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Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea ?

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FOREWORD

In June 1997, on the eve of the European Council in Amsterdam, le Groupement d'Etudes et de Recherches “Notre Europe”, published a study by two eminent specialists, Françoise de la Serre, Director of Research at the National Foundation of Political Science (CERI) and Helen Wallace, Director of Sussex European Institute, on the theme of reinforced cooperation. The aim of this study was to provide a historical, conceptual and practical analysis of the numerous concepts which have been put forward in the attempt to characterise the different possible models for the future construction of the European Union.

At Amsterdam, various provisions were adopted with regard to this subject. In our opinion it was useful to ask the authors to update the study to take account of the new situation. The following document is therefore an enhanced and updated version which, notably, includes in the conclusion a critical analysis of the provisions of the new Treaty. The debate in this area is far from over …

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INTRODUCTION

The Intergovernmental Conference (IGC) was engaged in a complicated exercise in preparing the Amsterdam European Council. It sought to introduce in the revised Treaty on European Union (TEU) clauses permitting a limited number of member states to develop forms of enhanced cooperation and thus to proceed with integration further and more quickly. The Irish presidency, in its draft text of December 1996, had presented this as one of the main issues in the negotiations, stressing that: '... what is decided on this - or the absence of decision - will be of extreme importance for the future of the Union'.

The idea is seductive, if not new. In the context of the planned enlargement of the European Union (EU) to the east and to the south, enhanced cooperation was vaunted, especially to public opinion, as a kind of miracle solution that would allow the Union to have the best of both worlds. It would provide a means of organising diversity in an increasingly heterogeneous Europe, while at the same time preserving an integration dynamic. Thus the old contradiction between 'widening' and 'deepening' would be resolved.

The misleadingly simple idea of a differentiated Europe is so seductive that it has over the years generated a variety of semantic terms in our political discourse: two-speed Europe; variable geometry; *à la carte*; flexible Europe; concentric circles; hard-core; and so on. These different concepts are not, however, interchangeable and each needs to be clearly stated. It is not only that they are open to different interpretations as they are translated into different languages, but that they connote different, even contradictory, strategies of integration. Moreover, the various concepts build on existing Community practices of differentiation and derogation. These result both from successive rounds of enlargement and from demands for special treatment by individual member states, notably in the agreements reached in 1991 at Maastricht on new opt-out clauses.

Participants in the recent IGC were therefore under pressure to give content to the notion of enhanced cooperation as a means of developing a 'differentiated' approach to integration. One version of enhanced cooperation was defined in a joint Franco-German document published in autumn 1996. Position papers from other member governments fuelled a debate that became increasingly complex, but also focused on means rather than ends.

Confusion persisted on the objectives of the exercise. Was it intended to facilitate enlargement? This was the most frequently cited rationale, even though in other respects enlargement was drawn into the IGC reform discussions only at the margins. Or was it rather a response to the opposition of those member governments which have resisted further development of the Union, by providing a vehicle to by-pass their reluctance in the future? Should we interpret enhanced cooperation as resting on a willingness to extend the dynamic of economic and monetary union (EMU) to other domains? Was it the means to establish a vanguard that would pursue a federalising agenda? Given the range of different expectations and positions the risk was that the Treaty of Amsterdam would contain texts on enhanced cooperation permeated by ambiguities which would cause as many problems as they would solve. Has this risk been avoided in the text eventually agreed in Amsterdam in June 1997?

The aim of this paper is to clarify the contours of this debate, one which is certainly not over. First, we sketch the different conceptions of integration that underlie the terminology; second, we recall some lessons from previous experience; and, finally, we comment on the thrust of what was debated in the IGC and incorporated in the Treaty of Amsterdam.

DIFFERENTIATION AND ITS VARIED SEMANTICS

It has been extensively demonstrated in the literature that the preoccupation with introducing greater elasticity and flexibility into the integration process is nothing new. On the contrary it was a feature of the Community process from the outset. Already at the end of the sixties Willy Brandt evoked the possibility of a two-speed Europe. In 1975 the Tindemans Report on European Union argued that, subject to certain conditions, 'the states in a position to do so have a duty to go out in front'.

It was at the beginning of the 1990s that, for several reasons, differentiation, with its confusing semantics, erupted a focus of debate, most often under the label of 'variable geometry'. First, the geopolitical disturbance that followed the cold war presaged a reconfiguration on the European continent, with German unification, the collapse of the Soviet Union and a reduced American presence in Europe. Second, the Treaty on European Union (TEU), agreed at Maastricht in 1991, the 'last treaty of the cold war', proved woefully inadequate as a response to the new situation.

Last, the decisions taken following the Copenhagen European Council of June 1993 brought into the open the unavoidable challenges posed for the EU by eastern enlargement.

In what follows we sketch the range of concepts which emerged, not as a comprehensive catalogue, but by situating them in relation to two opposing views about integration. The first view was summed up in the notion of a Europe *à la carte*, or 'flexible Europe', to use the Thatcherite term developed by John Major in his speech in Leiden in September 1994. In this much publicised notion of flexibility the only commitment common to all member states would be to the single market. On other subjects there would be varied groups of cooperating countries. In a way this was to generalise the system of exemptions and opt-outs obtained by Denmark and the United Kingdom, for, in the former case, the single currency, justice and home affairs, and defence arrangements, and, in the latter case, the single currency and the social chapter. This view rested on an extreme definition of differentiation. It would have the effect of abandoning the global character of what EU membership implied, bring into question the interdependence of Community policies, erode the unified institutional system, and increase the likelihood of frequent recourse to *ad hoc* and intergovernmental procedures. Eventually the logic might lead to the disappearance of the disciplines and mutual obligations which have characterised the Community method.

In sharp contrast the Lamers-Schäuble document of September 1994 proposed that those countries participating in the third phase of EMU should constitute a 'hard-core', determined to push integration forward, especially in the second and third pillars of the TEU. This hard core, formed at the outset by France, Germany and the Benelux countries, would, however, remain open to other member states. This approach built on the logic of a multi-speed Europe; it introduced a differentiation in the rhythms of integration, while at the same time insisting on keeping a federalist objective in sight. A later document from the CDU/CSU, published in June 1995, was somewhat more restrained. The proposal did not include specific propositions as to the institutional arrangements which would be needed or as to how the hard core would be incorporated into the Community system.

Jacques Delors and Valéry Giscard d'Estaing each subsequently took the Lamers-Schäuble proposal to its logical conclusion by separately suggesting the juxtaposition of two Europes which rested on distinct political ambitions. Giscard d'Estaing distinguished Europe as a 'power' from Europe as a 'space', while Delors advocated the coexistence of a 'small Europe' and a 'large Europe'. In both cases the inner group would accept not only a single currency but an extension into the domain of foreign and defence policy, with 'Europe' as a power' or 'small Europe' constituting a 'federation of nation states'.

Ranged between these two views are the various positions that go under the rather vaguer heading of variable geometry. Starting from what had been made explicit since Maastricht within the Community framework and from forms of parallel cooperation (the Western European Union (WEU) and Schengen) these various proposals envisaged forms of differentiation in several core groups around a common pivot. For those who advocate such positions it is axiomatic that several core groups would be needed because the plausible groupings for enhanced cooperation vary according to the subject addressed, since neither the WEU group nor the Schengen group (formed to facilitate the free movement of persons and goods) coincides precisely with the likely single currency vanguard. A version of this approach was echoed by Edouard Balladur, then French Prime Minister, when in November 1994 he advocated a Europe of 'concentric circles'. The primary circle of shared law (for the single market and some common policies) would be complemented by varied groupings pursuing closer cooperation. These would be open to others to join in due course and in the meantime would be managed by *ad hoc* institutions. This whole system would be located in a wider circle of 'partnership' between EU member states and neighbouring non-members. During the last French presidential election campaign Jacques Chirac took up this formula, with some modifications.

