. Recent experience of peer review has not been very conclusive. Member States tend to interpret the conditions with great leniency or great stringency depending on whether they want to please an ally or put pressure on a State with which they are in dispute.

Based on the above, participation in the initial group should in the future be managed by the Commission on the basis of a principle of openness, moderated by possible capacity criteria. The fact that the Commission's decisions may be legally challenged should be enough of a guarantee for the initiators and the other Member States interested by the development of such a co-operation. Unless otherwise specified, decisions relating to enhanced co-operation come indeed under the jurisdiction of the European Court of Justice. Decisions on the initial participation are no exception.

V.4.2 Subsequent participation

The current treaties stipulate that enhanced co-operation is open to all Member States at all times provided the candidates accept any decisions made under this framework and they are able to implement them. Beyond the general principle of openness and respect of the *acquis*, there are noticeable differences from one pillar to another. These variations are present at different levels: the notification of the request for participation, the institutions to be consulted and the scope of that consultation, as well as the institution entitled to decide on the request. To sum up, management of accession to enhanced co-operation for the first pillar is largely in the hands of the Commission (TEC article 11A). As regards the second pillar, the

Council asks for the Commission's opinion, then decides on the request and on possible prerequisites for accession. The decision is considered approved on this basis except if a qualified majority of states taking part in enhanced co-operation decides to suspend the decision (TEU article 27E). Accession procedure for the third pillar is identical to that of the second pillar except for two points: firstly the Commission's opinion may include recommendations on the conditions the applicant should meet before joining; secondly the qualified majority required to suspend the decision is different (TEU article 40B).

The arguments developed above (initial participation) also apply to the accession procedure. A single procedure to decide on initial and subsequent participation whatever the field should therefore be established. Recognising the right to participate, under the sole condition of accepting the *acquis* and having the means to implement it, is the most functional and centripetal approach at EU level (the sense of urgency is obviously stronger when a government knows a new regime will be developed without him and that he will later have to accept it without any renegotiation). For the sake of simplicity and efficiency and because current procedural variations are not of major political importance, the Council's intervention at this level should be done away with in favour of a single procedure managed by the Commission.

V.4.3 Suspension, exclusion and withdrawal

The mechanism of enhanced co-operation mentions no procedures for suspending or excluding States that joined enhanced co-operation in order to paralyse it from within. To protect themselves from Trojan horses, participants in enhanced co-operation may only rely on the general provisions of the Treaties demanding loyal co-operation between Member States and sanctioning the violation by a Member States of its obligations.

Is there a need for particular procedures of suspension, exclusion and withdrawal of participating states? Enhanced co-operation implementing a measure rejected by the Council could easily be subject to such procedures. By joining enhanced co-operation, each Member State adopts this measure. The obligations of the participants are clearly set out. It should therefore be relatively easy to demonstrate that a participant is in breach of its obligations, to call it to order by suspending its rights and, if need be, to sanction it by excluding it from enhanced co-operation. If the general provisions of the Treaty are not sufficient, specific procedures of suspension and exclusion could be envisaged. One option would be to introduce a device similar to TEU articles 6 and 7 (procedures concerning the breach by a Member State of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law) – this if the IGC does not decide to widen the scope of these articles. Another option suggested by the Canivet-Sauron report would be to give the Commission the right to suspend a Member State, provided that the other participating Member States by a unanimous vote do not oppose the measure. Both solutions have their merits. The aim of this study being to design the simplest mechanism possible, it is nevertheless suggested to stick to the general provisions of the Treaty.

Introducing suspension and exclusion procedures seems much more difficult in the case of enhanced co-operation authorised on the basis of set objectives (see V.1.2). Is it possible to sanction a State for opposing the adoption of a measure? This is hard to imagine. In such a case, very little would indeed remain of the freedom to vote. Faced with prolonged obstruction, one could only rely on legal action based on the general principle of loyal co-operation, on political pressures and on the threat to scupper enhanced co-operation in favour of co-operation set outside the EU in order to exclude the 'saboteur'. The general principle of

loyalty between Member States applies to partner States within enhanced co-operation. Participating Member States could invoke this principle at the Council, the Commission could issue a warning and the Court of Justice could sanction on this basis. Nonetheless this option seems lengthy and hazardous. Using political pressure would undoubtedly be quicker and certainly more effective. Taking serious political reprisals should not be a problem. The obstructive State having had the possibility of staying out, its sabotage would indeed appear all the more illegitimate. The last resort would be to terminate enhanced co-operation and start co-operation outside the EU from which obstructive States would be barred.

