WRR

WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID

FLEXIBILITY AND THE NEW CONSTITUTIONAL TREATY OF THE EUROPEAN UNION

Eric Philippart and Monika Sie Dhian Ho

WRR-PAPERSERIE 'DE NEDERLANDSE STEM IN DE EUROPESE CONVENTIE'

The Hague, May 2003

De paperserie 'De Nederlandse stem in de Europese Conventie' is een initiatief van de Wetenschappelijke Raad voor het Regeringsbeleid (WRR). De WRR besteedt momenteel, in aansluiting op het 4 maart jl. gepresenteerde rapport *Slagvaardigheid in de Europabrede Unie*, extra aandacht aan de Conventie over de toekomst van de Europese Unie en het belang van Nederland daarbij. De WRR beoogt de kwaliteit van het Nederlandse debat over en de bijdragen aan de Conventie te stimuleren. De verantwoordelijkheid voor de inhoud en de ingenomen standpunten in de papers berust bij de auteurs.

Voor meer informatie over dit project van de WRR:

drs. Monika Sie Dhian Ho
secretaris van de projectgroep
telefoon (070) 356 4624
email sie@wrr.nl

drs. Bas Limonard
lid van de projectgroep
telefoon (070) 356 4679
email limonard@wrr.nl

Dr. Eric Philippart is als docent verbonden aan Vakgroep Politieke Wetenschappen van de Vrije Universiteit Brussel en Senior Associate Fellow bij het 'Centre for European Policy Studies' (CEPS) in Brussel. Mw. drs. Monika Sie Dhian Ho is lid van de wetenschappelijke staf bij de Wetenschappelijke Raad voor het Regeringsbeleid (WRR) in Den Haag.

Wetenschappelijke Raad voor het Regeringsbeleid (WRR)
Plein 1813 nr. 2 en 4, Postbus 20004, 2500 EA 's-Gravenhage
telefoon (070) 356 4600, telefax (070) 356 4685
email info@wrr.nl, website http://www.wrr.nl

FLEXIBILITY AND THE NEW CONSTITUTIONAL TREATY OF THE EUROPEAN UNION

E. Philippart and M. Sie Dhian Ho

1 INTRODUCTION

This paper addresses a fundamental question confronting the Convention, namely how to deal with differences among Member States concerning the tempo and course of integration. Divergent preferences about the pace of integration may arise because certain Member States lack the financial resources or administrative capacity for an immediate adjustment, or because the challenge to adjust to the new rule is significantly larger for certain Member States (e.g. owing to differences in policy patterns, administrative traditions or legal cultures). Differences as regards the substance of new collective endeavours may follow from the fact that only a limited number of Member States face a specific cross-border problem, or from conflicting interests (e.g. economic or geopolitical) or standpoints (e.g. on EU competences in defence or criminal law).

In order to accommodate these differences, European integration has always been accompanied by differentiation of Member States rights and obligations. The Community orthodoxy has long been to regard these differentiated arrangements as exemptions, allowed only for a limited time (e.g. transition periods) or an objectively established difference in situation (e.g. the special treatment of the Outermost regions of the Union). Since the Treaty of Maastricht however, a new approach has progressively emerged that explicitly accommodates differences in enthusiasms to embark on new integration tasks. In politically salient fields where governments faced non-negotiable conflicts over the course of integration (e.g. in the spheres of social policy, monetary policy, defence, and justice and home affairs), *à la carte* ('opt-in' and constructive abstention) and even permanent decoupling ('opt-out') arrangements have been offered to unwilling Member States. Moreover, the treaties of Amsterdam and Nice have introduced and lightened the use of a general mechanism of 'enhanced cooperation' 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.

The objective of this paper is to analyse and evaluate various forms of 'flexibility' that are of relevance in the context of the Convention and the Intergovernmental Conference (IGC). We restrict the term flexibility to methods allowing for the development of collective action among a limited number of Member States in policy areas for which the EU has (some) competence.[1]

---

[1] This means that the following arrangements fall outside the scope of this paper: temporary non-participation by some Member States (e.g. the phased introduction of directives); initiatives in which all

The debate on flexible cooperation in Europe has many faces. One is the rather pragmatic discourse on how to solve immediate sectoral issues. Pragmatists thus ask themselves how to develop and reinforce the Euro's flanking policies, how to build up a European defence policy and how to create a European judicial area. At other times debates on flexible integration touch at questions about the very essense and trajectory of the Union. In that case visionaries look for an *avant-garde* mechanism or *centre de gravité* to boost the Franco-German motor, or ask themselves how a stable base for the enlarged Union or even a federalist ideal could be realized through a hard core system (*Kern Europa*). At the same time others – worried about the integrationist *engrenage* (ratchet mechanism) – are thinking of flexible mechanisms that would contribute to break any federalist dynamism and prepare the ground for a Union *à la carte*. These pragmatist and visionary levels are in several ways connected. Pragmatic and 'honourable' justifications sometimes hide other agendas. And even in the absence of hidden agendas, recurrent recourse to flexible arrangements as a 'managerial' solution to decision-making deadlock significantly influences the nature and trajectory of the European Union.

Seen as too technocratic a debate by some (owing to the large variety of flexible arrangements and the high complexity of some) and too divisive by others (because of the risk of undermining solidarity and creating 'second-class' Member States), it is nonetheless important that the Convention addresses flexibility in a clear and 'dispassionate' way (Delors 2003). Section 2 states that the issue of flexibility matters for the Convention for reasons of decision-making efficiency, legitimacy and simplification. Moreover, in the context of drafting a Constitution for the European Union, flexibility is of relevance in relation to the division of competences between the EU and its Member States, a 'division of labour' between the EU and co-existing institutional frameworks in Europe and the equipment of the Constitution with 'safety valves'. Last but not least, flexible options come to the fore in the event of a ratification crisis.

After a period of remarkable silence concerning flexibility, various variants have resurfaced in the final phase of the Convention. Against the background of increasing time pressure, this paper aims to support informed decision-making on these matters, adding to the small number of studies on flexibility and the European Convention that have been released so far.[2]

Member States participate but which are characterized by differentiation in rights and obligations among Member States (e.g. minimum or optional harmonization); and non-binding forms of cooperation in which all Member States participate (e.g. open method of coordination) (see for a similar distinction: Feenstra & Mortelmans 1985). The problematique of Article 308 EC (called the 'flexibility clause' in the Constitutional Treaty submitted by the Presidium), (see CONV 528/03, Article 16) also falls outside the scope of this paper, since this involves flexibility in the powers of the Union.

2 On flexibility in the context of the draft Constitutional Treaty, see: Commissariat Général du Plan

Section 3 to 6 examine specific forms of flexibility (extra-EU cooperation, enhanced cooperation, and constructive abstention). Section 7 proceeds with a review of flexible solutions to a ratification crisis.

The different formulae are evaluated in the perspective of a Union redesigned to work with 25 members or more. We postulate that the Intergovernmental Conference 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 abandon the current pillar structure, and that it should have four parts respectively devoted to the constitutional architecture of the Union, the charter of fundamental rights, the policies and implementation of the Union's actions, and the general and final provisions.

2 FLEXIBILITY IN THE CONTEXT OF THE CONVENTION

Looking at the agenda set by the European Council of Laeken, the issue of flexibility is important in relation to the objectives of increasing the Unions decision-making efficiency and legitimacy, and the simplification of its instruments. Moreover, when drafting a Constitution for the European Union, flexibility touches at debates concerning the division of competences between the EU and its Member States, a 'division of labour' between the EU and co-existing institutional frameworks in Europe and the equipment of the Constitution with 'safety valves'. Last but not least, flexible solutions could be considered in the event of a ratification crisis.

A first main concern put forward in the Laeken declaration has been to improve the efficiency and legitimacy of EU decision-making. Certainly, after Amsterdam and Nice, fewer decisions require unanimity. However, the required threshold for a great number of majoritarian votes is still problematically high.[3] 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 European Parliament is ready to back. With future enlargement, slowness and even deadlock, induced by unanimity or the high majority threshold in the Council, are bound to increase. There will be indeed a great number

---

(2003a); Commissariat Général du Plan (2003b); Philippart (2003a, 2003b); Shaw (2003a, 2003b); and Stubb (2003).

3 According to the Treaty of Nice, three separate conditions need to be met in order to achieve a qualified majority: a majority of weighted votes; a majority of members of the Council; and a majority representing at least 62% of the Union's population. In the years to come the qualified majority threshold will, according to the pace of accessions, waver between 71 percent and 74 percent. 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 (Quermonne 2002).

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.

Flexibility is only one way among others to avoid decision-making deadlock in the Council (Philippart & Sie Dhian Ho 2001). In many cases no doubt, the best option consists in banning decision-making modes resting on unanimity, and introducing a system of majority with a significantly lower threshold than that of the current qualified majority.[4] Resorting to different proceedings of convergence (e.g. the open method of coordination) and increasing EU funds aimed at compensating Member States that face the highest adjustment costs may also contribute to revising integration by uniformisation or harmonisation. The priority of the European Convention, as among others Frans Timmermans has insisted, should be to focus on these objectives first. Insisting on flexibility from the start would have undermined the case in favour of such vital changes.[5]

However, not all alternatives to flexibility seem within reach of the Convention (e.g. a substantial increase in the Union budget). 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. Legitimacy and implementation problems are looming in that case, as Fritz Scharpf has emphasized: '...in policy areas characterized by the legitimate divergence of politically salient national preferences, the solution ... which would essentially replace consensus-seeking procedures with majority votes plus unilateral powers of the Commission, could not be imposed against the governments of member states, and would not be normatively acceptable if it were' (Scharpf 2002a: 26). 'Lighter' modes of governance like the open method of coordination

---

4 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). The Presidium has proposed to introduce a dual majority system, requiring a majority of Member States, representing at least three fifths of the population of the Union (Article 17b, CONV 691/03).

5 Intervention by Frans Timmermans in the WRR workshop on flexibility on the basis of an earlier version of this paper, The Hague, 8 May.

offer much fewer systemic risks but are far from a panacea. Their pace is slow and results are often uncertain (cf. Hodson & Maher 2001; Scharpf 2002b; Philippart 2002).

Accordingly, for reasons of efficiency and legitimacy, flexibility appears under specific circumstances to be useful as a complement or a substitute. This view has been supported in various working groups of the European Convention as well as in the plenaries of the Convention discussing the final reports of these working groups.[6] The question which form of flexibility would be most suitable and why has however not been addressed in a systematic way, while their effects differ significantly in terms of for instance decision-making efficiency, transparency, complexity, legitimacy and solidarity.[7]

In relation to decision-making efficiency, the nearly continual revision of the constitutional framework of the Union is also a point of concern. Between 1985 and 2003-2004, the Treaties will have undergone no less than five major revisions, as well as minor revisions introduced by accession 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 worrying. These multiple revisions were pursuing several goals: enlarging the scope of the Union; redefining the powers of the Union; reforming decision-making procedures and reorganising the institutional framework. They also have been the opportunity to set up flexible 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-outs' and 'opt-ins' through secondary law. They used to require a Treaty base (primary law). This necessity has also contributed to increasing the frequency and complexity of constitutional negotiations. In order to avoid their recurrence, the Union needs to be equipped with a flexible mechanism to develop new policies that does not require Treaty reform.