It is in relation to this debate that the IGC endeavoured to define the content and the methods through which 'enhanced cooperation' might be pursued. In November 1995 Jacques Chirac and Helmut Kohl set out a joint approach (which picked up points made the previous spring by Jean Luc Dehaene, the Belgian Prime Minister), and a subsequent Franco-German document, from Hervé de Charette and Klaus Kinkel, of 29 October 1996 fleshed out the proposal.

It advocated the inclusion in the treaties of clauses that would allow enhanced cooperation (both generally for the EU and specifically for each of the three pillars) to be triggered 'within the single institutional framework of the Union'. Formulated in this way the proposal seemed to provide a synthesis of the various views of differentiation by focusing on one main objective: namely, to prevent the EU from being forced to move at the pace of its slowest member. Three main principles were enunciated: first, enhanced cooperation must serve the objectives of the TEU; second, it must be developed within the existing institutional framework of the EU; and, third, it must be designed to be 'open' to other member states to join subsequently, while being immune from veto by any individual member state.

Although there were elements of agreement as to the definition of these principles, as was clear from the Irish and Dutch presidency drafts, there were widely different interpretations of what the principles of enhanced cooperation would - or should - mean in practice. What mechanisms should trigger the introduction or the operation of enhanced cooperation? Should it be by unanimity or by qualified majority vote (QMV)? What role should be played by the Community institutions and, in particular, by the Commission? What legal consequences? What procedures - or criteria - for latecomers to join the vanguard? What relationships between the 'ins' and the 'outs'?

As became evident, the whole discussion on the subject was hugely complex. It tried to reconcile efforts to maintain the existing system with a reform that risked releasing centrifugal forces which could prejudice the integration project. Before we turn to our examination of whether enhanced cooperation is indeed compatible with the pursuit of integration, we first review some of the relevant lessons that can be drawn from Community history.

LESSONS OF THE PAST

Does enhanced cooperation do more than put new clothes on practices that have been used in the Community for a long time? On closer inspection it becomes clear that the EU has a welter of experience; it consists of both valuable precedents and dangerous examples. An inventory of this legacy reveals a plurality of methods: transitional arrangements for successive enlargements; opt-out formulae to meet claims of exceptionalism; the EMU vanguard; and forms of parallel cooperation linking member states, but outside the Community framework.

Transitional arrangements

The negotiation of clear and transparent transitional arrangements has been a tool of policy development in the EU since its earliest years, both for its initial membership and to deal with successive enlargements. The gradual application of the *acquis communautaire* through an agreed timetable has been the most frequent means of dealing with problems arising from objective differences in the practices or situations of acceding member states. The method has been used in core areas of integration: the customs union; agriculture and fisheries policies; trade agreements; and the budget. Sometimes initially transitional arrangements have become more or less permanent: the UK was able to maintain its imports of New Zealand butter; Greece and Portugal were able to delay long into the future some environmental legislation; the Austrian transit agreement deferred the application of Community rules for free transport access for heavy lorries; and the Nordic countries sought to preserve with only slight modification their alcohol monopolies. Sometimes the transitional arrangements have been at the demand of incumbent member states rather than that of the candidates. Thus it was only after very long transitional periods that Spain and Portugal were allowed to enjoy free movement either for their agricultural products or for their workers.

Enlargement has also prompted adaptations to existing Community policies and the creation of new 'solidarity' arrangements to take account of a new member's needs and characteristics. Thus a special protocol allowed Ireland, with its then less developed economy, to benefit from financial transfers; and Finland won a sixth objective in the European Regional Development Fund in order to provide support for its Arctic agricultural region. Rather more thorny have been those problems that could not be solved by transitional arrangements because they raised more fundamental issues about the basis of a Community regime. The British budget problem is the *locus classicus*; it took ten years of continuous 'renegotiation' to find a solution.

All in all it can be said that the Community has learned how to develop the policy resources to deal with the problems posed by successive enlargements. More open to question is whether this method can be adapted to deal with eastern enlargement. Although the concept of transition may provide the corner stone of the process, other important adjustments will be needed by both candidates and the existing EU, on which more below.

Opt-out formulae

In recent years we can observe a different phenomenon - claims for special arrangements to take account of two contrasting kinds of case. One is the argument that there is a persistent difference of taste and ambition that marks out an individual member state from the rest of the EU. The other is the impact of contingent political difficulties which isolate a member state from the great majority of, even all, other member states.

Danish singularity belongs to the first of these categories. It has led to outcomes ranging from the specific exception for beer bottles to refusal to take on whole sections of the TEU. In the wake of the first Danish referendum rejecting the TEU, Denmark's partners decided that the form of self-exclusion requested from Copenhagen was tolerable, as long as it did not constitute a precedent for

others. In return the Danish government, in achieving the range of opt-outs set out in various documents at the Edinburgh European Council of December 1992, implicitly accepted that it would not seek to obstruct efforts by other member states to develop further those same policy domains. One is, however, bound to ask whether this kind of arrangement could have been reached if the problem had been posed by a member state at the heart of the Community enterprise.

The social protocol attached to the TEU was a quite different case of exceptionalism, prompted by the dogmatically partisan view of the British Conservative government in a pre-electoral period. The categorical refusal of the Major government to accept any social provisions in the TEU led to the drafting of a separate protocol, to be applied by the other eleven (later fourteen) member states, but with its operation set within the Union's institutional framework. This hastily concocted formula caused as many problems as it solved: uncertainty from the outset led to confusion over the negotiating procedure for new social legislation (with or without British MEPs); the manifest inconvenience for British firms with continental subsidiaries; and, most importantly, the impression that the EU was coming to the rescue of the partisan approach of a government facing re-election. Moreover, the main danger of the social protocol was that it worked too well for the British Conservatives in portraying an image of triumphant exceptionalism, one which might be extended to other domains. Hence other suggestions for opting-out started to be put forward in the UK in fields with long established Community policy (notably fisheries), as well as broader advocacy of a shift towards an *à la carte* Europe.

Several lessons can be drawn from these various examples. First, a formula that preserves the key elements of the Community method is much the most satisfactory, even if the special treatment accorded to a particular member state gives it a clear advantage on the substance. At least subsequent discussion is confined to that special case without throwing into question the relevant Community policy, and all member states remain engaged in the discussion. Second, exceptionalism is tolerable if its effects are essentially confined to the dissident member state, without fundamentally disturbing the Community system. Finally, the EU is caught in an exposed position if it is drawn into taking sides in the partisan politics of an individual member state; here a negotiated political solution seems preferable to arrangements that prejudice either the principles or the rules of the game for the whole EU.

The EMU avant-garde

In contrast, the original methodology for devising EMU provides a more positive example of differentiated involvement in a common policy in a domain that lies at the heart of the integration process. The European Monetary System (EMS) had paved the way in the late 1970s in establishing a form of monetary cooperation which, from the outset, recognised differential engagement: the involvement of all member states, but with only some taking part in the exchange-rate-mechanism; broader and narrower margins of fluctuation around an agreed collective pivot; relatively elastic criteria for rejoining the system; and scope for third countries to be associated.

EMU was a fundamentally different exercise in so far as the line would be drawn sharply between participants and non-participants in the single currency regime. The rules of the game provided for no intermediate status and imposed strictly defined criteria for participants. These had to respect and to maintain the criteria or face sanctions. Although the system was to remain open to latecomers which met the criteria, it would in the meantime have been developed further by the initial participants. Thus the TEU clearly distinguished the initial participants ('member states without a derogation') from the rest ('member states with a derogation'). This deliberate discrimination is offset by the fact that EMU is firmly set within the treaty framework and that all member states were involved in the initial discussion, take part in subsequent discussion, and are kept abreast of the developing monetary *acquis*.

It is also important to underline that the TEU outlined an institutional procedure and specified roles for the Commission and other Community institutions. It established agreed texts to authorise the creation of a vanguard group, and also gave some rights to the initially excluded member states.