V.5 The *modus operandi* of enhanced co-operation

This last sub-section deals with the operating mode of enhanced co-operation (institutional framework, processes and degree of implication of non-participants) as well as the status and funding of measures taken under such schemes.

V.5.1 Institutional framework and procedures

It was decided in Amsterdam that enhanced co-operation would operate in the same way as the Union – same institutional framework and same procedures. This isomorphic principle has one important exception. If all members of the Council take part in the deliberations, only those representing Member States participating in enhanced co-operation take part in the adoption of decisions. As for the rest, the institutions play the role they would normally play in the development of EU policies. Incidentally, this solution has also been used for EU policies that do not commit all Member States (cf. Monetary and Economic Union and for the European area for security, freedom and justice).

The current system has several major advantages: simplicity and readability; a high level of involvement of non-participants facilitating their accession; preservation of the coherency and supranational characteristics of the Union. The first advantage is obvious. The Union is a complex system which can do without another layer of institutions and procedures. Deciding that enhanced co-operation would operate through existing institutions and follow existing procedures is of course the simplest option. EU processes and actions are difficult to understand. If the isomorphic option does not contribute to make them more readable, at least it does not aggravate the problem. The second advantage is less obvious. The underlying argument is fairly straight. For various reasons, some countries prefer the 'wait and see' strategy as far as European integration is concerned. Allowing those to have a close look at the policy developed by enhanced co-operation is the fastest way to reassure them and speed up their joining. This is only partly borne out by historical evidence. In the case of social policy, the United Kingdom was showing no sign of 'acclimatisation'. The Commission and the other Member States decided to bypass John Major's government by resorting to procedural tricks. Nowadays, the UK and Ireland contribute positively to the debate in matters of asylum policy and take part in all the measures taken. On the other hand, their right to opt in was hardly used for immigration policy. The third advantage of the current formula is to protect the coherency and the supranational nature of the Union. Thanks to the involvement of non-participating Member States, tensions and conflicts may be dealt with at an early stage. Moreover, by preserving the institutional unity of the Parliament, the Commission and the Court of Justice, it consolidates the supranational logic to which the EU owes its success. Should it be otherwise (i.e. distinguishing between MEPs, Commissioners or Judges on the basis of the list of States participating in enhanced co-operation), it would indicate that the members of these institutions are first and foremost national actors operating

at European level. Reaffirming the indivisibility of these institutions encourages members to determine themselves on the basis of political or legal choices rather than on national loyalty. In other words, behind that choice is the crucial difference between further Europeanisation and creeping renationalisation.

On the minus side, the *modus operandi* chosen in Amsterdam and Nice is functionally suboptimal, poses various equity and legitimacy problems and may lead, in some cases, to entrenching cleavages. At an operational level, the choice of isomorphism does not allow enhanced co-operation to have more efficient procedures than those currently used at EU level. Thanks to the procedural improvements expected from the Constitutional Treaty due for adoption by the end of 2003, this should not be too high a price to pay. A more substantial inconvenient is the relative vulnerability to reluctant States determined to decelerate, dilute or derail the development of enhanced co-operation. These states could use their rights within the Council to serve this '3D' strategy. In cases where enhanced co-operation does not involve a large majority of Member States, they could also try to mobilise the European Parliament against measures proposed for the implementation of enhanced co-operation (in areas managed by the co-decision procedure, measures adopted by the enhanced co-operation group at Council level have to be endorsed by the European Parliament as a whole). Nevertheless, this vulnerability should be put in perspective. The argument rests in part on fragile, even disputable postulates (see V.2.2.1 minimum participation threshold). For reasons mentioned below, it is unlikely that a majority of MEPs elected in non-participating States would commit themselves to systematic opposition to the development of new policies through enhanced co-operation. Firstly, in order to be authorised, enhanced co-operation must further EU objectives, serve the interests of the Union and strengthen European integration. The Commission must certify that these requirements are effectively met and a large majority of Member States must confirm the Commission's judgement. In such a context, opposing MEPs would almost automatically appear as rabid Euro-sceptics. Secondly, MEPs are not supposed to model their attitude on the governments of the States of origin. They are the "representatives of the peoples of the States brought together" in the Union. As such they are expected to act in EU general interest. Accepting instructions from national capitals means losing much of their European political credibility[36]. So, all in all, in the hypothesis of pressures from 'their' national government, some MEPs might abstain but few of them would go as far as voting against proposed measures.