A second main aspiration expressed in the Laeken Declaration involved the simplification of the Union's instruments and procedures. Various forms of existing flexibility are difficult to reconcile with the objective to make EU policies more readable for the public. The last decade has witnessed an increase in the number of ad hoc flexible regimes, sometimes of Byzantine complexity – e.g. the Schengen protocols of 1997 – or poorly improvised. These important variations from one sector to another are not only difficult to understand and justify, but

---

6 E.g. CONV 459/02: 7, 26; CONV 461/02 : 18-19; CONV 426/02 : 15, 24; De Kerchove 2002: 17; Fischer & De de Villepin 10-11; CONV 473/02, 23; CONV 449/02, 13 15.

7 For a comparative evaluation of different forms of flexibility, see Philippart & Sie Dhian Ho (2000).

costly to manage and risky from a systemic viewpoint. If the Union needs the flexibility provided by special regimes, the current situation certainly calls for some streamlining. Such appeals for a critical reappraisal of existing derogatory regimes have been made in the working group IX on Simplification (Piris 2002: 23-24), by the Commission (2002a: 23), as well as by the working group that drafted the so-called Document *Penelope* at the request of President Prodi, Commissioners Barnier and Vitorino (European Commission 2002b: 138-141).

Third, flexibility can be seen as a solution for certain conflicts concerning the division of competences between the EU and its Member States. Several authors have indicated that in the post-enlargement Union, a *new form of subsidiarity* is needed. In an almost Pan-European Union it is likely that some integrative endeavours will only be appealing to sub-systems within the EU (regionally and/or functionally defined). Collective action that might be functional for some Member States might be unnecessary for others. Therefore, a new type of subsidiarity – differentiated subsidiarity[8] – is needed, under which some Member States stick to national solutions whereas others choose to adopt sub-European ones.

A fourth aspect of flexibility that should be discussed involves the relationship of the new Constitutional Treaty to extra-EU cooperation schemes among a limited number of Member States. In the 1980s and 1990s, new extra-EU cooperation has 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 cooperation. Their number is decreasing (cf. integration of the 'Schengen *acquis*' into the EU framework, of a large part of the WEU *acquis* in defence matters and of the Bologna process in education matters). However, instances of extra-EU cooperation are still numerous (e.g. the Benelux) and new developments are not improbable. The European Convention should therefore address the question of extra-EU cooperation, and the obligations of Member States taking part in such cooperation.

A fifth reason to discuss flexibility in the context of the Convention involves the equipment of the Constitution with *'safety valves'*. It is very difficult to predict the development of a number of elements, such as the speed and extent of Europeanisation in the new Member States or the strength of centripetal and centrifugal dynamics within the Union about to become continental. 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

---

8 The concept 'differentiated subsidiarity' has been coined by Hervé Bribosia (1998). See also Philippe De Schoutheete (2001); Tuytschaever (1999); and Philippart & Sie Dhian Ho (2000).

valves should not be designed solely by reference to current or foreseeable risks. The Treaty of Rome was equipped with a safety valve provision for the operation of a common market (Article 308 TEC). The project of Article 16 (labelled 'flexibility clause') of the Constitutional Treaty presented by the Presidium 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 needed to that effect (CONV 528/030). Accordingly, and as a second safety valve, the Constitution should be equipped with a general mechanism for flexible integration (cf. the existing Treaty provisions on 'enhanced cooperation', Title VII TEU).

Last but not least, more revolutionary forms of flexibility come to the fore in the event of a 'ratification crisis'. If the electorate of a Member State rejects ratification of the Treaty adopted by the IGC, those Member States who have already ratified it or intend to do so, could for instance invite (or even oblige) the unwilling state to leave the Union, or negotiate a new (additional) treaty among themselves ('enhanced union').

The remainder of this paper will deal with various forms of flexibility that are of relevance for the above mentioned questions for the Convention, that is: extra-EU cooperation; enhanced cooperation; constructive abstention; and flexible solutions to a ratification crisis (more specifically the option of an 'enhanced union').[9]

3 EXTRA-EU COOPERATION

The oldest form of flexibility consists of agreements outside the institutional framework of the EU between less than all of its Member States (extra-EU cooperation, also called 'inter se' agreements' or 'partial agreements'). In doing so, as Bruno de Witte has outlined in his legal analysis of partial agreements, "...the Member States exercise the treaty-making power which, as independent subjects of international law, they have preserved not just in relation to the outside world (the vast mass of so-called 'third states') but also in their mutual relationships"(De Witte 2001: 232). The EU has not become the exclusive framework for the legal relationships between its Member States, in stead European integration has been characterized by what Helen Wallace has called 'interlocking patterns of integration', with Europeanization taking place in different co-existing institutional frameworks. Examples of such extra-EU cooperation concluded among some Member States are the Schengen

---

9 Existing opt-outs and specific flexibility arrangements (e.g. in the fields of foreign policy and defence) fall outside the scope of this paper.

cooperation (before it was integrated in the EU framework by the Treaty of Amsterdam), the Common Travel Area between the United Kingdom and Ireland, and the Benelux cooperation.

The issue of extra-EU cooperation is dealt with in different parts of the current Treaties of the EU. 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 cooperation (Declaration No 28 annexed to the accession Treaty of Austria, Finland and Sweden) or protocols to the Treaties (protocol on the application of certain aspects of Article 7a of the TEC to the United Kingdom and Ireland). 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 cooperation on a bilateral level, in the framework of WEU and NATO, 'provided such cooperation does not run counter to or impede' that provided for in the Treaty (Article 17, TEU par 4). Since TEU Article K7 has been repealed, no such provision exists for police and judicial cooperation in penal matters, the third pillar of the Union. However, this does not prevent Member States to develop many instances of extra-EU cooperation in these fields.

Member States may opt for extra-EU cooperation because of the relatively light conditions and procedures, their complete autonomy during the negotiation process, or because they are keen to preserve national control in the implementation and enforcement phase. However, in reaction to the launching in the 1980s and 1990s of new extra-EU cooperations in areas where the Union has responsibilities, concern has grown about monitoring and task duplication problems, as well as about tensions owing to the exclusive nature of some of these endeavours. The European Commission and European Parliament have moreover emphasized the superiority of the Community system as regards guarantees for democratic control, judicial control and solidarity (European Parliament 2000). The drawbacks of extra-EU flexibility have indeed been one of the key arguments used during the previous two IGC's by proponents of the introduction (and afterwards 'lightening') of procedures for 'enhanced cooperation' inside the EU framework.

Extra-EU cooperation can clearly contribute to problem solving in Europe. From the Union point of view, this possibility should be maintained. Especially in the case of cooperations involving regional 'sub-systems' of the EU that do not aspire to function as 'laboratories' for

the EU (that is, developing rules that might be introduced into the EU framework in the future), there is little reason to absorb and/or develop all these schemes inside the EU framework. Administrating all these flexible schemes would indeed be a tremendous burden for the EU institutions. Moreover, the very existence of the extra-EU option may indeed be used as a negotiation tool to convince some Member States to adopt more conciliatory positions and to allow the development of new policies inside the Union.

So what reference to extra-EU cooperation should be included in the Constitutional Treaty? The revision of the Treaties should at least be the opportunity to do away with the anachronistic reference to the Benelux. In the logic of forsaking the pillars and simplifying the Treaties, existing articles that are spread over the existing Treaties and protocols should be merged in one general principle on extra-EU cooperation. This is a matter of confirming the fact that intergovernmental cooperation among a number of Member States is authorised, but that Union membership implies certain obligations as far as the scope and content of this cooperation is concerned.[10] The document *Penelope* suggests such a general clause 'allowing closer cooperation between Member States working towards objectives that cannot be reached by applying the Constitution, on condition that the cooperation in question respects the Constitution' (European Commission 2002: xvi-xv). Although the Presidium has submitted to the Convention an Article D in the General and final provisions, that reproduces the Benelux Article 306 of the TEC, the accompanying comments of the Presidium read that "... the Convention may wish to examine the significance of this Article and/or its relationship with provisions on enhanced cooperation" (CONV 647/03).

Is it enough for the Constitutional Treaty to state the general principle or should it specify the obligations of Member States taking part in extra-EU cooperation? The palette of conceivable obligations is naturally very large. Should the participating 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? *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. The key guarantee against perverse effects of extra-EU cooperation lies in the competence of the European Court of Justice to review such extra-EU flexibility in the light of the principles of pre-emption, sincere cooperation and the primacy of EC law.[11]

---

10 For instance, Vlad Constantinesco has disputed the legality of intergovernmental cooperation in fields falling within the competence of the EU and EC Treaties, after the introduction of the provisions for 'closer cooperation' by the Treaty of Amsterdam (Constantinesco 1997).

11 See also De Witte, op. cit., p. 241; Scheltema (2003).

4 ENHANCED COOPERATION

'Enhanced cooperation' is a mechanism allowing a group of Member States to use the EU framework to develop new policies. The Council may grant that facility, provided that a number of conditions are met[12]. The action envisaged by the group (consisting of at least eight 8 Member States) must be in line with the objectives of the Union, remain within the limits of the powers of the Union and not relate to matters having military or defence implications. Last but no least, this option may be undertaken only as a last resort (it must be established that the objectives of the enhanced cooperation cannot be attained within a reasonable period through 'normal' procedures).

The use of the EU framework means that, whereas 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. For the rest, the institutions play the role they would normally play in the development of EU policies. The decisions taken only bind the participating Member States ('variable geometry') that, by default, bear the operational expenditures resulting from implementation of enhanced cooperation. As Jo Shaw pointed out, enhanced cooperation is to some extent paradoxical as an intergovernmental principle is used for allowing further integration.[13] The opportunity given to Member States to opt out is indeed very much in line with intergovernmentalism and international law. Beyond this characteristic though, enhanced cooperation is not more intergovernmentalist than other forms of integration, since the rules for enhanced cooperation stipulate that the same procedures (e.g. the same role of the European Commission and European Parliament) apply as in 'normal' integration initiatives.

The mechanism for enhanced cooperation (initially called 'closer cooperation') has been introduced by the Treaty of Amsterdam and revised by the Treaty of Nice. No authorization has yet been requested, but the establishment of an enhanced cooperation has been envisaged on several occasions. In half of the cases, it contributed to break the deadlock.[14]

---

12 In that respect, the provisions on enhanced cooperation are enabling clauses. They define the conditions of authorization for Member States seeking enhanced cooperation to 'make use of the institutions, procedures and mechanisms' laid down by the TEU and the TEC. The wording of these provisions makes clear that enhanced cooperation as such is not the subject of authorisation under the Treaty, but only the use of the EU framework.

13 Intervention by Jo Shaw in WRR workshop on flexibility, on the basis of a previous version of this paper, The Hague 8 May, 2003.