Nonetheless several points remain to be clarified, not least the real relationship between the 'ins' and the 'outs'. Here a distinction must be drawn between the 'pre-ins', which have a clear preference for joining the system, but have not yet met the criteria, and those which could join, but may expressly prefer to remain outside, the case of Denmark and the UK. The 'pre-ins' have no automatic rights of eventual entry into the system and have no effective means at their disposal for influencing what the 'ins' decide on in order to strengthen the system, particularly as regards flanking fiscal or social policies. In this sense EMU is not a form of partnership easily accessible for latecomers and it remains quite plausible that the first participants in the single currency regime could emerge as a vanguard in the Community system across a broader range of issues.

Parallel cooperation

Europe has a rich history of cooperation between varied groups of countries in separate organisations. These include: regional groupings such as Benelux (acknowledged in Article 233 of the Treaty of Rome (EEC)) and the Nordic Council; special bilateral relationships, such as the Franco-German couple, or, for certain purposes, the UK and Ireland; the particular formula adopted in the Schengen Agreement; and, in the defence field, Nato and the Western European Union (WEU). Many of these examples of parallel cooperation either predate the European Community or deal with issues that at the time were not within the competence of the EC. In so far as these have a complementary role, by embodying a kind of division of labour or dealing with the interconnections between close neighbours, they do not create real problems for the EU. After all the defence organisations, Nato and WEU, grew out of the exigencies of the strategic context in the early 1950s and the opportunity for the EC to develop as only a 'civilian power' after the collapse of the project for a European Defence Community in 1954. The position of the Schengen Group in the mid-1980s was different in that the free movement of persons and goods fell within the field of competence of the then EC.

But even so it should be remembered that at the outset Schengen was mainly conceived as a framework for dealing with relationships between immediate neighbours and in an effort to resolve what had been serious aggravations between France and Germany. Initially its role was not seen as stepping on the ground of the EC and it was devised in a different context from the pressures that were later to lead to Title VI of the TEU creating the third pillar.

In recent years, however, the complementarity of these forms of parallel cooperation has become less self-evident. As EU competences have spread wider, so the continued separate existence of these groupings has been increasingly questioned, especially in the fields of external and internal security.

In the case of defence and external security the end of the cold war and, in particular, the reduced American presence in Europe led the members of the EU to define new goals for European defence set out in Title V of the TEU. This specified that the policy of the EU should be compatible with what is undertaken by Nato and that it need not impede further parallel cooperation in the frameworks of Nato and the WEU (Articles J.4 and J.5). In addition the different statuses of EU member states in Nato and WEU were recognised, although here we should note the perceptible shift of opinion in some of the neutral countries (notably Austria and perhaps Finland) towards envisaging Nato membership in due course. The confusing pattern of different institutions was further complicated by differences in views among the EU member states on the role to be accorded to the EU on defence matters and on the corollary development of WEU. Changes in French defence policy in December 1995 brought the debate out of its zero-sum straitjacket - EU versus Nato - and reduced the overt competition between the various defence organisations. Nonetheless, given the preferences and blinkers of member governments a new consensus remains elusive on how to reconfigure these forms

of parallel cooperation in a new security architecture.

The other domain in which extensive cooperation has developed among only some EU members is that covered by the Schengen Agreements. These originated in the combination of a new Franco-German agreement with the long established Benelux framework to facilitate in tandem the free movement of persons and of goods.

Here it is important to note that the creation of Schengen did not result from a failed attempt at wider EC cooperation, but rather from a conviction on the part of its originators that a form of parallel cooperation, while compatible with Community law (Article 134 of the Agreement), would better serve their interests given their geography and policy priorities. As the 1996/7 IGC took place Schengen had enlarged to seven full members, with the inclusion of Portugal and Spain and a further six EU members in the process of joining. Moreover the original members lacked confidence that some of the later joiners could meet the full conditions needed to apply the agreements. The UK preferred to remain outside Schengen and Ireland therefore also remained outside so as not to prejudice the Anglo-Irish Common Travel Area, while Norway and Iceland had become associate members by virtue of their membership of the Nordic Passport Union. Hence Schengen consisted of a mosaic of differentiated arrangements.

In parallel a variety of initiatives were taken within the EU in the domains covered by Schengen. German concerns in the wake of its unification and the end of the cold war were focused on issues of asylum, visas and immigration; these were crucial in launching the third pillar of the TEU to cover justice and home affairs (JHA). The TEU also included in Article 100c visa provisions intended to strengthen what was already partly covered by Schengen. The result was a juxtaposition and coexistence of several different regimes. Article K7 of the TEU embraced these, while permitting tighter cooperation on some aspects among the Schengen members.

Nonetheless this coexistence of regimes covering the same policy domains caused problems. Neither the EU version nor the Schengen model was entirely satisfactory in terms of its outputs and both were marked by the absence of democratic transparency and judicial control on subjects that touched directly citizens' rights and public liberties. The development of both was hampered by the limits of intergovernmentalism and the absence of an institutional dynamic. The difficulties and delays in negotiating and implementing agreements based on international conventions aptly illustrated the deficiencies of the system.

ENHANCED COOPERATION: WHAT RESPONSE TO WHICH NEEDS?

Given this legacy, what more could the idea of enhanced cooperation bring to the EU process? Would it provide a better way of managing the increasing heterogeneity of situations and motivations of the member governments? Currently we can identify three categories of member governments: those that claim they can and will pursue integration further; those that wish to, but cannot, for reasons to do with their capabilities; and those that could, but choose not to.

The process of enlargement

Further enlargement will increase the number of member states in the second category that we identified by extending the heterogeneity present within the EU. With members from the east the EU will have to manage a form of coexistence between well established democracies and countries still in transition. It will contain both highly cohesive societies and societies weakened by the experience of communism. It will have to face severe inequalities in levels of development that go well beyond the cleavages in the EU of fifteen. It will juxtapose quite different preoccupations on security issues, largely due to non-coinciding perceptions of the threats that different countries face.

Enhanced cooperation is often put forward as a means to facilitate the incorporation of new member states. Indeed a number of studies and propositions have advocated resting the strategy of enlargement on a differentiated development of the Union's *acquis*. This might, for example, include for all members the customs union, the single market and involvement in the second and third pillars, but exclude new members from the cash-guzzling agricultural and cohesion policies. But such an approach, debatable in itself as a viable strategy, does not really fit with the philosophy of enhanced cooperation in that this is aimed rather at developing new steps in integration rather than at excluding countries from existing integration policies.

On the contrary it can be argued that the next enlargement could be handled like the earlier ones, albeit with some necessary modifications to the model, following the principles and methods adopted in the past: that is to say by the wholesale application of the *acquis*, phased over time and with provisional derogations. From one enlargement to the next the concept of transitional periods has given candidates a basis for negotiating the gradual and variable adoption of the *acquis*, sector by sector.

This is the classic approach, often framed with generous margins of flexibility, and it continues to predominate in the thinking of many of those concerned. It has already produced a form of temporally differentiated integration which is well entrenched already in the EU of fifteen. It has created a kind of multi-speed Europe: the acceptance of common aims and objectives, combined with different rhythms introduced to adjust capabilities to ambitions. The Maastricht Treaty took still further the notion of temporal differentiation by adding to the concept of transitional periods the convergence criteria of EMU. Thus it could be envisaged that other criteria could be introduced in other policy domains, with thresholds spread over the transitional period, to enable new members to enjoy additional flexibility in their adaptation to the *acquis*.

But to acknowledge the assets of the traditional process for handling enlargement should not blind us to its limits. Given the foreseeable state of the EU's budgetary resources it would be impossible to extend to the candidate members in full the common agricultural policy and the structural funds, as the Commission has emphasised in its documents of July 1997 on the *Agenda 2000*. For the same reason it may well prove difficult to create new policies or spending programmes on the model of the existing structural funds to compensate future new members for their adjustment costs. Nonetheless, some forms of solidarity will need to be invented to facilitate in a concrete way the incorporation into the EU of the countries of central and eastern Europe. Lastly, as regards the institutions, the arithmetic projection of the current arrangements could deal the final blow to a system that is already at breaking point. To solve the various problems identified requires the reform of common policies, a revised budgetary package and, above all, further institutional reform. The Agenda 2000 proposals address the first two sets of issues, but the IGC decided to postpone the last. Simply to take a differentiated approach to the *acquis* thus seems hardly a recipe for a successful enlargement. It risks provoking frustrations that would not favour the further development of a project from which the new members might feel excluded - not a course that would be in the interests of the Union either. In this context the cases of successful enlargement in the cases of Ireland, Portugal and Spain are rich in lessons.