Operational concerns put aside, the prevailing procedures raise questions regarding equity and legitimacy. How come that the 'pre-ins' do not have more rights than the 'outs' (see V.4.1) – or rather that the 'outs' have as many rights as the 'pre-ins'? Those wishing to take part in enhanced co-operation but prevented from doing so due to material reasons should logically have a more favourable status than those not wishing to participate. Other features of the current mechanism are criticized as democratically questionable. Some challenge in particular the right of MEPs from non-participating countries to approve or reject measures that will not apply to 'their' States. From their point of view, MEPs represent their constituency and beyond that, their country. They must be considered as national representatives like the ministers sitting on the Council. Rules related to deliberations and decision-making within the Council should then apply equally within the European Parliament. To this reasoning, we can oppose the letter and the spirit of the Treaties. TEC article 189 says the Parliament consists of "representatives of the peoples of the States

[36] This is no trivial matter in particular for their career in the European Parliament (cf. participation in the various committees and delegations of the Parliament; nomination as rapporteur, quaestor and other positions of responsibility).

brought together in the Community". Furthermore, TEC article 190 does not specify the number of representatives elected "by" each Member State but "in" each Member State. These are not legal niceties of little political relevance. It clearly establishes that the European Parliament is a supranational institution and that the mandate of the MEPs is a European one. Both elements are of high systemic importance and cannot be disposed of without serious consequences for the dynamics of the Union. To those who consider illegitimate for members of Parliament to vote measures that will not apply to 'their' country, one could also oppose the fact that it is already a common thing at the Union level. MEPs from Austria vote on the fishing quotas in the North Sea and MEPs from the Netherlands vote on Alpine agriculture programmes. No one ever suggested suspending their right to vote on these issues.

Last drawback of the present system, one may wonder if the rather comfortable situation of non-participating States will not contribute to entrenching cleavages. Involving closely non-participants in the mechanism of enhanced co-operation may, as indicated above, bring on a change of attitude and speed up their admission. In some cases this could lead to the opposite. The history of the European Community shows that a number of countries eventually applied for membership because of frustration from being sidelined, having little information and possibility to shape decisions.

Is there an alternative mechanism that, while not jeopardising the Union's foundations, would be more operational, fair and centripetal? The notion of creating parallel institutions for enhanced co-operation should be put aside for reasons explained above (see V.2.1). There remains the possibility of changing the way the Council and other institutions of the EU operate. How the Council operates could be amended in three ways: increase the prerogatives of the willing but unable (the 'pre-ins'), diminish the prerogatives of the able but unwilling (the 'outs') or increase the prerogatives of the latter.

For fairness sake, the new mechanism could associate the 'pre-ins' more closely by giving these States the right to vote on the main orientations of the policy to be developed by enhanced co-operation. This would, however, involve a major risk: the 'pre-ins' have no interest in the speedy development of a costly policy. By slowing down development and limiting the financial ambitions of enhanced co-operation, their coming up to standard would be easier. It is therefore important for operational reasons to suspend their right to take part in the adoption of decisions until they fully meet the participation criteria.

The new mechanism could also give fewer prerogatives to the 'outs', in order to diminish the vulnerability of enhanced co-operation and to create a centripetal dynamic (assuming that frustration is the most effective means to change the mind of unwilling Member States). The unwilling could be kept informed of the development of enhanced co-operation, but have no right to attend the Council meetings. Can we still speak of the Council if some Member States no longer have the right to sit on it? Another possibility would be to give them observer status: they could attend Council meetings but not take part in the debate, a right only enjoyed by 'pre-ins' and 'ins'. Politically speaking, it is difficult to suppress a long-established right. Both these amendments would appear as an attempt to exclude or gag any opposing view. Another option, less brutal and systematic, would be to allow the Member States that participate in enhanced co-operation to hold restricted meetings[37]. This would also

[37] In the run up to the launch of the Euro, several Member States insisted to have that possibility. Their demand led in December 1997 to the creation of the Euro-group (European Council of Luxembourg). For many observers, there is a similar need to hold restricted meetings in matters of police and security co-operation.

make enhanced co-operation more attractive from the point of view of the States willing to develop new policies.