14 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

4.1 Assessment and evaluation of the current mechanism for enhanced cooperation

4.1.1 The request – contents and conditions

The request for using the Union's framework is introduced by interested Member States (right of initiative). There is an ambiguity regarding the contents of the request. The wording of the last resort provision seems to indicate that interested Member States are expected to define the scope of action and objectives they intend to pursue through enhanced cooperation. This should be explicitly indicated. The recipient of the request is the Commission for the first and third pillar, the Council for the second pillar. This difference has a symbolic and political meaning, namely to assert the undivided control of the Council over CFSP. The appointment of a European Foreign Affairs Minister, replacing the High Representative for the CFSP and the vice-president of the Commission in charge of external relations, would allow simplifying the procedure at that level.

In order to be taken into consideration for authorization, a request must satisfy no less than fifteen substantive and three procedural conditions. Except for the last resort condition, the Treaties do not specify who is responsible for verifying whether those requirements are met. Logically speaking this duty should fall on the institution responsible for the authorisation proposal.

The 'substantive conditions' 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. That reference should therefore be suppressed.

---

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.

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. All these conditions are merely repeating general obligations set up in other articles of the Treaties; thus they could be dropped.

The remaining substantive requirements list the areas in which enhanced co-operation is forbidden (negative list). This list is relatively short: enhanced co-operation is prohibited where the Union has no competence, in fields under the exclusive competence of the Union or with military and defence implications. The first prohibition is based on a basic democratic principle: transfer of powers requires the formal consent of the authority that relinquishes its right. The mechanism for enhanced co-operation cannot be used to by-pass national and/or regional parliaments. As some have rightly pointed out, that rule may prove quite restrictive in areas where the competence of the Union is minimal – say, promoting exchanges of information and evaluating experiences. What if a group of Member States wants to harmonise their laws and regulations while the Treaty excludes that possibility explicitly (cf. social policy, education, culture or public health – Articles 136, 150-152 TEC). In order to overcome such limitation, the mechanism for enhanced cooperation could allow participating Member States to go beyond Treaty restrictions provided that their decision is taken in accordance with their respective constitutional requirements[15].

Forbidding 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

---

15 Procedures for simplified revision of the Treaty provisions already exist for extending the scope of action of the Union or for changing decision-making procedure. For instance, article 17 TEU provides that the progressive framing of a common defence policy ... might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements. Article 67(2) TEC (title IV on visas, asylum, immigration and other policies related to the free movement of persons) reads as follows: the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

completely to the Union, is tautological. In matters of international trade, the Union is indeed either speaking with one voice at the WTO or is not. Likewise, it is impossible to have two monetary policies for the same currency, even less so to have two 'single' currencies. What applies to Member States taken individually also applies to a group of Member States. The reference to exclusive competence is totally redundant and should be abandoned.

As for the third restriction, it prevents any use of enhanced cooperation for the peace-keeping operations (the Petersberg tasks) or for progressing on multinational forces, armament, human resources management, training and common doctrines' development as envisaged by the Franco-German proposition (De Villepin & Fischer 2002).[16] As Wim van Eekelen strongly argues, dispatching forces is the only decision that really requires unanimity. For such cases, enhanced cooperation could well be the sole option for dealing with a Member State's opposition.[17] The new mechanism could be designed in order to offer a 'lean' alternative to the proliferation of ad hoc flexibility that characterised the Presidium's draft articles on external action (Articles 19 to 21). It should, at least, allow willing and able Member States to develop 'enhanced cooperation' concerning foreign, security and defence policy.

The current system lays down 'procedural conditions' regarding the participation's threshold, the situation of last resort and the degree of openness of enhanced co-operation. The Treaty of Amsterdam stipulated that enhanced co-operation has to involve a majority of Member States. At Nice, it was decided to fix the minimum participation threshold at eight Member States. There are five 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) guaranteeing enhanced co-operation's legitimacy; (5) and minimising the risk of institutional tension. After analysis of the main reasons for fixing a minimum participation threshold and of the relevance of the current threshold's level (Philippart 2001: 14-7), we draw three main conclusions. First of all, there is no universally valid participation threshold (the choice for a fixed minimum 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-

---

16 The contribution also mentions some areas covered by the Letter of Intent and the OCCAR (security of supplies, organisation of exportations, dealing with sensitive information and reciprocal market opening).

17 Intervention made by Wim van Eekelen during WRR workshop on flexibility, on the basis of a previous version of this paper, The Hague 8 May 2003.

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. This does not mean that the concept should be abandoned altogether. A better option would be to say that the authorisation proposal may include a minimum participation threshold among other specific provisions deemed as necessary.

The formulation of the 'last resort' stipulation adopted in Nice seems to indicate a switch to a logic based on the political recognition of a foreseeable impasse. It would no longer be needed to establish that a measure, detailed in a formal proposal and debated by all, has been formally rejected. It would be a matter for a group of Member States, concerned by the stagnation in a sector, to envisage resorting to enhanced co-operation, to define its objectives (with a reference to the Treaty articles concerned but stopping short of detailing future measures), and to ask the Council to acknowledge the impossibility to reach these objectives in a reasonable time limit (Bribosia 2001: 135). The formulation used in the Treaty is however quite ambiguous. In order to state clearly that it is no longer necessary to wait for the end of very long legal procedures, the new mechanism should, as suggested above, state that interested Member States must indicate the scope of action and objectives they intend to pursue through enhanced cooperation. In addition, it should not say that enhanced cooperation may only be undertaken when these objectives cannot be attained "by applying the relevant provisions of the Treaties". As somebody else suggested, the solution would be to authorize enhanced cooperation if its objectives cannot be attained "by the Union as a whole". Those two amendments would make clear that enhanced cooperation offers a real alternative to extra-EU closer cooperation à la Schengen.

4.1.2 The authorisation

The procedure for setting up enhanced co-operation consists of three stages: authorisation proposal, consultation and deliberation, adoption or rejection of the proposal.
At the moment, the 'proposal procedure' varies from case to case. Depending on the pillar, the Commission, the interested Member States, or the Commission and the interested Member States have the authority to submit a proposal. Maintaining such a structure is hardly compatible with the ambition of transcending the pillar structure and simplifying 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. The responsibility already lies with the Commission for the development of most of the Union's policies. Besides the Commission is better placed to carry out this task because it is more inclined to think in

terms of what serves best the Union's interests and not just the interests of the Member States concerned. Thanks to its long multi-sector experience, it is also better able to assess the appropriateness of proposing the establishment of parallel or competing enhanced co-operation projects. For foreign policy, security and defence matters, the power of proposal should be in the hands of the European Foreign Affairs Minister.

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; minimum number of participants (see above on minimum participation threshold); assistance to Member States wishing to participate but not having sufficient resources 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.

Current '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 consultation and deliberation procedures 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 if he/she is responsible for proposing the authorisation, there would be no need to ask for the Commission's opinion. The definition of the European Parliament's prerogatives is a difficult matter. 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 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 enhanced cooperation relates to an area covered by the co-decision procedure or every time its operational expenditures are to be borne by the Union. *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 that the Council is willing to approve. Another option, more supranational, would be to require the assent of the European Parliament for any authorisation.

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.

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. Authorisation to establish enhanced co-operation should be granted by a majority of Member States representing the majority of the Union's population (or three-fifth of the Union's population conform the Presidium proposes for qualified majority voting). 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. Considering that enhanced co-operation is likely to be a second-best choice in many cases, that opportunity should probably be maintained. Others propose to suppress it altogether. This optimised authorisation procedure should apply to all fields open to enhanced co-operation.

4.1.3 The membership

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).

Conditional openness combines inclusiveness and efficiency. Capacity criteria already exist for Member States wishing to join an existing enhanced co-operation. 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. These objective conditions should be laid down from the start and included in the decision to authorise enhanced cooperation. For reasons explained above, it should be up to the Commission to make a proposal on this point.

The current treaties stipulate that enhanced co-operation is open to all Member States at all times (subsequent participation) subject to compliance with all the decisions taken within that framework. 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). The 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[18], is the most functional and

---

[18] As suggested by Philippe de Schoutheete, this could involve paying a fair share of the assets developed by others. In a number of cases, enhanced cooperation will involved developing common assets (cf. structured cooperation). It would then not be enough for latecomers to agree to use those assets. In order to deter free-riding, there should be some kind of mechanism compensating the frontrunners.

centripetal approach at EU level (the sense of urgency is obviously stronger when a government knows new policy 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.

4.1.4 The operating mode of enhanced cooperation

Enhanced co-operation is supposed to operate in the same way as the Union – same institutional framework and same procedures. This isomorphic principle has one important exception. Whereas all members of the Council take part in the deliberations, only 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.

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. Maintaining the institutional unity of the Parliament, the Commission and the Court of Justice is particularly important. 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. In other words, what is at stake is the choice between further Europeanisation and creeping renationalisation.

On the minus side, the current operating mode is functionally suboptimal, and poses various equity and legitimacy problems. 'Procedural isomorphism' could be a serious problem if the new Constitutional Treaty does not improve EU rules in a number of areas. To be on the safe side, the new mechanism should provide that participating Member States may decide acting unanimously that enhanced cooperation shall be governed by qualified majority instead of unanimity and/or by the co-decision procedure. A more substantial inconvenience of the current arrangement is the relative vulnerability of enhanced cooperation to ill-intentioned Member States. Should enhanced cooperation only involve a minority of Member States, non-participating States could try to mobilise the European Parliament against measures proposed for the implementation of enhanced co-operation. This particular argument however rests in part on fragile, even disputable postulates (Philippart 2001: 27). In case of

pressures from 'their' national government, it is likely that many MEPs will abstain, but few of them would go as far as voting against proposed measures.

The present mechanism also raises questions regarding equity and legitimacy. Those refusing to participate (the 'out') have as many rights as those wishing to take part in enhanced co-operation but prevented from doing so due to material reasons (the 'pre-in'). The provision regarding the deliberations in the Council could be reviewed. The unwilling for instance could be kept informed of the development of enhanced co-operation, but have no right to attend the Council meetings[19]. This would not only be more equitable but also diminish the vulnerability of enhanced co-operation and increase centripetal dynamics (assuming that frustration rather than acclimatisation is the most effective means to change the mind of unwilling Member States). Such a differentiation between 'pre-in' and 'out' could be defined in one of the specific provisions included in the authorisation proposal.

Another possible point of friction rests with the right of MEPs from non-participating countries to approve or reject measures that will not apply to 'their' States. Some see that as democratically questionable. From their point of view, MEPs represent their constituency and, beyond that, their country. Just as the ministers sitting on the Council, they must be considered as national representatives and should therefore be excluded from the deliberations and/or the adoption of enhanced cooperation's measures. 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 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. As long as enhanced co-operation is used as a laboratory or an implicit *avant-garde*, variable geometry should not be introduced in the

---

19 The right to attend meetings is indeed not universal. Countries that did not adopt the Euro are excluded from the governing body of the European Central Bank. In April 2003, it has been decided that, from September, Britain, Sweden and Denmark should no longer take part in senior official meetings preparing the sessions of the 'Eurogroup'. For other options for differentiating between the rights of the unable and the unwilling, see Eric Philippart, *op.cit.*, p. 28-29.

structures of the Parliament, the Commission and the Court of Justice on account of such high systemic costs.