If then there is to be a form of enhanced cooperation, it would need to start from the premise that many of the problems posed by enlargement as such had already been dealt with in the classical way.

This is all the more important in that it is broadly agreed, first, that the single market and the existing range of common policies should not be considered eligible for enhanced cooperation and, second, that these are precisely the subjects that will be at the heart of the accession negotiations with the next group of candidates. Within the first pillar - the 'European Commumity'- the form of differentiation endorsed by the Maastricht Treaty for EMU should suffice to resolve many of the problems to be faced by the new members. In that it is unrealistic for central and east European countries to take part

in the third phase of EMU these countries would benefit from the derogation set out under Article 109k. There is a considerable diversity among the candidates, since some will reach much sooner than others an acceptable degree of convergence, while others will have difficulty in meeting the requirements of the first phase. In the case of this latter group the need to pursue policies aimed at catching up western Europe could well prove to be contrary to the letter of the treaties. Hence derogations to derogations might well be what will be needed.

The dissidents and the reluctant

Perhaps then enhanced cooperation would be a means to deal with the problems posed by those member states which do not want to be committed to further steps in integration. It is beyond doubt that a key reason for articulating the concept of enhanced cooperation was to overcome the repeated challenging of the aims and methods of integration that have emanated from the UK in recent years. This challenge has been judged by the UK's partners as far exceeding what could be countenanced as the legitimate defence of a national interests. Faced with the impossibility of accommodating a philosophy so different from their own, some member governments have come to the view that it would be better to find a means of authorising within the treaties some member states to proceed further and faster in the integration of Europe.

In the thinking of its advocates a formula of this kind would enable them to bypass the veto of a single member government without proliferating opt-out arrangements. The case of the UK under the social protocol had demonstrated just how pernicious such exemptions could be. The notion that by contamination other policy sectors could be subject to exclusion from common policies (the common fisheries policy is another example that was suggested) had begun to circulate in the debate.

By reversing the argument enhanced cooperation was envisaged as replacing a logic of refusal to participate by a more constructive logic which would enable some member states either to extend an existing policy or to initiate a completely new policy. A second objective was added to the first, especially for those member governments which disliked intergovernmental methods, namely an effort to prevent new groupings being created outside the treaties and institutions of the EU. Such a development is, however, not to be ignored as a persisting temptation. Rather less explicitly another preoccupation was present in the debate - the hope of using a formula for enhanced cooperation to act as a proxy for extending majority voting. It is crystal clear that the scope for proceeding to a majority vote, however little used in practice, has in practice served to foster the search for compromise. By analogy, evidence of the willingness of some member governments to proceed by enhanced cooperation - *and their ability to use a legal formula to do so* - might have the powerful effect of provoking the more reluctant to join in rather than be left behind.

This conception of the aim of enhanced cooperation - namely to bypass the veto - goes a good way to explaining why the advocates of the formula were especially keen to see it introduced in areas subject to unanimity decision rules. This also explains their preference for triggering enhanced cooperation by majority vote rather than by unanimity.

We argued above that the opt-out formulae to meet Danish difficulties had been accepted relatively easily by other EU members for several reasons. They have relatively little impact on other member states or on the EU as a whole. The Danes have agreed, implicitly at least, not to stand in the way of the development of the policies concerned. It has been asserted that the arrangements would not be a precedent for other member states. But, as is clear from the protocol on the defence aspects of the common foreign and security policy, the Danes have also accepted that this involves for them a cost in the form of their diminished influence on EU policy development.

In contrast the UK case has raised quite different problems, because of the more central role of the UK within the EU. It became clear that Britain's European policy had in recent years fallen hostage to

partisan politics, although the problem of British dissidence cannot simply be explained in these terms.

Of course the arrival in office of a Labour government, with the stated policy priority of achieving better cooperation with European partners, gave some grounds for thinking that such British problems might be amenable to solution in the context of a broader compromise. But it is too early to tell how such good intentions will find concrete expression. It was quickly emphasised from London in May 1997 that the social protocol of Maastricht would be revoked and the possibility emerged that, given time, sterling might be included within the single currency. Nonetheless, to judge from statements by Robin Cook and others, there is likely to be persistent reluctance on the part of the British to accepting an EU competence in the defence field, as well as British insistence on retaining border controls affecting the free movement of persons and thereby on certain goods that are carried. On these latter issues a majority of member governments, keen to 'communitarise' the provisions of Schengen relevant to asylum and immigration policy, reached the conclusion that enhanced cooperation could produce a feasible solution.

A broader argument also weighed in the advocacy of a formula that would bypass a veto, namely the scope that would emerge for overcoming resistance to the extension of the EU policy agenda and competence. Such a usage of enhanced cooperation nonetheless carries considerable risks. Careful discussion is needed of the dangers of overloading the Community system and of pushing it to respond to too many diverse demands on the pretext that this would make the system more coherent. To the extent that what would be involved would be a form of open cooperation and would recognise the right of all member states eventually to be involved, such proposals would have to prove that they would bring added value to efforts to deepen the EU and that they would take account of the principle of subsidiarity. But who is to pass judgement on this? Which policy domains are to be selected for any such initiatives? The form of any such proposals and the role accorded to the Commission would be crucial tests of what was at stake.

Vanguard or lever of further integration?

One last role for enhanced cooperation has to be examined, that of establishing a kind of vanguard in policy domains deemed crucial for the dynamic of integration. This would assemble those who can and will extend integration and enable them to do so within the single institutional framework of the EU.

In theory such a vanguard could develop in two ways. The first would be the constitution of a single circle of member states engaged in a common project. Thus the implication was that the same member states would all be involved in the same strengthened mutual commitments, in the same important domains, with tough rules to govern them, and with decision rules that would eventually accentuate majority voting. This was very much the philosophy of the Lamers-Schäuble proposal and it followed the line of thinking developed by Jacques Delors. Such a core group would be the motor of integration on a day-by-day basis, and it would provide the test-bed for a future federal structure in Europe. Yet in the current context such a grouping seems elusive. It would have to consist of a limited, but significant, group of member states, with their governments taking a sufficiently common view of their most important interests in order to generate shared management of common policies. Yet it seems improbable that the group of states taking part in the single currency will necessarily be the same as that which might be willing to cooperate more intensively in the defence or internal security fields.

In the absence of a single core circle, the alternative outcome could be a series of intersecting 'olympic rings'. It is this second path that the IGC ended up favouring. The choice that was faced in Amsterdam was how to open the way not for a fixed coalition of member states, but for a series of circles of enhanced cooperation, their composition varying depending on the policy domain

concerned. Would such a juxtaposition of different circles constitute a lever for tighter integration?

Several difficulties suggest that this is a gamble. In the first place the development of different circles of enhanced cooperation could hardly be expected automatically to provide the dynamic that would be needed. To act as a lever for deeper integration the new circles of enhanced cooperation would have to do more than bring a marginal increment in particular policy sectors. They would have to be based on a clear commitment to deeper integration. The EU framework, with its mechanisms for collective decisions and disciplines, would have to be firmly established as the relevant and durable framework for handling the most salient policies, thus for money, security and so forth.

A second difficulty relates to the fact that the emergence of several circles of enhanced cooperation, with varying configurations of member states, would require some adaptation of institutional arrangements. But the increased complexity that would follow in finding ways of managing such policy groupings would cause some tricky dilemmas. How would the Council be composed? How would the European Parliament handle them - with all MEPs involved or only those from the relevant member states? What role would the Commission play? And another even more delicate issue - what would the impact be on the 'normal' Community process of the existence of a kind of caucus of those member states that were involved in each such circle of enhanced cooperation? A 'hegemonic' model would be at variance with the traditions of the EU and could be counterproductive, destabilising the process and thus prejudicing the objectives of the exercise. Moreover, from the perspective of the citizen the transparency and comprehensibility of the process could be prejudiced. The citizen might accept the notion of enhanced cooperation as a way round some of the blockages in the system, but would still have difficulty understanding an increasingly complicated organisation of the EU or in grasping what model of Europe might emerge from the different circles of member states.