The prerogatives of the 'outs' could be increased in order to strengthen the centripetal dynamism of enhanced co-operation (assuming that positively engaging the unwilling States is the most effective way to win them over). For that matter, the new mechanism could provide that reluctant Member States are not bound by the *acquis* developed by enhanced co-operation, but have the right to take part in the adoption and application of any measure. Such derogatory regimes already exist in the Union (this is for instance the position of the United Kingdom and Ireland regarding the Union's visas, asylum, immigration and other policies related to free movement of persons – TEC Title IV). As mentioned above, with the *à la carte* approach, there would be a risk of fragmentation – when some Member States have the right to opt-in on a case-by-case basis, the geographical scope of the policy may vary from one measure to the other.

As for changing the way the other institutions operate, one has to distinguish between the Commission and the Court of Justice, on the one hand, and the European Parliament on the other. The Commission and the Court, as they are both collegiate supranational institutions, offer few possibilities for procedural variation, even if the idea has been suggested in the past. That leaves the Parliament which, according to leading experts, could or should operate through variable geometry structures for operational and legitimacy reasons[38]. As long as enhanced co-operation is used as a laboratory or an implicit *avant-garde*, this change should be opposed on account of its high systemic costs (cf. the above-mentioned 'renationalisation' effect)[39]. At a more mundane level, such a change could also pose a problem. One may indeed wonder if it would still be possible to persuade a variable geometry Parliament to earmark the non-administrative costs of enhanced co-operation on the EU budget.

Our suggestion is therefore, as far as the Council is concerned, to give all Member States the right to take part in the deliberations; to authorise States participating in enhanced co-operation to hold restricted meetings at an informal level; and to exclude non-participating States from the adoption of decisions. For the rest, the unity of the Parliament, the Commission and the Court of Justice should be upheld.

V.5.2 Status

The Treaty of Amsterdam left these points undecided, apart from article 8 of the 'Protocol integrating the Schengen acquis into the framework of the European Union'. This article stipulates that this "acquis" must be accepted in full by all States candidates for admission. The Treaty of Nice does not bring up the issue of the status of enhanced co-operations but specifies that acts and decisions resulting from them "shall not form part of the Union acquis" (article 44, §1 TEU).

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[38] This idea of a European Parliament with a variable configuration has already been suggested in Ehlermann Claus-Dieter, (1995), 'Différenciation accrue ou uniformité renforcée?', *Revue du Marché Unique Européen*, Vol.3, pp.191-218.

[39] The conclusion would be quite different if enhanced co-operation were used to establish an 'enhanced Union' (i.e. to form a Political Community among a limited number of Member States willing to further integrate in several areas – cf. Club de Florence (1996), *Europe: l'impossible statu quo*, Stock, Paris). It would then be imperative for the European Parliament to have one configuration for that hard core or inner circle and one configuration for the EU as a whole.

Determining the status of enhanced co-operations is not an easy matter insofar as the use of this mechanism creates a hybrid situation. An enhanced co-operation is not a separate international organisation insofar as it has no legal personality and is fully integrated in the Union's framework. Neither is it a group of States acting collectively and mandating the institutions to accomplish certain tasks in their name[40]. Indeed the representatives of Member States taking part in the enhanced co-operation act in their capacity of members of the Council and not as representatives of their government (in the latter case, the Treaties would have referred to the acts "of representatives of the governments of Member States meeting in the Council"). The most satisfactory definition is to consider an enhanced co-operation as "a legal order subordinate to the legal order of the Union but endowed with a certain autonomy and, to some extent, entrusted with powers relinquished by the Union" until the latter is able to exert them itself[41].