Our suggestion is therefore, as far as the Council is concerned, to maintain the right for all Member States to take part in the deliberations or to grant that right on a case-by-case basis; to authorise States participating in enhanced co-operation to hold restricted meetings at an informal level; to exclude non-participating States from the adoption of decisions; and to uphold the institutional unity of the supranational institutions of the Union.

4.1.5 The status and funding of measures developed through enhanced cooperation

The Treaty of Amsterdam did not specify the status of measures taken to implement an enhanced cooperation, except for the development of the Schengen *acquis*. Article 8 of the protocol pre-authorising enhanced cooperation in this domain stipulates that this *acquis* must be accepted in full by all States candidates for admission. It meant that the status of enhanced cooperation's measures was very similar to that of EU policies with an opt-out for some Member States. The Treaty of Nice changed that by stating that acts and decisions resulting from enhanced cooperation "shall not form part of the Union *acquis*" (Article 44, §1 TEU).

The fact that enhanced cooperation's measures may no longer be considered as part of the Union's *acquis* with a limited territorial scope is, legally speaking, very puzzling.[20] One option is to accept the fundamental ambiguity of the present system from this viewpoint and hope that Member States involved in enhanced co-operation will quickly have the majority needed in the Council to impose the inclusion of these measures in the Union's *acquis*. Another option suggested somewhere else is to specify that for the purposes of the negotiations for the admission of new Member States into the European Union, enhanced cooperation's *acquis* shall not be regarded as an *acquis* which must be accepted in full by all States candidates for admission. This elegant solution avoids theological traps, while being legally speaking more coherent and politically speaking more centripetal.

As far as 'funding' is concerned, 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".

---

[20] On the post-Nice status of enhanced cooperation in the Union legal order, see Bribosia Hervé, *op.cit.*, p.153.

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 implementation of its policies to the Member States, without financial compensation. This being said, on most budgetary issues, unanimity is no longer required. 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.

4.2 Recommendations – draft article on enhanced cooperation

The following provisions should be divided between 'Part I: Constitutional Architecture – Title V: The Implementation of EU actions' (Article 32) and in 'Part II: Union Policies and their Implementation - D: Functioning of the Union' (institutional and procedural provisions; budgetary provisions) of the draft project of a Constitutional Treaty proposed by the Presidium.

4.2.1 Contents and admissibility of the request

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: aims at furthering the objectives of the Union, at protecting and serving its interests and at reinforcing its process of integration; respects the Constitution and the *acquis* of the Union; and respects consistency between all the Union's policies and its external activities.

The enhanced co-operation may be undertaken only if it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.

4.2.2 Authorisation Procedure

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 European Foreign Minister.

The proposal may include specific provisions deemed as necessary. These provisions may, in particular, concern objective requirements governing participation in the enhanced co-operation; minimum number of participants; assistance 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; operational expenditures that should be charged to the budget of the Union; as well as [Option 2 – see below, under operating mode] the right of non-participants to attend the Council meetings. In the event of the Commission or, as appropriate, the European Foreign Minister proposing to refuse the authorization, the proposal must indicate the reasons.

[Option 1] 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. [Option 2] The assent of the European Parliament shall be required.

[Dispensable] 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.

4.2.3 Enhanced co-operation's membership

When enhanced cooperation is being established, it shall be open to all Member States insofar as they satisfy conditions of participation. 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.

4.2.4 Enhanced co-operation's operating mode

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. By way of derogation from provisions excluding any harmonisation of the laws and regulations of the Member States, the Member States participating in enhanced co-operation may decide, by unanimity and in accordance with their respective constitutional requirements, to do otherwise. By way of derogation from the decision-making procedures provided by the Treaty, they may also decide, acting unanimously, that enhanced cooperation shall be governed by qualified majority instead of unanimity and/or by co-decision procedure.

[Option 1] 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. [Option 2] Only 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.

The acts and decisions adopted for the implementation of the enhanced cooperation shall be binding only on those Member States which participate in such cooperation.

[Option 1] For the purposes of the negotiations for the admission of new Member States into the European Union, enhanced cooperation's *acquis* shall not be regarded as an *acquis* which must be accepted in full by all States candidates for admission. [Option 2] 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.

5 CONSTRUCTIVE ABSTENTION

The Council of the Union has basically three decisions rules: unanimity, qualified majority and (absolute) majority, the latter being the rule by default. In all cases, decision-makers may either vote in favour or against a measure, or decide to abstain from voting (abstention). The standard norm in the Union is that "abstentions by members present in person or represented shall not prevent the adoption of decisions".[21] Once a measure is approved, it binds all Member States, including those which opposed its adoption or abstained during the vote. 'Constructive' abstention differs from 'normal' abstention at both levels. It prevents the adoption of decisions if too many Member States resort to it. Besides, when abstaining 'constructively', the member is not compelled to apply the decision but accepts that the decision commits the Union.

5.1 Constructive abstention: description and background

Constructive abstention (also called 'declaratory', 'positive' or 'active' abstention) has been introduced by the Treaty of Amsterdam, offering a new form of flexibility in Common Foreign and Security Policy (CFSP). The mechanism laid out in Article 23(2) TEU is based on three rules. Firstly, 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. Secondly, if the members qualifying their abstention represent more than one third of the weighted votes, the decision shall not be adopted. Thirdly, "in a spirit of mutual solidarity, the Member States concerned shall refrain from any action likely to conflict with or impede the Union action". As for the scope and operating scale of constructive abstention, it is restricted to one policy area (CFSP), is only used in combination with unanimity and applies to single measures. No Member State ever resorted to constructive abstention since the entry into force of the Treaty of Amsterdam in 1999. The specific features of this mechanism are put into perspective hereafter.

---

[21] Cf. Article 205(3) TEC states that 'Abstentions ... shall not prevent the adoption by the Council of acts which require unanimity'. There is no general provision of that type in the TEU, but there is an explicit stipulation of that sort under Article 7(4) (determining the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)) and Article 23(1) (CFSP).

The novelty rests less with the opportunity given to Member States than with its formalisation. The history of the Union is indeed full of gentleman's agreements providing that some Member States would not oppose the adoption of a decision as long as they would not have to contribute to its implementation or would not be bound.[22] In that, the Union was continuing a well-established practice in international relations, this type of arrangement being very much in line with the intergovernmental method and the basics of international law.

The procedure is very simple and entirely in the hands of the reluctant Member State. The derogation is automatically granted on the basis of a simple declaration by the interested Member State during the voting procedure. This is very different from opt-outs negotiated during an IGC or derogations granted on the basis of Article 88(2) TEC, that all require unanimous agreement.[23] The Council of Europe has a similar system ('partial agreements'), but there too derogations are based on collective decision.[24]

The potential flexibility provided by the constructive abstention is substantial. Member States qualifying their abstention should not represent more than one third of the weighted votes (i.e. more than 29 votes out of 87 – after the 2004 enlargement, more than 115 votes out of 345). Concretely, it means that any initiative requires the active support of the 11 largest Member States, three more than the minimum participation threshold set for 'enhanced cooperation'. The flexibility provided by constructive abstention is nevertheless substantial in absolute terms. For instance, it allows the adoption of measures without the support of Germany, the United Kingdom, France and Spain or without the support of the 16 smaller Member States (from Malta up to Hungary).

The policy scope of this procedure is rather narrow as it only concerns CFSP. Constructive abstention may be used for all issue areas under TEU Title V – Provisions on a Common Foreign and Security Policy, military and defence matters included. In the absence of any restrictive provision in the Treaty, the procedure applies for the adoption of CFSP principles and general guidelines, for the adoption of common strategies, joint actions and common

---

22 This point was underlined early on by Elmar Brok, one of the two representatives of the European Parliament at the 1997 IGC (*Agence Europe*, *Bulletin Quotidiènne*, 27 May 1997).

23 Article 88(2) subpar.3 TEC: On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances.

24 'Partial agreements became possible in 1951, after the adoption of a resolution by the Committee of Ministers of the Council of Europe according to which the representatives of the Member States on the Committee of Ministers could decide unanimously that abstention from participating in a proposal was permitted' (Tuytschaever 1999: 86). See also De Witte (2001: 234-5).

positions as well as for the conclusion of an agreement with one or more States or international organisations.

Many officials and academics however reckon that constructive abstention is restricted to particular measures with no military or defence implications. The reasons behind this restrictive interpretation of the Treaty are linked to intellectual inertia, political preferences or faulty interpretation of the Treaty. During the IGC 1997, the representatives of the Member States when discussing constructive abstention were often referring to specific measures. Some continue to think in these terms.[25] Others simply think that, for political reasons, this mechanism should not be used to adopt for broad decisions or decisions with direct military implications. The remaining ones misread the signification of various derogations regarding "decisions having military or defence implications". The Treaty only stipulates that qualified majority voting moderated by the emergency brake procedure, on one hand, and general funding rules, on the other hand, do not apply for this type of decisions.[26] The first derogation means that decisions having military and defence implications must be adopted on the basis of the procedure provided by Article 23(1) TEU, that is, unanimity and ... constructive abstention. As to the specific funding rules for military decisions, they are fully consistent with those applying to Member States resorting to constructive abstention. All this is no coincidence. From the start of the 1997 IGC, it was indeed obvious that the mechanism would be most useful for peace-keeping operations (the Petersberg tasks).

The procedural scope of constructive abstention seems equally narrow, this type of abstention being formally restricted to decisions to be taken by the Council acting unanimously. Article 23(1) TEU sets the basic decision rule for CFSP. It states that "decisions under this Title shall be taken by the Council acting unanimously", that abstentions shall not prevent the adoption of such decisions and that any Member State may qualify its abstention with the limits and consequences described here above. In other words, constructive abstention is mentioned directly after unanimity, in a separate indent but in the same paragraph.

---

25 For instance, Portugal was considering as essential "to decide how many Member States could invoke constructive abstention over individual joint actions or positions" (European Parliament 1996).

26 Article 23 TEU: 1. Decisions under this title shall be taken by the Council acting unanimously. Abstentions by members present in person or represented shall not prevent the adoption of such decisions... 2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority: when adopting joint actions, common positions or taking any other decision on the basis of a common strategy, when adopting any decision implementing a joint action or a common position, when appointing a special representative in accordance with Article 18(5). This paragraph shall not apply to decisions having military or defence implications.

Does it forbid Member States to qualify their abstention when decision-making follows the procedure set by Article 23(2) TEU, that is, when a decision is referred to the European Council for adoption by unanimity[27] or when the Council decides by QMV? As for the possibility to resort to constructive abstention in the European Council, there is no objective or political reason why this could not be the case. Flexibility does not diminish when decision moves up the authority ladder, quite the opposite. Thus, on this point, the silence of the Treaty should not be interpreted too literally.