In essence all this discussion of enhanced cooperation hinges on what happens to EMU and the plans for a single currency. If this goes forward, a vanguard really will have been created. EMU is in effect the only version of enhanced cooperation which has as yet been clearly defined as regards both the criteria for participation and the links to the Community system. It is widely recognised that the success of EMU would provide a huge boost to integration, while its collapse would be a grave setback.

In the logic of the functionalists a European monetary policy would have major impacts not only on the macroeconomic policies of participating countries, but also on budgetary, fiscal and social policies. In due course such an engagement could generate extensions of common policies and produce the 'Community of destiny' that has been suggested by Michel Rocard and Hans Tietmeyer. The issue is to judge whether the forms of enhanced cooperation being sketched could underpin the dynamic likely to be generated by an EMU vanguard and then to ascertain if such a model could be applied in other sectors, and which sectors those might be.

This rapid analysis of the lines of argument which have emerged in the debate about enhanced cooperation suggests that efforts to apply the concept in practice pose a number of risks, in particular for the traditional Community pillar within the EU. Even though there may have been an agreement among a majority of member governments to preserve the particular features of that Community pillar, there is a danger of intergovernmentalism proving contagious. This could destabilise what has been achieved in terms of the vigour and success of the traditional Community model, its institutional dialectic and its legal order. Hence at a minimum any introduction of enhanced cooperation requires safeguards and guarantees in order to preserve the strength of the Community model.

WHERE AND HOW TO APPLY ENHANCED COOPERATION?

A general clause alongside the other general provisions of the treaties? A range of specific clauses for each of the pillars? In due course a list of policy domains eligible for and excluded from enhanced cooperation? These were the questions that permeated the discussions in the IGC about how to introduce differentiation into the treaties. The negotiation was largely focused around the principles, the triggering mechanism and the ways to implement it. In other words the debate was about the methodology rather than the substance or about the policy domains in which it might be applied.

At the outset there seemed to be a consensus that enhanced cooperation would be particularly useful in those policy domains where integration remained embryonic or where it depended on decision rules of unanimity. The citing of particular instances in which some member governments had blocked agreement on CFSP issues weighed heavily in the debate. The insertion of an enhanced cooperation clause was also advocated as a means of enabling some areas of parallel cooperation to be brought within the EU framework without committing all of the member states; Schengen and the free movement of persons along with WEU and defence issues were widely canvassed. It was only rather late in the day that people began to suggest that a similar clause might also be introduced for the first Community pillar.

Common foreign and security policy

As regards foreign policy, in contrast to defence policy, it should be recalled that Title V of the Maastricht Treaty did not envisage any opening for enhanced cooperation. The rule for adopting common positions or joint actions was unanimity, although one of the attached protocols encouraged dissenting member states to abstain rather than to block.

The question was then whether a formula for enhanced cooperation would enable the EU to escape from the straitjacket of unanimity and then make great strides forward. Foreign policy-making is beset by the unpredictability of situations and crises that arise and by the complexity of the real issues that it has to confront. Thus it is hard to argue that some form of predetermined enhanced cooperation provides a magic solution that will permit convergence in the policies and interests of individual member states of the EU. It is difficult to establish objective criteria that would facilitate the evolution of common policy along the lines laid down in the case of EMU. For the foreseeable future EU foreign policy is more likely to emerge case by case on the basis of varied coalitions of member states. If the problem is really the unanimity rule then other devices are available to remove or at least to mitigate this constraint. Constructive abstention would allow some member governments to refrain from taking part in particular actions but without preventing others from acting, as long as there was an appropriate majority in favour. A formula for consensus minus **x** would have the same effect. Mechanisms of this kind would allow reluctant governments to stand back from actions which were otherwise widely accepted. On a case by case basis such formulae would respect differences in national positions without reducing the capabilities of the EU to zero. Enhanced cooperation as such would be no more effective.

The real difficulty facing the EU is not so much about procedures, but rather the repeated insistence by some member governments that some of their 'vital interests' cannot be reconciled with those of the majority. The Protocol agreed at the Edinburgh European Council in December 1992 may have resolved this problem as regards Denmark, but Greek dissidence has become a almost permanent feature of debates among the Fifteen on issues at the heart of their foreign policy concerns: the former Yugoslavia; relations with Cyprus and with Turkey; and the link made by Athens between this last set of issues and eastern enlargement. But at this point we reach the limits of procedural remedies. To exclude Greece would have the effect of accentuating its singularity within the EU and would leave only the illusion of a solution as regards Turkey.
With further enlargement in prospect and in spite of the opportunities under the Stability Pact to take

preventative action on issues of minorities and ethnic conflict, other difficult cases of this kind could well arise.

In the foreign policy field the main benefit that enhanced cooperation would confer, in comparison with what has gone before, would be the scope for a small number of member governments to undertake a joint action in the name of the EU. Thus an enabling clause could transform certain kinds of action previously undertaken by only a few (such as the Franco-Belgian cooperation in central Africa to evacuate civilians or the operation by some member states in Albania in spring 1997) to have a kind of EU endorsement. What remained to be defined was whether such a decision would need to be dependent on a majority decision, if so by how many, and what financial means might be available from the Union. The political advantage of enhanced cooperation of this kind would be to enlarge the scope for the participation of a wide number of member states. It might thus militate against the emergence of a directorate, a recurrent directing coalition, more or less formal, whether within the EU or outside it. Here the example of the Contact Group on Bosnia (containing France, Germany and the UK along with the USA and Russia) has been much cited as a bad precedent by other EU partners, although it may have had its utility at the time.

Defence issues in contrast were differently defined by the Maastricht Treaty, perhaps in recognition of the reality of circumstances. Several factors circumscibe the scope for enhanced cooperation going beyond what was set out in Article J.4, para 5. This had made clear that the new provisions on CFSP were without prejudice to other forms of cooperation in Nato, in WEU, or between particular member states. A first consideration here was that the Maastricht Treaty had acknowledged that varying national circumstances led to differences in status between the member states in relation to WEU, with the neutral countries, in particular, present only as observers. The fact that the memberships of WEU and the EU differ was compounded by the ambiguity as regards the relationship of the WEU to CFSP. Although WEU might be viewed as potentially the military arm of the EU - 'in the longer term perspective of a common defence policy within the European Union' (Protocol attached to the TEU), it was condemned for an indefinite period to a separate existence. Title V did not establish the basis for a common defence, but only sketched it as a possibility for the future.
It was precisely this ambiguous and conditional formulation of defence policy that lay at the heart of the debate in the recent IGC. Its outcome would frame the scope for future developments in this field, including the possibility of some enhanced cooperation.

Contrary to what many had supposed at the time of the last enlargement taking in neutral countries, which would not accept a defence dimension to the EU, had not turned out to be so crucial a problem for the development of the CFSP. Recent statements from the Austrians and from the Finns point to a substantive shift in their governments' policies. Instead the obstinate problem was the refusal of successive British governments, albeit with some support from the neutrals, to entertain any defence competences for the EU which might lead to the gradual absorption of the WEU within the EU. This is not merely and institutional question, but rather a fundamental disagreement about which responsibilities to attribute to the EU, about the future development of European defence, and about how it should be configured *vis-à-vis* Nato. Given the current divergences of view, reiterated when in March 1997 six member governments again proposed a merger of the WEU with the EU, the scope for enhanced cooperation on a recurrent and predetermined basis can hardly be built on the WEU framework.