If an enhanced co-operation is a suborder of the Union, what status should be given to measures taken in this legal framework? A first solution would be to leave it up to the ECJ to establish a jurisprudence on that matter, which would then be confirmed or invalidated by the Member States on the occasion of a constitutional reform. This option goes against one of the objectives assigned to the new mechanism of enhanced co-operation (contributing to diminish the frequency of Treaty revisions) and should, for that reason, be discarded. A second solution would be to consider that measures taken within the framework of an enhanced co-operation are part of the Union's acquis, but that their geographical scope is limited. This approach – the most centripetal of all – would draw the enhanced co-operations nearer to EU policies that allow for *à la carte* participation (constructive abstention and opt-in in matters of asylum, immigration and monetary policy notably). This would however necessarily mean that unwilling Member States will be more likely to obstruct enhanced co-operation authorisation. A third and last solution would be to consider that, if the policy developed by enhanced co-operation may be called upon to become part of the acquis of the Union, this requires a formal act of "transfer". In other words, measures taken in the framework of an enhanced co-operation are not part of the acquis of the Union as long as the Member States involved in enhanced co-operation do not have the majority needed in the Council to decide such a transfer or, when unanimity is required, as long as the last outsider has not asked to join the enhanced co-operation. This option seems to be the most balanced.

V.5.3 Funding

The current system provides that "expenditure resulting from implementation of enhanced co-operation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise".

There is a logical contradiction in this. Enhanced co-operation can only be authorised if the Commission and the Council (as well as the European Parliament under certain circumstances) acknowledge that it serves the objectives and interests of the Union. How is it then that all operational costs should be borne by default by the participating States? It is true that, in many areas (legislative and regulatory in particular) the Union entrusts the

[40] The Treaty does not prevent the Member States – i.e. all the Member States – from entrusting the institutions of the Union with specific tasks that are beyond the scope of Union competence. This possibility is established by the jurisprudence of the European Court of Justice (Judgment of the Court of 30 June 1993, *European Parliament v Council of the European Communities and Commission of the European Communities. Emergency aid - Prerogatives of the Parliament - Budgetary provisions,* Joined cases C-181/91 and C-248/91).

[41] See Bribosia Hervé, *op.cit.*, p.153.

implementation of its policies to the Member States, without financial compensation. This being said, on most budgetary issues, the Council does not decide by unanimity or is due to stop doing so[42]. There is no reason to make an exception here. It should be possible for the Council to decide by a qualified majority (or what will replace it) that the Union's budget will support enhanced co-operation's operational costs.

VI Flexibility in the implementation of a common policy: 'pilot-nation' and 'framework-nation'

The Nice treaty enlarged the field of enhanced co-operations to common foreign and security policy. It is stipulated that enhanced co-operation in this area 'shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene' (article 27A §1). That co-operation shall only relate to the 'implementation of a joint action or a common position' (article 27B TEU).

This system is paradoxical in more than one way. Firstly, enhanced co-operation is meant to assert the Union's identity, whereas by definition it is not the Union and does not engage the Union. Secondly, if such co-operative measures implement a policy of the Union, why is it that they are not part of the *acquis* of the Union? Thirdly and for the same reasons, how comes that the funding should by default be borne solely by States that have volunteered for the implementation?

The fact that this form of co-operation is required to assert the Union's identity and is restricted to joint actions and common positions clearly indicates that it is based on a different logic than that of enhanced co-operation *stricto sensu* (i.e. a laboratory or 'avant-garde' logic in which new policies are developed). This logic is that of a mandate entrusted by the Union (contracting authority) to a task force (master of works) with a certain degree of autonomy. In some ways this approach is an extension or an extrapolation of the concepts of 'pilot-nation' and of 'framework-nation' developed within the Western European Union (WEU).[43]

This fundamental difference in logic must be conveyed by distinct denominations and adapted procedures. In order to make things simpler, this form of mandate should not be referred to as 'enhanced co-operation', nor be dealt with under the article dedicated to enhanced co-operation (article 34B of the draft project of Constitutional treaty). Depending on the proceedings of the European Convention and the ensuing IGC, it may either be introduced in article 28 of the draft Constitutional treaty (procedure for implementing supporting actions and monitoring them) or in article 29 (Common Foreign and Security Policy), maybe even in article 30 (Common Defence Policy). Concerning the procedure itself, four modifications seem particularly important. First of all, the minimum participation threshold should be dropped. It has even less sense than it does for 'real' enhanced co-operation. Secondly, considering that the system amounts to giving a mandate to a group of Member States, the measures taken should be considered as part of the Union's *acquis*. For

[42] Regarding the Structural Funds, the Treaty of Nice agreed that, from 1 January 2007, the Council shall act by a qualified majority if, by that date, the new multiannual financial perspective – 2007-13 – has been adopted (TEC article 161).