The question of the compatibility of qualified majority voting and constructive abstention is more complex. When Article 23(2) TEU states that "By derogation from the provisions of paragraph 1, the Council shall act by qualified majority when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; [and] when adopting any decision implementing a joint action or a common position", it does not forbid Member States from abstaining. The derogation only means that abstentions will prevent the adoption of the decision if they bring the 'yes' camp below 62 votes.[28] Likewise, it could be argued that Article 23(2) TEU does not in itself foreclose the possibility of exempting a Member State. This defining feature of constructive abstention is indeed not intrinsically incompatible with QMV. In fact, the only compatibility problem lies with the threshold beyond which the decision shall not be adopted (the upper limit for constructive abstention is 29 votes – cf. supra – whereas the maximum admissible under QMV is 25 votes). When adopting a decision by qualified majority, one should therefore consider that the maximum threshold set by Article 23(1) TEU does not apply. It is replaced by QMV threshold, meaning that a decision would not be adopted if the addition of negative votes, abstentions and constructive abstentions go above 25 votes. All in all, it appears that constructive abstention could be used in the European Council and, perhaps, also for the adoption of a decision under QMV.

Constructive abstention allows Member States to opt out from 'single measures' on a 'case-by-case' basis. In other words, while other forms of differentiation involve sub-policy or policy areas, this mechanism operates on the smallest scale possible (micro-flexibility). This also means that the group of participating Member States is not pre-defined (it is only known for sure after a vote has been taken) and that the size and composition of the group may vary from one measure to the next.

---

27 In a number of cases, the Council may act by qualified majority. However, if one of its members declares its intention to oppose the adoption of the decision to be taken by qualified majority, no vote is taken. The Council then may 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 (Article 23(2) TEU).

28 This would be different if the Treaty was not defining the majority by reference to absolute numbers but to a percentage of positive votes. Then the adoption of the decision would not be prevented by abstentions.

In the name of mutual solidarity and loyal cooperation among EU members, the States abstaining constructively have to accept a number of political and financial obligations. These obligations are significantly lighter than those imposed on Member States resorting to standard abstention (the latter are fully committed by the decision, politically and financially). In that respect, special abstention is less 'constructive' than simple abstention. Resorting to Article 23(1) will nevertheless appear 'constructive' each time Member States strongly opposed to a measure accept to trade their veto for this type of abstention.

Political obligations are, in most cases, fairly limited. Abstaining Member States may indeed follow their own (national) course of action, as long as it does not undermine the Union's action. This restriction however is not as mild as it might seem. In cases of economic sanction and embargo, it means that abstaining Member States will have to apply de facto the measures decided for the Union. Their opt-out then will be purely symbolical.

Financial obligations are more substantial. In 1996-7, the Spanish government – ironically perhaps considering recent developments – was adamant that, on CFSP, "solidarity in general, and financial solidarity in particular, should inform the funding formulas, which should also apply in the case of positive abstention or opting-out" (European Parliament 1996). Except for military and defence matters, the Treaty has largely adopted that view[29]. Indeed, CFSP expenditures are charged by default to the EU budget. The Council may decide otherwise for operational expenditures, but only by unanimity. This guarantees that financial solidarity cannot be broken unilaterally.

As for military and defence expenditures, the Treaty states that Member States having qualified their abstention "shall not be obliged to contribute" to their financing. This derogation is of course very substantial insofar as military operations are often the most expensive CFSP actions. One should however not overlook the subtle nuance of the wording used: it is not said that the Member States abstaining constructively will make no financial contribution, but that they cannot 'be obliged' to do so. In other words, the mechanism

---

[29] Article 28 TEU: 2. Administrative expenditure ... shall be charged to the budget of the European Communities. ... 3. Operating expenditure to which the implementation of those provisions gives rise shall also be charged to the budget of the European Communities, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise. In cases where expenditure is not charged to the budget of the European Communities, it shall be charged to the Member States in accordance with the gross national product scale, unless the Council acting unanimously decides otherwise. As for expenditure arising from operations having military or defence implications, Member States whose representatives in the Council have made a formal declaration under Article 23(1), second subparagraph, shall not be obliged to contribute to the financing thereof.

comprises an implicit invitation for voluntary contribution. This point is not purely rhetorical. In international relations it is not uncommon to see States with conflicting interests or allegiances, which cannot afford political solidarity with a third country and yet are willing to help financially.

The current Treaty does not address the question of follow-up decisions. In the event of urgent and/or volatile problems, the initial decision setting the immediate and/or general objectives of the Union will have to be reviewed and probably amended. The silence of the Treaty could pose a problem. Logically speaking, Member States having resorted to constructive abstention should not be allowed to block the adoption of follow-up measures.

There is no provision either indicating how a Member State can drop its initial abstention and join the other Member States in the implementation of the decision. This point is underlined by Filip Tuytschaever who argues that, in the absence of any specific provision, the adoption of a new decision seems necessary (Tuytschaever 1999: 87). A priori this would not require more than a decision of the Council establishing that the Member State has lifted its abstention and is fully bound by the initial decision.

5.2 Ex ante evaluation of constructive abstention

The evaluation of the pros and cons of constructive abstention shows that the current mechanism has several important drawbacks. It remains that it offers an interesting second or third best solution for CFSP and should therefore be kept among other flexibility tools.

5.2.1 Arguments in favour of constructive abstention

Constructive abstention allows the Union to take action where it would have been previously condemned to silence. It helps in particular when dealing with domestic politics: “An abstaining government can argue to its voters that it did not support the legislation” even “if under unanimity an abstention is equivalent to support for a proposal”(Hix 1999: 68-9). This is true for the neutrals. This is also true for countries with very specific geopolitical interests which lead them to resist any EU intervention in a third country (peace enforcement).[30] All in all, constructive abstention changes the perception of the veto, lowering tolerance vis-à-vis national veto which has now become a gesture of utmost gravity. It prepares for the introduction of a 'super-qualified majority' arrangement (consensus minus one or two).

---

[30] Mutatis mutandis, during the Kosovo crisis, Greece strongly opposed the use of force against the Yugoslav regime, made it known but let NATO go ahead with its military strikes.

Constructive abstention gives an opportunity to set higher ambitions and move faster. As the EU increases in size and diversity, operations binding all Member States cannot be but 'particularly low-key, low-risk and low-cost' (Missiroli 2000: 16). Constructive abstention represents a possibility to push back that 'triple L' limit.

Constructive abstention is remarkable in terms of procedural simplicity, parsimony and versatility. This procedure is very light compared to enhanced cooperation. Insofar as it provides for micro-flexibility, it is also highly versatile, which is important in international politics.[31]

It is comparatively 'discreet'. Enhanced cooperation, protocols entrenching ad hoc arrangements or enhanced Union, by their nature, are bound to be widely publicized. Compared to these options, constructive abstention offers a better chance for putting on a façade of unity.

Constructive abstention does not require institutional changes at EU level (variable geometry and special decision-making procedures). As long as differentiation pertains 'to specific legislative acts or situations', there is no repercussion on the composition of EU institutions or on its decision-making procedures.

It facilitates the import of new competence (EU policy widening). Constructive abstention has, for instance, eased the extension of the CFSP to peace-keeping operations. It prepared the ground for the other parts of the Western European Union's *acquis*.

5.2.2 Arguments against constructive abstention

Constructive abstention may undermine the credibility of the decision and its implementation insofar as the Union cannot rely on a number of national assets[32].

---

[31] In the case of CFSP decisions, flexibility is required not as regards policy but for specific measures dictated by the constantly moving target of international events. The possibility of acting with the abstention of some Member States is a response to this (Petite 1998: 27).

[32] On variables affecting credibility, see Missiroli (2000: 15). Credibility mainly depends on who abstains and on the type of measure adopted. For any action requiring the use of force (peace enforcement), the action of the Union would loose much credibility if the United Kingdom and France (85% of EU member States' military capacities) were resorting to constructive abstention. For peace-building or classical peace-keeping operations, the Union could do without them as shown by many UN peace keeping missions run and staffed by EU small(er) countries. It also depends on the type of decisions concerned (an abstention on general guidelines for the common foreign and security policy or common strategies will be more damaging than on a joint action or common position).

The pick-and-choose approach is, in theory, the most damaging option with respect to maintaining the coherence of a general scheme (Philippart & Sie Dhian Ho 2000: 315-6). There could be also a problem of 'readability'. Constructive abstention however is less confusing than cases of a non-EC/EU policy developed in the EC/EU framework.

EU action with a highly variable territorial scope substantially increases transaction costs (cf. management and judicial costs).

Constructive abstention to some extent invites free-riding and 'wedge politics'. Free-riding is quite common in security matters because of the nature of this collective good. Because of the characteristics of the EU, this strategy often proves costly for free-riders. This problem should probably be considered as relatively minor. Despite its relative discreetness, constructive abstention identifies clearly the 'weak link(s)' in the EU. External relations mean interaction with third countries and international organizations pursuing their own agenda. Such indication is of course precious for those among them wishing to drive a wedge between Member States (cf. coalition strategies).

Case-by-case differentiation tends to undermine package dealing which proved vital for the progress of European integration. Indeed it eliminates "the possibility of cross-sectoral bargains, and hence entails the danger of paralysis on account of discussions pertaining to the principle of fair return" (Tuytschaever 1999:234).

5.3 Recommendations

Several key players in the European Convention referred explicitly to constructive abstention. One of the vice-presidents of the Convention, Jean-Luc Dehaene, invited the members of the working group on external action to reflect on 'better use of constructive abstention' (CONV 356/02: 1). Lamberto Dini, the former Italian Prime Minister and member of the Convention designated by the Italian Senate, said that he was in favour of strengthening or widening the notion of constructive abstention. Among measures aiming at improving CFSP effectiveness, Javier Solana proposed to explore the possibilities provided by that procedure (Solana 2002: 1).

However few concrete proposals have as yet been aired in the Convention. Some do no more than restating the present state-of-play and have therefore been discarded here[33]. Of the four

---

33 For instance, Cushnahan (2003) proposes that member states adopting "a policy of 'constructive abstention' will not be allowed to oppose the agreed EU policy" – which is already the case. See also Kohout (2003: 4).

left, half suggest clarifying specific points while the other half envisage using constructive abstention for other purposes. These proposals together with those made during previous IGCs, as well as recommendations found in recent academic work and options that have not been envisaged yet are listed hereunder for further debate.

Firstly, the Constitutional Treaty could dispel ambiguity over the adoption of follow-up decisions and over the use of constructive abstention regarding defence and military measures. The Treaty could specify that Member States having resorted to constructive abstention are not allowed to block the adoption of follow-up measures.[34] Concretely, it could be decided that abstaining states have no say on that matter in the Political and Security Committee.[35] Another clarification would be to underline in Article 23(1) TEU that constructive abstention applies for decisions having military and defence implications.[36]

Secondly, the Constitutional Treaty could change the design and the scope of the current mechanism. In theory, constructive abstention could be included in new policy packages imported in the EU. It could be extended to other issue areas ruled by unanimity. Combined with qualified majority, it could be used to replace unanimity. It could also be introduced in areas already ruled by majority voting.

Using unanimity plus constructive abstention for importing extra-EU cooperation, Anne-Marie Idrac argues that constructive abstention is one of the 'transitory' rules that could facilitate further integration in defence matters (Idrac 2002). As shown by the previous extension of EU competence in CFSP, this might indeed offer a solution for unable and neutral countries, but not for the atlanticists. Contrary to neutrals who only want to be exempted, atlanticists are indeed determined to block any development undermining the role of NATO. The best way to achieve that is of course to keep sensitive competences out of the Treaties.