On the other hand, it does seem possible to envisage some development of enhanced cooperation on a case by case basis by varying groups of member states. Hence within the IGC the argument was built up for bringing the WEU Petersberg tasks (humanitarian aid, peace-keeping, peace-making and so forth) within the ambit of the EU. On this question there has been a striking evolution on the part of the British government, which came to accept this argument, even though it continued to resist the EU becoming a 'security organisation' as such. But even this limited role for the EU as regards the Petersberg tasks could transform operations by a small number of member states, as in Albania, into

an example of enhanced cooperation within the framework of CFSP and with an EU label. The Dutch presidency took this idea further in proposing that all EU members might take part in the decisions to undertake such operations, and won support for this from neutrals such as the Austrian and Finnish governments. Such a development may have its utility, not least by symbolically giving some meaning to the notion of a European policy, but even so it would count only at the margins. Although such a step might answer the question of what action could be taken by some member states against whom, it would not resolve the central issues about European defence, namely what do the EU members want to do together and how to factor in the changing role of Nato.

The Community pillar

The Franco-German proposals of late 1996, seeking to give some substance to the concept of enhanced cooperation, suggested its possible extension to the first Community pillar. The case for inserting a clause on this was defended by those who wanted to put obstacles in the path of new *ad hoc* forms of cooperation outside the treaties altogether.

Thus during the IGC the field of application for enhanced cooperation was confined to the more peripheral areas of policy that fall outside the areas of exclusive or predominant Community competence, that is, education, culture, research, professional training and the environment, except for those items that touched directly the single market. In addition there was talk of relying on enhanced cooperation in policy sectors that were mentioned in the treaties but not yet fleshed out common policies, for example free movement of persons, as is discussed further below. In any event it would be risky to use the formula of enhanced cooperation to turn the Community into a 'catch-all' organisation and to overload its agenda to the point where its core objectives were undermined or the principle of subsidiarity set aside. Given all of these limitations the scope that was to be introduced for enhanced cooperation under the first pillar seemed essentially to respond to two objectives: first, to prevent policy development outside the treaties altogether; and, second, to provide a basis for dealing with the unpredictable, not least in the light of further enlargement.

An agreement gradually emerged to the effect that some enhanced cooperation might be envisaged under the first pillar, provided that it was hedged with a number of safeguards and guarantees. The policy fields to which any such formula might be applied was also specified as excluding the single market and a range of common policies: agriculture, fisheries, trade, transport, competition, and cohesion. Because these policies were interconnected and interdependent, because they had produced blocks of collective policy powers, and because of the requirements of financial solidarity, there were limits to what could be done under the rubric of enhanced cooperation, unless one wanted to risk the emergence of an *à la carte* Europe.

In this respect the debate which took place in 1996/7 around the German proposals for a monetary stability pact proved useful. It put the spotlight on the contradiction between having created a framework for EMU which was enhanced cooperation *par excellence* and denying the legal base for its development within a Community framework. The legal formula that was eventually adopted for the stability pact rested in effect on a generous interpretation of Article 104c of the TEU, complemented by solemn declaration from the European Council. The result was a kind of patchwork with an uncertain juridical base, questionable in terms of Community orthodoxy, and a worrying precedent. Above all reliance on Article 104c did not achieve the desired results except without some costs. The article had been designed to deal with any excessive deficits and was hardly a good basis for a general and automatic stability control. It was, for example, questionable whether the non-participants in the single currency should be involved in deciding on whether any deficits accumulated by the participants were excessive and should therefore be subject to penalties.

This episode helped to create a strong argument for those who wanted an enhanced cooperation clause to provide a legal base for any other policy developments (economic, fiscal, or social) around

EMU. Thus, it was argued, the scope would be there for any integration dynamic resulting from the single currency. But is this the only way forward? Much the same result might have been achieved by an amendment to or a reformulation of Article 109 of the TEU in the form of an evolutionary clause. This might authorise the establishment of corollary policies of for EMU on the basis of a qualified majority of only those member states taking part in the third phase, in response to a proposal from either the Commission or the European Central Bank, and in consultation with the European Parliament.

An alternative approach, which was not explored in the IGC, might have provided a simpler treatment of enhanced cooperation within the first pillar. It would have consisted of using Article 235 of the Treaty of Rome, since this was in effect a kind of evolutionary clause allowing the adoption, by unanimity, of measures to implement the Treaty that had not been explicitly anticipated. Brought up to date and reformulated this article could provide a legal base for new measures needed to develop integration within the first pillar. But it would be logical to relax the requirement of unanimity, given the number (current and foreseeable) of member states.

Taking its inspiration from the EMU precedent an article of this kind might in a more straightforward way be a means of proposing measures that would suffice and be clearly within the traditional Community framework. If the measures in question were clearly approved by a majority of member governments, then, and only then, the majority group in the Council and the Commission could envisage proceeding further along the lines that they had indicated. The dissenting minority of member states would be associated with the process by appropriate derogations, with the guarantee of the option of joining the lead group subsequently.

In the absence of some such formula it cannot be over-stressed that there are risks of the Community method being subverted. In the first place enhanced cooperation should remain essentially an instrument of last resort for the first pillar, with the main operating principle being that policy development should be undertaken by all member states. In the second place, any enhanced cooperation should depend on a firm triggering mechanism that would involve all of the EU institutions and protect the Commission's right of initiative.

Justice and home affairs

The area of justice and home affairs was among those most discussed as a candidate for introducing forms of enhanced cooperation. The relevant policy issues range from the free movement of persons (especially as regards the operation of border checks and controls) to highly sensitive matters of immigration and internal security, as well as including international crime and cross-border fraud. The member states had already made some efforts to establish new forms of cooperation, which had remained poorly defined and embryonic, not least because of their intergovernmental character.

On the eve of the IGC negotiations the situation for handling these issues was extraordinarily complex, with three different elements juxtaposed in the discussion. First, the SEA had established some Community competence for free movement of persons. Second, the Schengen Agreements had created a more limited area for cooperation in some of these fields. Third, Title VI of the TEU had created additional provisions for cooperation in justice and home affairs.

The aim of achieving free movement of persons was set out in Article 7A of the SEA, which had amended the Treaty of Rome (EEC); this was reiterated in Article 8A of the TEU. But the achievement of this aim depended on a unanimous decision in the Council and was in any case the prisoner of disagreements between member states. Some of those involved followed the Commission in arguing that free movement of persons meant the removal of systematic border controls within the EU (as distinct from more occasional checks on or near the border). Others, notably the British Government, insisted on maintaining the right to exercise systematic controls at the border over third

country nationals, however lightly they might operate them. The Irish Government was tied to the British position because of the 'common travel area' between the two countries, which enabled citizens from each country rights of movement, residence, employment, and voting in the other country.

The Schengen Agreement, first set out in 1985, and its implementing Convention had followed a traditional intergovernmental path rather than a Community framework, its architects having proclaimed that it pursued the same aim of free movement of persons (and goods), that it was compatible (Art 134) with the provisions of Community law, and that it was open to other EU members to join (Art 140), subject to the unanimous acceptance of prior Schengen signatories. These arrangements for parallel cooperation had provoked contradictory responses. One view was that they were at variance with Community law and had introduced discrimination on the basis of nationality and even damaged the notion of citizenship. A contrasting view was that Schengen was a laboratory devising a system that could be extended across the EU, thus not in competition or contradiction with the Community regime, but a means to facilitate its operation.

In parallel to this process the then Twelve member states had in 1991 established Title VI in the Maastricht Treaty as a means of intensifying cooperation on justice and home affairs within the EU: 'For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community...' (Art K.1(TEU)). At the heart of the questions of common interest that Title VI was to embrace were visa, asylum and immigration matters, thus overlapping the province of the Schengen Agreements. This new 'third pillar' was to be governed by intergovernmental procedures, but keeping open the possibility of gradually transferring them within the main Community framework, by using the *passerelle* clause of Article K.9.
Thus it endorsed the experience of Schengen by not preventing 'the development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title' (Art K.7).