[43] Cf. Boone Philippe (2002), 'Une démarche capacitaire pour l'Europe', *Défense nationale*, n°7, July ; and Cardot Patrice (2002), 'Renforcer la PESC et la PESD en modernisant les institutions de l'Union européenne (2e partie)', *Défense nationale*, n°1, July.

the same reason, the funding of an enhanced co-operation should fall by default on the Union's budget, stipulating that the Council by a reinforced majority has the power to limit this funding to administrative costs. The current device is indeed encouraging free riding. Finally, since joint action in foreign, security or, even more so, defence matters may require speed and confidentiality, it seems necessary to leave much flexibility to volunteering States in the implementation of their mandate.

CONCLUSION: PROPOSITION OF ARTICLES FOR THE CONSTITUTIONAL TREATY OF THE EUROPEAN UNION

The conclusion of the study is, on one hand, that there must be a mechanism for enhanced co-operation in an enlarged Union and, on the other hand, that the current mechanism must be improved at several levels. A general article should be included in the Constitutional Treaty confirming that extra-EU co-operation between Member States is allowed, but that Union membership imposes certain constraints concerning the scope and contents of this co-operation. It should be followed by an article allowing several Member States to use the Union's institutions, procedures and mechanisms for developing their co-operation. In the structure of the draft project of Constitutional treaty proposed to the European Convention on the 28th of October 2002 by the Praesidium, these provisions should be enclosed in the first part 'Constitutional Architecture', Title V 'The implementation of EU actions', respectively as article 34A and article 34B.

This study shows that it is possible to improve the mechanism of enhanced co-operations in order to reinforce the decision-making capacity within the Council; to make extra-EU co-operations in areas of Union competence less attractive; to further rationalize the use of flexibility within the Union; and, finally, to facilitate the use of flexible solutions that in the past required Treaty reform. The improvements proposed below would endow the Union with a more operational mechanism, based on simple, clear and procedures, which do not undermine the foundations of the European Union and its inclusive dynamic. The following proposition groups the different elements of the revised mechanism in four paragraphs. They deal respectively with the request to use the constitutional framework of the Union and its admissibility, the authorisation procedure, the rules of participation in and the functioning mode of enhanced co-operation.

Insofar as the mechanism of enhanced co-operation introduced by the Nice treaty for the CSFP does not deal with the development of new policies, but with the implementation of a common policy (mandate logic), it is suggested to use a distinct denomination and to deal with that mechanism in another part of the Constitutional Treaty. Depending on the proceedings of the Convention, the paragraph dealing with the mandate given to certain Member States for the implementation of a common policy could be inserted in Article 28 (procedure of implementation of support actions and supervision of their execution) or in article 29 (Common Foreign and Security Policy), maybe even in article 30 (Common Defence Policy).

Draft project of a Constitutional Treaty / Part I: Constitutional Architecture / Title V: The implementation of EU actions

Article 34A – General principle related to "closer co-operation" (co-operation between Member States outside the Union)

The present treaty shall not preclude the development of closer co-operation between two or more Member States on a bilateral, regional or multilateral level, provided that such co-operation does not run counter to the provisions of this treaty and to the law of the Union, or impede the development of the Union's policies.

The Member States concerned shall inform the European Parliament, the Council and the Commission of the implementation of their closer co-operation.

Article 34B – General mechanism of "enhanced co-operation"

Contents and admissibility of the request

1. The Member States which intend to establish enhanced co-operation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty.
They shall address a request, which defines the scope of action and the objectives of the enhanced co-operation, to the Commission to that effect.

The Commission shall, within three months of the notification, verify whether the envisaged enhanced co-operation:

a) aims at furthering the objectives of the Union, at protecting and serving its interests and at reinforcing its process of integration;
b) respects the single institutional framework of the Union;
c) respects the acquis of the Union;
d) does not undermine the internal market as defined in Article [2nd Part: The Policies and implementation of the actions of the Union, A. Policies and internal actions, A1.], or the economic and social cohesion as defined in Article [2nd Part: The Policies and implementation of the actions of the Union, A. Policies and internal actions, A3.III.]
e) does not constitute a discrimination or a barrier to trade between the Member States and does not distort competition between them;
f) respects consistency between all the Union's policies and its external activities.
g) respects the competences, rights and obligations of those Member States which do not participate therein.

The enhanced co-operation may be undertaken only when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.