New transfer of competence regarding defence, in particular by importing extra-EU cooperation, has to meet other demands such as the need for decision-making procedures to take into account the respective contributory capacity of the Member States. Hence the preference for ad hoc systems going beyond constructive abstention.

---

34 Point emphasized by Alain Richard, former French Defence Minister, Intervention for the Working Group on 'Defence', European Convention (CONV 405/02).

35 The political decision to intervene in a crisis is taken by the Council. Article 25 TEU provides that the PSC (also know as COPS, its French acronym) "shall exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations". Abstaining Member State would take no part in terms of operational control and leadership.

36 See the suggestion of Mathias Jopp made at the seminar of defence experts organized at the request of Michel Barnier, the chairman of the Defence group of the European Convention (CONV 417/02: 5, 8).

Replacing unanimity with unanimity plus constructive abstention

Unanimity is prima facie the most demanding rule.[37] Many observers argue that 'the third enlargement of 1986 crossed a threshold beyond which reliance on consensus building became more problematic' (Hayes-Renshaw & Wallace 1997: 19). Replacing unanimity with unanimity plus constructive abstention helps in that respect, insofar as it diminishes the legitimacy of the veto in a number of cases. However, because of the 'indivisible' nature of some policy areas and because of its highly fragmenting potential, extending the scope of constructive abstention should be decided on a case-by-case basis.

Replacing unanimity with QMV plus constructive abstention

This was the proposal Austria put forward for CFSP during the 1997 IGC.[38] In 2002, Sören Lekberg (member of the Swedish Parliament and of the European Convention) suggested that "decisions in the area of police cooperation and cooperation in criminal matters should be taken by qualified majority" but that the system should "preserve the intergovernmental character of the cooperation in the area." For him, the use of constructive abstention is one of the possibilities for reconciling intergovernmentalism and effectiveness (CONV 376/02). The remarks made for the previous option also apply here.

Replacing QMV with QMV plus constructive abstention

Fritz Scharpf has recently argued in favour of "a generalized possibility of 'constructive abstention' which would allow individual member states to 'opt out' of a common policy which otherwise could be blocked by their negative vote" (Scharpf 2003). European harmonization of taxes on capital interest, of the rules for hostile takeovers or European action in some areas of immigration and asylum policy could be the first areas benefiting from such generalisation.

According to him, "if input and output legitimacy is to be maintained in constellations where problem-solving effectiveness requires European solutions while politically salient policy conflicts cannot be settled by majority vote, 'something's gotta give'". What ought to give is

---

37 This is not always true. Under unanimity, abstention counts as a yes. At the extreme, a decision approved by only one Member State, all the other abstaining, could become EU law (Hix 1999). In some cases then, unanimity plus constructive abstention could prove more rigid than unanimity (see point supra on maximum thresholds).

38 "On the precise arrangements for majority voting, Austria suggests examining the following models: firstly, qualified majority voting for specific areas of the CFSP (to be decided on at the IGC); secondly, super-qualified majority voting (consensus minus one/two) for non-military areas of the CFSP, so as to stop decisions being blocked by a Member State; thirdly, majority voting as the general rule for all aspects of the implementation of joint actions. In all of these cases, Austria believes there should be the possibility of 'constructive abstention' or 'opting-out'" (European Parliament 1996).

the notion that European policy should necessarily generate uniform rules applied equally in all member states, provided on one hand, that common action by a group of member states does not have negative external effects on other member states that are unable or unwilling to join the group, and, on the other hand, that the existence of member states that will not join the group does not have negative external effects on the effectiveness of action by the group. This would require a change regarding the rights of the abstaining States: "In view of free-rider temptations..., it would still be necessary that opt-outs be allowed by a majority in the Council." The European Parliament and the Commission should not have a veto because they are "likely to be committed to uniformity for its own sake".

This option seems quite radical insofar as it represents a form of regressive flexibility, procedurally speaking. Considering the nature of the 'double test' proposed by Fritz Scharpf, it does not mean however that the Union become the pick-and-choose system advocated by others.[39] Nevertheless, the full implications of such a move need to be further examined.

6 ENHANCED UNION

The idea of an enhanced Union (forming a new political entity among a limited number of Member States willing to further integrate in several areas) is for a large part born out of the constraints of the current revision procedure. The latter is indeed a formidable obstacle for coherent and ambitious schemes. Considering present events, it is worth looking at enhanced Union as one scenario among others for dealing with ratification crisis.

This section examines the options in line with the current Treaties as well as 'revolutionary' options such as the 'enhanced Union' (a treaty binding a limited number of Member States and existing alongside the current Treaties) and the '*Union refondée*' (a treaty binding a limited number of Member States and replacing the current Treaties, a sort of reconstituted Union).

The procedure for the amendment of the Treaties on which the European Union is founded is defined in Article 48 of the Treaty on European Union (TEU). It states that amendments have to be approved by a "conference of representatives of Member State governments" (Intergovernmental conference IGC) and only enter into force when they have been ratified by all Member States (European University Institute 2000). The current revision process is governed by that procedure (the European Convention may at times take on the appearances of a Constituent Assembly, but its only prerogative is to prepare the ground for the IGC).

---

39 See the model advocated by Warleigh (2002).

6.1 Scenarios for dealing with ratification crises under the current treaties

If the electorate of a Member State rejects ratification of the Treaty adopted by the IGC, those Member States who have already ratified it, or intend to do so, could, under the current rules:

- make do with the post-Nice Treaties (i.e. abandon the results of the IGC and the hope of revising the institutions and procedures of the Union; resort to existing modes of flexibility – such as 'enhanced cooperation' or constructive abstention – for developing new policies);
- request the government concerned to seek further ratification of the rejected text. Choosing this path rests on one of the following assumptions: the setback was a problem of timing and one only needs to await a more propitious electoral climate; the setback was the result of government failing to provide adequate explanation of the treaty amendments (information deficit) or lack of political commitment (political deficit); in these circumstances a more vigorous information campaign or greater political effort to construct a coalition of the willing would be sufficient (e.g. Nice Treaty and the resolution of the problem in Ireland 2001-2);
- issue a political declaration clarifying certain points, offer reassurance or even derogations to the recalcitrant state and so 'buy' its ratification (e.g. Maastricht Treaty and the Danish problem in 1992-3, resolved following a political agreement at the Edinburgh European Council December 2002). These agreements have no legal basis (in the case of the derogations they are even anti constitutional). Such political declarations could also include a promise to incorporate these assurances and derogations in the Treaties on the occasion of their next revision;
- withdraw the text and, within the framework of Article 48 TEU, convene a new IGC to consider a new plan of amendments that would include various schemes for differentiated integration – ad hoc forms of flexibility and/or a revised mechanism for 'enhanced cooperation' (i.e. system allowing a group of Member States to use the EU framework to develop new policies that only bind the participating Member States) (Philippart 2003);
- invite the recalcitrant state to leave the Union. The current Treaties have no mechanism for such action, which does not mean that it is impossible to leave the Union.[40]

---

[40] The idea of withdrawal is largely incompatible with the model on which the Union has been initially built. The founding fathers of the European Community were indeed 'determined to lay the foundations of an ever closer union among the peoples of Europe' (preamble TEC). That political ambition was reasserted in the preamble of the TEU and given a legal basis in TEU Article 1. Consequently, no article in the Treaties provides for the withdrawal of Member State from the Union. Except for the ECSC, the Treaties have all been concluded for an unlimited period. Membership has been conceived as a *voyage sans retour*, i.e. an

Important members of the Convention are now suggesting that the invitation to leave should become an obligation. The amendment to Article G put forward by Andrew Duff *et al*, proposes that the European Constitution will enter into force after approval by the European Parliament and ratification by five sixths of the Member States. Those Member States not wishing to ratify the new treaty will be able to negotiate an association status with the Union. Similar amendments have also been tabled at the Convention in the name of the European People's Party by Elmar Brok and others as well as by Borrell and Carnero y Lopez Garrido, proposing entry into force after approval by four fifths of the Member States.

The Presidium's proposal for the adoption, ratification and entry into force of the constitutional treaty (Article G) is not without ambiguity on this point.[41] On the one hand, the Presidium underlines that, according to Article 48 TEU, the Constitutional Treaty cannot enter into force "unless it has been ratified by all the Member States which signed it" and "if at least one of the signatory States did not ratify the Constitutional Treaty, it could not enter into force and the current Treaties would continue to apply." (CONV 647/03). On the other hand, the second paragraph of the Presidium proposal refers to the entry into force of the Constitutional Treaty "... following the deposit of the instrument of ratification by the last signatory state to take this step." Some members of the Convention maintain that this wording would allow the Treaty to enter into force without the unanimous approval of the Member States (see David Heathcoat-Amory and Bonde amendment). This interpretation is strengthened by the fact that the Presidium's proposal includes a clause for a meeting to discuss possible ratification problems (Article G paragraph 3). This could suggest that the Treaty would indeed come into effect when four fifths of the Member States had ratified. This could also be a simple flaw in the proposal. As Haenel and Badinter emphasise in their amendment to Part III, "the assumption is that this arrangement [the meeting clause] will only become effective with the Constitutional Treaty itself, which presupposes that it has been ratified by all the Member States".[42]

---

irreversible commitment. Irreversibility is however not absolute. It is indeed difficult to imagine that any Member State expressing the desire to withdraw from the Union would be prevented by force from doing so. There is even a precedent at that level with the Greenland case. The present situation should therefore be understood as follows: the right to withdraw is only implicitly recognized; exercising such right might therefore be costly and in any case relatively long and difficult (in the absence of agreed procedure, the transaction costs could be substantial).

41 Article G: 1. The Constitutional Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements ... 2. The Constitutional Treaty shall enter into force on ..., provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step 3. If, two years after the signature of the Constitutional Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

42 See also the Amendment by Hannes Farnleitner, Reinhard Eugen Bösch, Gerhard Tusek and Eduard

6.2 Enhanced union scenario (additional treaty)

If none of these options is acceptable to Member States who have already ratified the IGC results nor sufficient to secure ratification by recalcitrant state(s), those wishing to go further could:

- adopt a constitution-building approach, in other words establish among themselves a new multi-sectoral treaty for the consenting parties, superimposed on the existing treaties. This would constitute a sort of regional union but with the ambition of becoming Europe wide. By analogy with enhanced cooperation, one could therefore talk of an 'enhanced Union'.

This option has been considered at different times in the past, particularly by Jacques Delors and the Club de Florence (1996).

Among the amendments tabled by the members of the European Convention, only one foresees a permanent system of coexistence between the consolidated treaties that came into effect 1 February 2003 and the Constitutional Treaty that should be adopted by the end of 2003. Taking into account the fact that the existing treaties can only be repealed with the consent of all members of the Union, Jan Zahradil suggests that the states who have not ratified the Constitutional Treaty retain their current status and that pre 2003-4 arrangements continue to be applied.[43]

6.2.1 Defining and instituting an enhanced union

Insofar as this paper is reviewing scenarios for dealing with ratification crises, we assume that Member States envisaging an enhanced Union do so because others are blocking the entry into force of a new EU Treaty. From this, it may be deduced that they are not opposed to and probably prefer to develop new policies on the basis of a Treaty.