The widespread dissatisfaction prompted by the incoherence of these different methods of cooperation and by the modest results generated through these intergovernmental procedures led to pressures within the recent IGC for a reappraisal. The Benelux governments and then a Franco-German initiative argued for a partial 'communitarisation' of Title VI. This would be based on a new title within the first pillar to cover free movement of persons and the development of associated common policies and on a reformulation of the third pillar dealing with a 'common judicial area' and internal security matters. This move implied a rethinking of the Schengen Agreements and prompted calls to include them within the EU framework. Thus there would be a new pattern in the Treaty of Amsterdam with three elements to incorporate all of these issues within the EU. First, the new title in the first pillar would cover policies on border controls, visas, asylum, immigration, and cooperation in civil law. Second, the third pillar would be strengthened, but confined to police and judicial law cooperation. Third, the so-called Schengen *acquis* would be incorporated within the treaties by a new Protocol, although this apparently voluminous *acquis* was not either published or clearly identified.

With all of these elements in place there would be an end to all this area of parallel cooperation outside the EU institutions and the Community legal system. However, this probably implied that some forms of enhanced cooperation would have to be introduced. One reason was the refusal of the British government, which had deliberately remained outside Schengen, to accept that these two sets of arrangements should be rolled into one. The Irish had little choice but to follow the British on this. Another reason was that some member states, notably the Danish, although in the process of joining Schengen, had won a derogation at the Edinburgh European Council of December 1992 to avoid even a partial inclusion in the third pillar. Hence it was argued that a strong dose of flexibility would need to be agreed as a last resort and in effect allow the Schengen countries to engage in enhanced cooperation, but within the EU framework. For this to proceed would require a series of opt-out formulae which allow the similar, but not identical, positions of the UK and Ireland to be

accommodated and to be drawn to some extent within the new clauses to be inserted in the Treaty of Amsterdam.

The Danish situation would also have to be resolved; as a recent signatory of Schengen, yet implacable opponent of communitarisation, to manage its relations *vis-à-vis* both EU and Nordic partners would need an extraordinary legal sleight of hand.

This is by no means an exhaustive list of problems, but it gives an indication of the range of difficulties. To these must be added some questions of principle over the propriety and wisdom of incorporating in the *acquis communautaire* measures which had not been subjected to any parliamentary or judicial scrutiny within the EU institutions.

CONCLUSIONS

The question that follows, in the light of what has been argued above, is whether the introduction of a form of differentiation through the method of permitting enhanced cooperation will be of decisive importance for the future development of the European Union. Is it the best recipe for reconciling the need to maintain an integration dynamic with the heterogeneity that further enlargement can only increase? Some advocates of a deepening of the EU, for example the Club of Florence, have reached the view that the choice is between 'differentiation and fragmentation'. They have put enhanced cooperation forward as keeping the best of both worlds: that is to provide a degree of flexibility, while maintaining the existing framework for integration.

In contrast, the authors of this report (in the preliminary version circulated in June 1997) had judged before the European Council in Amsterdam that, given all of the difficulties that have been reviewed, it would not be a tragedy if the IGC did not succeed in revising the treaties by inserting a form of enhanced cooperation. This judgement derived from a considerable fear lest some such formula would weaken rather than reinforce the existing system. After all the potential risks did not seem negligible: the erosion of the sense of belonging to one and the same Community; the possible weakening of the Commission's role of initiative and of speaking for the collective interest; the encouragement of recourse to opt-outs; a fragmentation of the Comunity legal order; and even more complexity in the rules of the game and the procedures, which are already hard for the European citizen to comprehend. Above all the creation of forms of enhanced cooperation did not seem to constitute a satisfactory alternative to a more wide-ranging institutional reform, as a precondition of further enlargement.

If, nonetheless, some elements of reinforced cooperation did need to be established, then it seemed preferable that they should be firmly located in a consolidated institutional system. Developments in the period before Amsterdam had led us to doubt that enhanced cooperation would resolve the problems posed by enlargement. These latter seemed more amenable to solution by transitional arrangements and some derogations, and thus should exclude forms of partial membership for new countries in one pillar or another or in one policy sector or another. Moreover the identification of policy domains that might be appropriate for the operation of enhanced cooperation had thrown into relief the fact that in some cases such a formula risked being either illusory in terms of what it might achieve, or a real danger. Both CFSP and JHA were cases in point.

The draft Treaty adopted at the Amsterdam European Council, currently being put into final form, has a section entitled 'closer cooperation'. The word 'flexibility' has been dropped in the reworking of the text. It contains general clauses to be introduced into the new Treaty and specific clauses for the EC pillar and the pillar on JHA. These are set out in the attached Annex and follow the re-numbering of articles of mid-September 1997. Although the Treaty is not yet in final form, several points need to be underlined.

1. The determination of some member states to proceed further and faster with integration has been accepted as legitimate, both in a general clause and in specific sections of the treaties, and as falling clearly within the procedures, mechanisms and institutions of the treaties. This is intended to remove the temptation to develop new areas or to intensify integration outside the framework of the EU.

2. The trigger procedure is rather cumbersome, to be activated as a 'last resort' solution, and only with the consent of at least eight member governments. Along with the specification of the scope for enhanced cooperation, it introduces a series of guarantees. First, these seek to preserve the *acquis communautaire*, and to maintain as an engagement for all member states those policies within the exclusive competence of the treaties. Second, they aim not to marginalise any non-participating member states as a consequence; it is left broadly open to them to join in any such areas subsequently and the need is acknowledged to take into account the related interests of non-participants.
Third, the institutional arrangements envisaged are within the inherited treaty framework; they safeguard the roles assigned to each institution, and, especially within the first pillar, the involvement of the Court of Justice and the power of initiative of the Commission.

This latter is, however, qualified in the case of the 'communitarisation' of parts of the third pillar. Here the member states retain for 5 years the right of initiative, and as regards the incorporation of Schengen, perhaps the showcase example of enhanced cooperation, the Commission's power is confined to the formulation of 'opinions'. In addition the budgetary consequences are in the first instance the responsibility of the participating member states rather than attributed to the Community budget, unless, that is, the Council decides otherwise by unanimity.

3. Nonetheless, and this is perhaps the most critical point, there is room for doubt as to whether the formulae introduced for taking decisions on enhanced cooperation, with all their qualifications, really meet the objectives of those member governments which had claimed that they wanted an opportunity to intensify integration and thereby to escape the veto of individual dissenting or reluctant member states. Although in theory enhanced cooperation can be decided by QMV in the Council, a single member state may - for important and stated reasons of national policy - oppose and thus prevent a vote being taken. A similar clause is contained in the Article 26 of the CFSP Chapter of the Treaty of Amsterdam (as numbered in mid-September 1997). In such a case the matter may go to the European Council, which can then proceed only by unanimity.

Such a formulation is contrary to the philosophy and indeed the principle of enhanced cooperation in that any proposed measure can thus be blocked by the very member government or governments which are opposed to the measure at issue. These provisions introduce into the legal system of the EU a version of the 'Luxembourg compromise', hitherto confined to the status of political declaration. It can perhaps be argued that political reality would mean that any government seeking thus to block a proposal for enhanced cooperation would have to provide a powerful justification. But what of the legal consequences? Could a difference of view on the case for triggering enhanced cooperation be taken to the Court of Justice? This is the implication of the texts and would be consistent with the orthodox tenets of Community law, following various articles in the treaties (see here Article 43.4.2 of the Treaty of Amsterdam).

We should note, however, the interpretation made by the British prime minister, a view which may well be shared by other heads of government. Tony Blair stated clearly to the House of Commons on 18 June 1997 that 'we secured a veto over flexibility arrangements which could otherwise have allowed the development of a hard core, excluding us against our will'.

4. Additional mechanisms for enhanced cooperation might have been especially useful for the further development of EMU, already a prime example of policy engagement applicable to only some member states. To be sure the Treaty of Amsterdam fills the legal vacuum that had been encountered

when the pact of monetary stability was being devised.

However, the constraints included in the decision-making mechanisms agreed at Amsterdam do not remove the problem of the 'outs' having their say on new measures proposed as corollaries to EMU, which the 'ins' might wish to develop. Hence much depends on how these articles are interpreted in practice, as we argued in the previous paragraph. The opportunity was not taken in Amsterdam to complement the EMU provisions in a less ambiguous way, even though it was precisely in this field that enhanced cooperation had been specifically endorsed much earlier in Maastricht.