Authorisation Procedure

2. Authorisation to establish enhanced co-operation shall be granted by the Council acting by a majority of Member States representing the majority of the Union's population on a proposal from the Commission and after consulting the European Parliament. If the request concerns foreign, security or defence policy, the proposal shall be made by the High Representative for Common Foreign and Security Policy and vice-president of the Commission in charge of external relations.

The proposal may include specific provisions deemed as necessary. These provisions may, in particular, concern objective requirements governing participation in the enhanced co-operation; aid measures to Member States wishing to participate but not able to do so; the apportionment of operational expenditures among Member States taking part in the enhanced co-operation; and/or operational expenditures that should be charged to the budget of the Union. In the event of the Commission or, as appropriate, the High Representative for Common Foreign and Security Policy and vice-president of the Commission in charge of external relations proposing to refuse the authorization, the proposal must indicate the reasons.

When enhanced cooperation relates to an area covered by the co-decision procedure, or when the Commission's proposal envisages that operational expenditures shall be charged to the budget of the Union, the assent of the European Parliament shall be required.

A member of the Council may request that the matter be referred to the European Council. After that matter has been raised before the European Council, the Council may act in accordance with the first subparagraph of this paragraph.

Enhanced co-operation's membership
3. When enhanced cooperation is being established, it shall be open to all Member States insofar as they satisfy capacity standards. It shall also be open to them at any time, subject to compliance with the basic decision and with the decisions taken within that framework as well as possible capacity criteria.

Any Member State which wishes to participate in enhanced cooperation shall notify its intention to the Commission, which shall give an opinion to the Council within three months of the date of receipt of that notification. Within four months of the date of receipt of that notification, the Commission shall take a decision on it and on such specific arrangements, as it may deem necessary.

The Commission and the Member States participating in enhanced cooperation shall ensure that as many Member States as possible are encouraged to take part.

Enhanced co-operation's operating mode
4. For the purposes of the adoption of the acts and decisions necessary for the implementation of enhanced cooperation, the relevant institutional provisions of this Treaty shall apply. However, while all members of the Council shall be able to take part in the deliberations, only those representing Member States participating in enhanced cooperation shall take part in the adoption of decisions.

Member States participating in enhanced co-operation may meet in an informal way to discuss issues related to the development of their co-operation. The Commission is invited to join these meetings.

The Council and the Commission shall ensure the consistency of activities undertaken on the basis of this article and the consistency of such activities with the policies of the Union and the Community, and shall cooperate to that end.
Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the enhanced cooperation in which they participate. Such acts and decisions shall be binding only on those Member States which participate in such cooperation

and, as appropriate, shall be directly applicable only in those States. Member States which do not participate in such cooperation shall not impede the implementation thereof by the participating Member States

The acts and decisions adopted in the framework of enhanced co-operation are not part of the acquis of the Union.

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting by a majority of Member States representing the majority of the Union's population after obtaining the assent of the European Parliament, decide otherwise.

Article 28 / 29 /30 – Implementation of a joint action or a common position (CFSP / CDP)

Paragraphs to be inserted, depending on the Convention's proceedings, in Article 28 (procedures of implementation of support actions and supervision of their execution) or in Article 29 (Common Foreign and Security Policy), or even in article 30 (Common Defence Policy).

The implementation of a joint action or of a common position may be entrusted to one or more Member States. Member States wishing to take part in this implementation shall inform the High Representative for Common Foreign and Security Policy and vice-president of the Commission in charge of external relations who in turn passes the request on to the Commission for opinion and to the European Parliament for information.

After the Commission has given its opinion, the Council shall take a decision on the request as well as on possible specific arrangements. The Commission shall submit its opinion within a time limit to be set by the Council according to the necessities linked to the development of the situation.

The Member States entrusted with the implementation of a joint action or a common position shall organise their co-operation according to operational necessities. The High Representative for the Common Foreign and Security Policy and vice-president of the Commission in charge of external relations is, in any cases, closely involved in this implementation.

The High Representative for the common foreign and security policy and vice-president of the Commission in charge of external relations shall ensure that the European Parliament and all members of the Council are kept fully informed of the implementation of the joint action or the common position.
Expenditure resulting from this implementation shall be born by the Union, unless all members of the Council, acting by a reinforced majority after consulting the European Parliament, decide otherwise.

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