Insofar as it is not a case of amending existing treaties but adding to them, these states are not subject to Article 48 TEU. They will be free to set their own rules for the negotiation, adoption and ratification of the 'enhanced Union' treaty. This does not mean that their approach would have to be purely intergovernmental. They could choose the option of a

---

Mainoni: "The applicability of the provision of para 3 depends – from a legal point of view – on the entry into force of the Constitutional Treaty. In such a case there is of course no need for it any more as all Member States have ratified the Constitutional Treaty."

43 Brok et al also envisage this sort of coexistence but only on a temporary basis, i.e. during the time in which the recalcitrant states decided if they will ratify the Constitution or leave the Union (1 year to begin from the application of the Constitution in the States who have ratified). Amendment Brok *et al* on behalf of the EPP Convention Group.

convention preparing the diplomatic phase or even the option of a constituent assembly. Representatives from the European Commission and/or the European Parliament could also be invited so that early consideration could be given to exactly how the European Union would interact with the future enhanced Union. The participation of supranational European institutions should not cause major legal problems (at least if the latter are invited to participate as observers).[44] Though the Commission was not associated with the launching of the Schengen agreement in 1985, it was invited to participate as an observer in the work of the institutions set up by the 1990 Schengen Convention. Having said this, involving the Commission in the creation of an enhanced Union would place it in a difficult situation. Unless the Commission has a mandate from the Council for this, it could give the impression that it was acting on behalf of one 'camp' at the expense of the European Union's interest.

As to the ratification of the 'enhanced Union' treaty, it could also be organized on a new basis.[45] There are numerous options at that level: ratification by enhanced Union-wide referendum or by a congress; entry into force after ratification by a majority (four fifths being the most often mentioned threshold); partial entry into force (ie only in those countries that have ratified before an agreed date or when a predetermined number of countries have ratified). Above all the procedure adopted will have to be relatively conservative in order to minimise political risk. The supporters of an enhanced Union treaty will indeed need to overcome opposition stronger than that associated with the revision of treaties already in place (namely the opposition of those satisfied with the current level of European integration and those wanting to re-nationalise certain European policy areas). They will not be able to count on the entire pro-integrationist electorate, some in that camp being bound to reject the enhanced Union option as being dangerously divisive.

6.2.2 Contents of the new treaty for an enhanced union

Those countries in favour of an additional Treaty could use the conclusions of the 2003 IGC. This would have the advantage of being quick and easy, as well as relatively centripetal (recalcitrant states are more likely to be attracted by a scheme they helped design than by a new framework entirely defined around pro-integrationist preferences). However, adopting the agreement produced by the IGC would not necessarily provide the best basis for the enhanced Union. Why, indeed, use a text that had, of necessity, been influenced by

---

44 If the aim were to conclude a 'geographical' treaty like the one for the protection of the Alps (7 November 1991) or the protection of the Rhine (12 April 1999), the Commission could be invited to participate in negotiations. This would not make sense in the case of discussions on an enhanced Union. By definition, the European Community cannot be a signatory of such treaty.

45 Article 24 of the Vienna Convention on the Law of Treaties: "a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree".

concessions made to states with different ambitions and logic? Not to mention the fact that IGCs often end up in hectic package dealing among heads of state and government, which does no good for policy coherence. Therefore it would be preferable to use instead the European Convention's proposal (because of its particular legitimacy) or to draw up a new text, based completely on the ambitions of those countries wanting to move forward.

In any case the new treaty will need to fulfil certain conditions, i.e. not be in contravention of obligations required by EU/EC Treaties, nor hinder EU/EC policies. The exclusive competences of the EU will, by definition, be off limits. The enhanced Union could follow the Schengen format, focusing on a specific objective, or embrace several dormant or underdeveloped policies. The ambition could, for instance, be to set a 'security +' Union dealing with defence, border guards, police, social security and so on.

6.2.3 The institutional links between the European Union and the enhanced union

Without doubt the creation of an enhanced Union would pose complex legal and organisational problems but should be feasible. There are two institutional options: cohabitation or splitting up. Provided that the enhanced Union is not perceived as a threat or that its supporters are able to impose such a solution, one could imagine retaining a common institutional structure, functioning through various variable geometry arrangements. If the countries refusing further integration object to the use of the EU's institutions or impose too stringent conditions, the enhanced Union will have to have a separate set of institutions.

The option of the enhanced Union using the EU's institutions does present some major problems: obtaining the authorisation of all the EU Member States; practical complexity; the particular strain on the supranational institutions of the EU having to serve two masters.

The option of separate institutions would be a priori easier to put in place in that it will not require negotiating the joint use of EU structures.[46] The duplication cost will certainly be substantial, not just in human resource and financial terms, but also in political terms. Such an option could well encourage the members of the enhanced Union to behave as a bloc inside the European Union (caucus syndrome). This would in turn affect mutual solidarity and loyalty within the EU, adding to communication and coordination problems.

---

[46] Negotiations between the EU and Turkey concerning the use of NATO assets for EU missions demonstrated how problematic this type of arrangement could be. And yet, that case only involved two parties meant to become one, having to agree on operational matters regarding a single sector.

Practical complexity or duplication costs will increase with the policy scope of the enhanced Union.

6.2.4 Relationship between the European Union and the enhanced union

The nature of this relationship will largely depend on the size and weight of the group making up the enhanced Union. If this group is able to command a qualified majority in the European Union, the establishment of a system of concentric circles will be possible. In most areas, decisions will be taken by the enhanced Union and afterwards 'transferred' to the European Union. This sort of relationship, in which there is a clear distinction between decision-makers and decision-takers, is rather akin to the one that currently exists between the EU and the three members of EFTA[47] in the context of the agreement on the European Economic Area.

If the group making up the enhanced Union is powerful but not capable of wielding a majority at the European Union level, it will be possible for it to pursue its interests through 'institutional shopping'. In this case, as nothing can happen without its support, the group can choose where to operate. Acting on its preferences, it will be able to decide in which forum policies will be developed first.[48] The European system would then comprise one part built for all (the common *acquis*) and one part developed to meet the needs of a specific group. It would appear in this case that the metaphor of a multi-stage rocket would be more appropriate than that of concentric circles.

If those engaged in an enhanced union are clearly only a minority of the European Union, one could well see the reappearance of a system that pits the differently structured groups against each other. This minority group will not only be unable to set the European agenda but its size will be insufficiently 'dissuasive': a large coalition diminishes the value of staying out, while a small coalition often invites the formation of counter-groups or blocking coalitions ('if you can beat them, don't join them').[49] Fragmentation would follow. Relations among European states would turn into a multi-centred system organized through variable

---

47 Norway, Island and Liechtenstein.

48 For instance, the Member States have different approaches to export credit. In order to limit the use of this instrument for unfair competition, the most liberal minded governments are looking for strict regimes. Such regimes could be developed first at EU, Transatlantic, OECD or WTO level. Interested Member States have therefore the possibility to do some institutional shopping, i.e. go to various places and see where they will have the best deal. Interregional fora are often used for intra-regional purposes.

49 Odell (2000: 192-3). Italy's reaction to the mini-defence summit between Belgium, France, Germany and Luxembourg on 28 April 2003 illustrates that point. Franco Frattini, the Italian foreign affairs Minister, declared that the creation of a mini-military alliance among those countries would 'force' Italy, Spain and the UK to organise their own defence summit.

geometry, with a common base upon which parallel or competing *acquis* would develop. This would be the signal for a return to the 1960s, i.e. a situation characterized by the coexistence of an integrationist group ('founder countries + x'), an intergovernmentalist group and free agents practising unilateralism.

The relations between the EU and the enhanced Union will also be affected by the character of the 'goods' produced by this enhanced Union. One could expect progressive rapprochement or even eventual reunion of the two entities provided that (Kölliker 2001: 125-151):

- the enhanced Union produces 'goods' that cannot be produced at national level or through alternative groupings (clear added value for its members);
- outsiders can be excluded from the benefits created by the enhanced Union;
- the action of the enhanced Union is not without consequence for the outsiders (e.g. neighbouring states being affected by the police cooperation developed between the members of the enhanced Union);
- additional members increase the benefits for the initiating group.

If the excludability and the external consequences are particularly marked, one should expect growing tension between the two entities.

6.3 Scenario of a *Union refondée* (Treaty of substitution)

If none of the previous options was acceptable to the states who had already completed ratification or sufficient to secure ratification in the recalcitrant states, then those countries wanting to further integrate could:

- leave the European Union and set up a new community among themselves.

This is obviously the most dramatic scenario of all. To arrive at that extremity, Member States will have to be very dissatisfied with EU performance and utterly convinced that existing treaties will never be properly revised. Confronted with partners that cannot be convinced or expelled, the only option left to them will be to withdraw unilaterally from the structures of the EU and create a new Union (exit and '*refondation*' strategy).[50]

Opting for a '*Union refondée*' is relatively simple compared to the enhanced Union scenario, insofar as relations between the *Union refondée* and the residual EU will be based on international law. It is also bound to be a very long and costly procedure, politically and financially speaking. Considering the efforts invested in the EU, the level of interdependence

---

[50] On the legality of withdrawal see Weiler & Modrall (1985: 168-9).

of the current Member States and the benefits attached to EU membership, the Union *refondée* is, par excellence, the solution of last resort. It would represent a major reversal in the evolution of the European architecture. For the last fifty years, that evolution has indeed been characterized, on the one hand, by a progressive pan-Europeanisation and, on the other hand, by the management of a growing number of policies in a single forum.

6.4 The outlook for 2004-6

Should the EU prepare for constitutional crisis? Undoubtedly the rejection of the Nice Treaty by the Irish people in June 2001 is a worrying precedent. It shows that a country with a government strongly committed to European integration, which joined the process decades ago and benefited massively from it, may encounter serious ratification problems when asked to ratify relatively modest amendments. The sovereignist and intergovernmentalist stance developed over the last few years by a number of governments in the Union is not a reason for optimism either.

Smooth passage or crisis? The answer will largely depend on the ambitions of the constitutional Treaty in the making. Are we discussing incremental change or regime change? If reality check or self-censorship prevails in the European Convention and if, as expected, the IGC further dilutes the draft Treaty, the ratification of the future Constitutional Treaty of the Union, if tight, should not be too difficult in the large majority of Member States. Classical pressures and concessions should be sufficient to deal with the hard cases. The main issue, however, is not the effectiveness of these methods but their efficiency. Alternative solutions allowing for swifter entry into force of new Treaties are needed. Very few Member States are ready for the extension of majority rule to Treaty ratification. The necessary social legitimacy is simply not there. If neither submission nor obstruction is acceptable (Scharpf 2003), the only solutions are to be found in subtraction. In that respect, an automatic withdrawal clause seems both fair and logic.

The 'enhanced Union' scenario can certainly be used to convince reluctant Member States to ratify the new Constitutional Treaty. More importantly, it offers a solution to a problem that goes beyond ratification crisis, i.e. the problem of what is submitted for ratification. The current revision procedure is indeed a formidable obstacle for coherent and ambitious schemes. Those keen to promote such schemes should therefore not exclude the possibility of establishing an enhanced Union à la Schengen, either if the ratification of the new Treaty is blocked or if its contents are minimalist. As for the Union refondée, it will most probably remain the nuclear option nobody wants to envisage for many more political generations.