5. CFSP had been argued by some to be a crucial domain for the introduction of enhanced cooperation. It might be open to the application of the new general clause, but no specific clause was added to Title V. The preference instead was for formalising the concept of 'constructive abstention'. This prudence illustrates exactly the difficulties, to which we alluded earlier in this report, of introducing enhanced cooperation in the development of an EU foreign policy, not least because of the absence of a collective view about the ends and means for such a policy. The possibility, even the likelihood, persists that from time to time the more activist member states will fall back on extra-EU mechanisms (as in the Bosnian case) for dealing with specific issues.

As regards defence issues, differences of opinion prevented the inclusion of a specific clause of enhanced cooperation even for developing the European armaments industry. The Treaty of Amsterdam includes provisions to fulfil the 'Petersberg tasks' within the scope and framework of the EU, but without permitting these to be made operational by enhanced cooperation and without giving the EU any military capabilities of its own.

WEU will thus have to be used for any such operations and it is within the WEU, rather than the EU, that any flexibility would have to be found. Those EU members (Denmark and the neutrals) which are only observers in WEU are thus given a say on any operations under the Petersberg rubric with which they choose to be associated.

6. The aim of developing the common area of liberty, security and justice was hard to reconcile with the legacy of parallel cooperation, opt-outs, and different starting points of individual member states.

Article 43 was therefore introduced at Amsterdam to permit enhanced cooperation, along with provisions to incorporate the Schengen Agreements and their *acquis*, by only some of the member states. It is, however, implausible that these provisions will suffice to address the relevant policy concerns of some member states. Additional arrangements were necessary to preserve the Danish opt-out and to legitimise the special positions of the UK and Ireland, while keeping open the scope for subsequent opting-in (especially for Ireland).

These are all expressed in a series of Protocols, which will prove hard to apply and will set in place a very complex regime. Moreover, it remains to be seen how the details of the Schengen *acquis*, which has still to be categorised and scrutinised, will be divided in practice between the first and third pillars.

7. As for further enlargement of the EU, the notion that enhanced cooperation might facilitate the absorption of new members has not been endorsed, even though some had seen it as a useful tool. Generally speaking, enhanced cooperation as agreed at Amsterdam cannot be applied to the *acquis communautaire*, which necessarily lies at the heart of any accession negotiation. Moreover it is specified that in some policy domains, which are open to incremental absorption in the EU (notably Schengen), the relevant *acquis* must be 'accepted in full' by any new member states (according to Article G of the Protocol incorporating the Schengen *acquis*).
Confirmation of this has subsequently been given, if any were needed, in the Commission's proposals

on the *Agenda 2000*. This document insists on the necessity for new members to take on their full EU obligations along the lines followed in previous enlargements. In addition, the Commission has gone further in arguing that it would be highly desirable for the candidate members to take on a good part of the *acquis* 'in advance of full membership' as part of the pre-accession strategy.

In a European Union destined to become larger and more heterogeneous it is evidently unrealistic to expect all of the member states all of the time to be guided by the same degree of commitment to further integration. There was a strong case for finding a way to allow the more determined to provide an integration dynamic, both to deepen the process and to extend it to new domains, but without marginalising the slower or more hesitant member states. This was what the negotiations over the Treaty of Amsterdam sought to achieve. It is not obvious that the eventual text has reconciled and responded to these two very different objectives.

Françoise de La Serre and Helen Wallace
September 1997

ANNEX
THE DRAFT TREATY OF AMSTERDAM : PROVISIONS ON ENHANCED COOPERATION

This summary is based on the provisional text as available in mid-September 1997, with its new numbering of articles to incorporate the provisions of Amsterdam within the previous treaties. The phrase used in the text is 'closer cooperation'.

New Title VII:
General scope is provided for closer cooperation in general pursuance of treaty aims, as last resort, by a majority of member states, without damage to *acquis*, as long as no damage to non-participants, and open to all. It is subject to specific new provisions added to the EC Treaty (re-numbered Art 11) and to the third pillar (Art 43).

New rules are introduced that only the participating member states subsequently decide in the Council on relevant new actions and policies or their budgetary costs. In other respects the appropriate institutional rules for the relevant area of competence apply.

The EC Treaty (as renumbered Article 11):
Article 11 adds supplementary conditions concerning the introduction of enhanced cooperation in this pillar so as to conserve the existing *acquis* and policies. Triggered by a request from relevant member states, a proposal for enhanced cooperation from Commission is decided by QMV in Council, after consultation of EP.

But any member state may oppose 'for an important and stated reason of national policy', in which case the Council does not take a vote and a reference is made to the European Council, which can then decide only by unanimity.

It should be noted that instead of specifically mentioning closer cooperation as a vanguard option for those wanting higher standards than the EU as a whole in fields of health, safety, environmental and consumer protection there is a restatement of the option for individual member states to use of more stringent national measures. A further protocol clarifies the definition of subsidiarity and proportionality.

'Second pillar' - common foreign and security policy:
No specific clause provides for closer cooperation in this field. Instead Article 23 introduces a mechanism of 'constructive abstention': a decision may be taken on issues subject to unanimity rules, even though some member governments may abstain, as long as these do not comprise more than a third of the votes under the rules assigning weights for QMV.

On issues subject to majority voting (Art 23.2) a member government may 'for an important and stated reason of national policy' prevent a vote from being taken. The issue may be referred to the European Council, which may then decide only by unanimity.
WEU becomes an 'integral part of the development of Union'; it may have 'closer institutional relations' with EU. Nato is acknowledged as the common defence framework for some member states. Art 17.2 incorporates the 'Petersberg' tasks.

Area of freedom, security and justice
New Title IV is added to the EC Treaty on visas, asylum, immigration and other policies linked to the free movement of persons:
An extensive remodelling of treaty provisions is intended to incorporate most of Schengen and its

acquis and to communitarise much of previous third pillar, but with varied application to individual member states.
The Protocol on the position of the UK and Ireland excludes the Title's application to these two countries, unless and until these two member states signal a willingness to take part (a much simpler procedure for Ireland than for the UK).
Another Protocol maintains the rights of Ireland and the UK to exercise their own border controls.
The Protocol on the position of Denmark exempts it from application of the Title (in line with the 1992 Edinburgh European Council Decision on the special status of Denmark). Denmark may align voluntarily with new measures and implements Schengen as an international treaty rather as Community law.

A Protocol, based on the new Art 43 on closer cooperation (see above), incorporates within the EU framework the Schengen *acquis* for Schengen signatories (mix of 1st and 3rd pillars), but excludes the UK and Ireland (subject to the Protocols listed above), and accepts a different procedure for Denmark. The UK or Ireland may nonetheless ask to participate in any part of the new post-Schengen regime, but subject to the unanimous agreement of the prior Schengen signatories. The protocol (Art 6) also associates Iceland and Norway with the development and implementation of the Schengen *acquis*, in line with the Luxembourg Agreement of December 1996. It is explicitly stated that any new member states of the EU must accept the Schengen *acquis* 'in full'.
A Declaration exceptionally enables Belgium to deal with asylum requests from nationals of other EU member states.

Third pillar - Justice and Home Affairs:
Art 40 permits closer cooperation by some member states using QMV in the Council (after requesting an opinion from the Commission and informing the EP), but only by unanimity in European Council if any member state opposes a proposal for 'important and stated reasons of national policy'. Other member states may subsequently ask to become a party to any measures decided by close cooperation. In this case, after an opinion from the Commission, the Council, acting by QMV, may agree or demur, but in the latter case must fix a date for the request to be reexamined.
Art 34 allows agreed conventions to come into force as long as at least half of the member states have adopted them.

'Social Protocol' 14 of TEU:
Separately the European Council in Amsterdam noted that the new British Government had signalled its intention to accede to the social provisions and to accept measures previously agreed under the Protocol, thus (subject to legal clarification) removing the 'opt-out' from Maastricht.

SOME FURTHER READING

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