Bibliography

Bribosia, H. (1998) 'De la subsidiarité à la coopération renforcée', pp. 23-92 in Y. Lejeune (ed.), *Le Traité d'Amsterdam: Espoirs et* déceptions, Bruxelles: Bruylant.

Bribosia, H. (2001), 'Les coopérations renforcées au lendemain du traité de Nice', *Revue du Droit de l'Union Européenne*, N° 1: 111-171.

Club de Florence (1996) *Europe: l'impossible statu quo*, Paris: Stock.

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

Commissariat Général du Plan (2003b) *Autour de l'Euro et au delà : l'UEM et les coopérations renforcées*, Rapport de l'atelier sur les coopérations renforcées dans les domaines économique et monétaire (président: Jean Pisani-Ferry; rapporteur: Benoît Cœuré), (http://www.plan.gouv.fr/Publications/cooperationsrenforcee-/rapportUEM.pdf).

Commission of the European Communities (2002) *A Project for the European Union*, Brussels, COM (2002) 247 of 22 May (also CONV 229/02).

Commission of the European Communities (2002) *Constitution of the European Union, contribution to a preliminary draft*, a feasibility study, (rapporteur: A. Lamassoure), (http://europa.eu.int/forum/documents/offtext/const051202_en/pdf).

Constantinesco, V. (1997) 'Les clauses de 'coopération renforcée', Le protocole sur l'application des principes de subsidiarité et de proportionnalité', *Revue trimestrielle de droit européen,* Vol. 33, 4: 43-59.

Convention (356/2002) *Summary of the meeting held on 15 October 2002*, Note from the Secretariat to the Working Group VII on 'External Action', Brussels, 21 October 2002.

Convention (405/2002) *Note de synthèse de la réunion tenue le 4 novembre 2002*, Note du Secrétariat au Groupe de travail VIII 'Défense', Convention européenne, Le secrétariat, Bruxelles, 14 novembre.

Convention (417/2002) *Rapport du Séminaire sur la Défense* Note d'information du Secrétariat de la Convention, Bruxelles, 21 November.

Convention (426/2002) *Final Report of Working Group X 'Freedom, Security and Justice,* Report from the Chairman of Working Group X 'Freedom, Security and Justice' to the Convention, The European Convention, The Secretariat, Brussels, 2 December.

Convention (CONV 449/2002) *Summary report on the plenary session, Brussels, 5 and 6 December 2002*, The European Convention, The Secretariat, Brussels, 13 December.

Convention (459/2002) *Final Report of Working Group VII on External Action*, Report from the Working Group VII – External Action to the Members of the Convention, The European Convention, The Secretariat, Brussels, 16 December.

Convention (461/2002) *Final report of Working Group VIII – Defence,* Report from the Chairman of Working Group VIII – Defence to the Convention, The European Convention, The Secretariat, Brussels, 16 December.

Convention, (CONV 473/2002) *Summary report on the plenary session, Brussels, 20 December 2002*, The European Convention, the Secretariat, Brussels, 23 December.

Convention (528/2003) *Draft of Articles 1 to 16 of the Constitutional Treaty,* Note from the Presidium to the Convention, European Convention, The Secretariat, Brussels, 6 February.

Convention (647/2003) *Part III: General and final provisions* Note from the Presidium to the Convention, European Convention, The Secretariat, Brussels, 2 April.

Convention (691/2003) *Institutions – draft* Articles *for Title IV of Part I of the Constitution,* Note from the Presidium to the Convention, European Convention, The Secretariat, Brussels, 23 April.

Cushnahan, J. (2003) *Improving the effectiveness of EU foreign policy*, Contribution 276 (CONV 615/03), European Convention, The Secretariat, Brussels, 14 March.

Delors, J. (2003) 'Foreword', in E. Philippart, *A New Mechanism of Enhanced Co-operation for the Enlarged European Union,* Paris: Groupement d'Études et de Recherches Notre Europe, Research and European Issues No. 22, March 2003.

European Parliament (2000) *Resolution on closer cooperation,* Brussels, 2000/2162(INI) of 25 October.

European Parliament (1996) *White Paper on the 1996 Intergovernmental Conference Volume II, Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference*, Intergovernmental Conference Task Force, 29 march.

European University Institute (2000), *Reforming the Treaties' amendment procedures – Second report on the reorganization of the European Union Treaties submitted to the European Commission on 31 July 2000*, EUI – Robert Schuman Centre for advanced studies, Florence (Coordinators Claus-Dieter Ehlermann & Yves Mény; rapporteur: Hervé Bribosia).

Feenstra, J. en K. Mortelmans (1985) *Gedifferentieerde integratie en Gemeenschapsrecht. Institutioneel- en materieelrechtelijke aspecten.* Wetenschappelijke Raad voor het Regeringsbeleid, Voorstudies en achtergronden V48, Den Haag: SdU.

Fischer, J. & Villepin, D. de (2002) *Deutsch-französische Vorschläge für den Europäischen Konvent zum Raum der Freiheit, der Sicherheit und des Rechts,* Europäischer Konvent, Das Sekretariat, Brüssel, den 27. November 2002.

Hayes-Renshaw, F. and H. Wallace (1997), *The Council of Ministers*, Basingstoke: Macmillan.

Hix, S. (1999) *The Political System of the European Union*, London: MacMillan.

Hodson, D. and I. Maher (2002) 'The open method as a new mode of governance', *Journal of Common Market Studies*, Vol. 39, No. 4: 719-46.

Idrac A. (2002) *Les compétences de l'Union au service de l'intérêt commun des peuples d'Europe,* Contribution (CONV 44/02), The Secretariat, Bruxelles, 3 mai.

Kerchove, G. de. (2002) *Intervention de M. Gilles de Kerchove, directeur du Secrétariat général du Conseil, devant le Groupe de travail X 'Liberté, sécurité et justice',* Working document 35 of Working Group X, Secretariat de La Convention Europeenne, *8 Octobre.*

Kohout, J. (2003) *Non paper on the reform of European Institutions*, Contribution (CONV 485/03), European Convention, The Secretariat, Brussels, 15 January.

Kölliker, A. (2001) 'Bringing together or driving apart the Union? Towards a theory of differentiated integration', *West European Politics*, Vol. 24, No. 4 October.

Lekberg, S. (2002) '*Freedom, security and justice: How to increase the decision-making capacity of the European Union in order to combat crime'*, Contribution (376/02), The Secretariat, Brussels, 29 October.

Missiroli, A. (2000) *CFSP, defence and flexibility*, Institute for Security Studies – Western European Union, Chaillot Papers, N°38, February.

Odell, J, (2000) *Negotiating the world economy*, Itchaka: Cornell University Press.

Petite, M. (1998), *The Treaty of Amsterdam*, Harvard Jean Monnet Working Paper, 2/98.

Philippart, E. (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.

Philippart E. (2003a) 'A new mechanism of Enhanced Co-operation for the enlarged European Union', *Notre Europe (Research and European Issues),* N°22, March (http://www.notre-europe.asso.fr/fichiers/Etud22-en.pdf).

Philippart, E. (2003b) 'Combler le déficit prévisionnel – Typologie et méthode d'évaluation de la flexibilité dans l'Union européenne', in *Mélanges en hommage à Jean-Victor Louis*, Editions de l'Université de Bruxelles, Bruxelles, 2 volumes (forth.).

Philippart E. & M. Sie Dhian Ho (2000), 'From Uniformity to Flexibility. The management of diversity and its impact on the EU system of governance', pp.299-336 in De Búrca G.

and J. Scott (eds.) *Constitutional Change in the EU; From Uniformity to Flexibility*, Oxford: Hart Publishing.

Philippart, E. & M. Sie Dhian Ho (2000) 'Answering EU's Need for Policy Laboratories and Sub-Systemic Schemes: Reflections on the Reform of 'Closer Cooperation'', in: *Current Politics and Economics of Europe*, Vol. 10, No. 1: 51-72.

Philippart, E. & M. Sie Dhian Ho (2001) *Pedalling against the Wind. Strategies to strengthen the EU's Capacity to Act in the Context of Enlargement*, Working Documents 115, The Hague: Scientific Council for Government Policy.

Piris, J. (2002) *Simplification of legislative procedures and instruments,* Working Group IX, Working document 06, The European Convention, The Secretariat, Brussels, 6 November.

Quermonne, J. (2002) *La question du gouvernement européen*, Paris: Groupement d'Études et de Recherches Notre Europe, Research and European Issues, No. 20.

Scharpf, F. (2002a) *Legitimate Diversity: The New Challenge of European Integration*, Paris: Cahiers Européens de Sciences Po.

Scharpf, F. (2002b) 'The European social model: coping with the challenges of diversity', in *Journal of Common Market Studies*, Vol. 40, No. 4: 645-70.

Scharpf, F. (2003), 'Problem-Solving Effectiveness and Democratic Accountability in the EU', MPIfG Working Paper 03/1, Max Planck Institute for the Study of Societies.

Scheltema, M. (2003) *Comments*, WRR Workshop on the European Constitution, The Hague: 11 april.

Schoutheete, P. de (is dit 2001) 'Closer cooperation. Political background and issues in the negotiation', J. Monar and W. Wessels (eds.), *The Treaty of Amsterdam: Challenges and Opportunities for the European Union)* London: Pinter.

Scott J. (eds.) *Constitutional change in the EU: From Uniformity to Flexibility*, Oxford: Hart Publishing.

Shaw, J. (2003a) *Flexibility in a 'reorganised' and 'simplified' Treaty: a practical proposal*, The Federal Trust, London.

Shaw, J. (2003b), 'Flexibility in a 'reorganised' and 'simplified' Treaty', *in Common Market Law Review*, Vol. 40, No. 2: pp. 279-311.

Solana, J. (2002) *Address at the meeting of WG VII on 15 October 2002,* Working document 8, working group VII, European Convention, The Secretariat, Brussels.

Stubb, A. (2003) *Forming an EU 'hard core' - 'Old' or 'New' Flexibility, The European Policy Centre*, One or several Europe, 26 February 2003.

Tuytschaever, F. (1999), *Differentiation in European Union Law*, Oxford: Hart Publishing.

Villepin, de D. & J. Fischer (2002) *Contribution presenting joint Franco-German Proposals for the European Convention in the field of European security and defence policy*,

Contribution 150 (CONV 422/02), The European Convention, The Secretariat, Brussels, 22 November.

Warleigh, A. (2002) *Flexible integration – Which model for the European Union,* London: Sheffield Academic Press.

Weiler J. & J. Modrall (1985), 'The creation of the European Union and its relations to the EEC Treaties', in R. Bieber, J. Jacqué & J. Weiler, *An ever closer Union – A critical analysis of the Draft Treaty establishing the European Union*, Luxembourg: Office for Official Publications of the European Communities.

Witte, B. de (2001) 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', pp. 231-267 in B. De Witte, D. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, Antwerpen: Intersentia.