



EPC WORKING PAPER N° 9

Integrating Europe
Multiple speeds - One direction?

April 2004

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Franklin Dehousse
Wouter Coussens
Giovanni Grevi

**POLITICAL
EUROPE**



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FLEXIBLE INTEGRATION : WHAT COULD BE THE POTENTIAL APPLICATIONS ?¹

By Franklin Dehousse and Wouter Coussens

During 2003, flexible integration has been regularly evoked in speeches about the future of Europe. At the end of the year, it was mentioned as a kind of threat meant to impose the adoption of the Convention's Constitutional Treaty. More fundamentally, the limited results of the Convention, combined with the institutional impact of the enlargement, will create a context in which it will be difficult not to use the possibilities opened by the treaties of Amsterdam and Nice. It thus seemed useful to examine what could be done *in concreto*. The objective of this paper is therefore not to analyse in detail the legal nature of the different flexible integration arrangements, but to analyse what could be done with them.

This debate is complicated by a considerable conceptual confusion. Before making specific policy recommendations, it is therefore recommendable to clarify first the terminology. We will refer to 'flexible integration' as the overarching term referring to all sorts of collective action in a specific domain in which not all EU Member States are involved for lack of either political consensus or capacity to participate. Enhanced cooperation, allowed conditionally by article 43 TEU, is thus only one form among others of flexible integration.

Examining the possible uses of flexible integration is not at all easy. The technical aspects are very complex. There are a lot of connections with the present EU policies. It is consequently necessary to develop a progressive analysis. One must thus begin with a reminder of the previous experiences (chapter 1) and of the treaty provisions (chapter 2). It then becomes possible to define different categories of initiatives (chapter 3) and to examine possible projects in that context (chapter 4). These projects will concern the main areas of the last years: economic cooperation, internal security, foreign policy and defence. We will try, finally, to define a few practical lessons (chapter 5).

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1. Flexibility : experiences so far

It has long been a matter of Community orthodoxy that all its Member States should do the same thing at the same time, with the same rights and obligations for all of them. Admittedly, the initial Treaties did contain some provisions establishing differential regimes. Yet, these regimes were considered exemptions, allowed only for a limited period of time (e.g. transition periods) or responding to an objective socio-economic difference in situation (e.g. outermost regions). Apart from these forms of what is sometimes called ‘micro-flexibility,’ the issue of ‘flexible integration’ largely remained a taboo.² Nonetheless, it should be underlined that under this ‘veil of uniformity,’ some forms of micro-flexibility clearly occurred in specific cases which were neither temporary nor based on objective reasons. This even occurred within the ‘core business’ of the Union, i.e. the internal market.³

EU Member States however embarked upon several experiments *outside* the EU framework which involved only a limited number of Member States. Several examples exist: WEU, Eurocorps, EMS etc. For reasons of brevity, we only consider Schengen (1.1) and the WEU (1.2) here.

With the expansion of the Union’s membership as well its scope of action, this ‘taboo’ on intra-EU flexible integration has gradually been lifted. The Treaty of Maastricht constituted a turning point in this respect, by providing for derogations at the primary law level for Member States which were not able (e.g. the EMU convergence criteria) or willing (e.g. the UK opt-out of the Social Charter) to participate in certain policies.⁴ Accordingly, the Maastricht Treaty increased the level of flexibility *within* the Treaty framework, notably in the domains of social policy (1.3) and EMU (1.4).

1.1. Schengen

The origins of Schengen lie in the disagreement between the Member States on the concept of ‘free movement of persons.’ Some Member States felt that this should apply to EU citizens only, which would involve keeping internal border checks in order to distinguish between citizens and non-EU nationals. Others argued in favour of free movement for everyone, which would mean an end to internal border checks altogether. Since the Member States were unable to reach an agreement, France, Germany and the Benelux decided in 1985 to create a territory without internal borders, which became known as the “Schengen area.”

Schengen abolished the internal borders of the signatory states and created a single external border with common asylum and immigration checks. Moreover, this freedom of movement was accompanied by so-called “compensatory” measures. This involved an enhanced coordination between the police, customs and the judiciary as well as measures to combat terrorism and organised crime.

‘Schengen’ has been characterised by a strong centripetal dynamic. Currently, only three Member States are not fully involved: the UK, Ireland and Denmark. This dynamic also opened the door for the Treaty of Amsterdam to incorporate the decisions taken by the Schengen group members and the associated working structures into EU law.

The Schengen experience is illustrative in many ways of how flexible integration may complicate policy-making in the EU. It has illustrated that flexibility may trouble the relationship between Member States. For example, the question of membership for others was intentionally frozen by the five initiators, so as to ensure that they could set the basic rules themselves. Moreover, the ‘ins’ may be tempted to blackmail the ‘outs’ that wish to join the cooperation. This happened when in 1999 the Spanish government made its decision on the participation of the UK in certain aspects of Schengen dependent on a favourable solution of the Gibraltar issue.⁵ The latter dispute delayed the decision and an agreement could only be reached in 2000. This shows that the conditionality and procedure for joining should be clearly laid down. Schengen also illustrates the difficulty of integrating an extra-EU cooperation, and the administrative structures set up to that effect, into the EU framework.

Schengen moreover illustrates that law-making, implementation and management become somewhat more complicated in an area of flexible integration. It is sometimes unclear whether a specific subject-matter concerns Schengen and what states are involved. In turn, this complicates policy-making and renders it more difficult to explain to the public.

1.2. Western European Union (WEU)

In 1948, France, UK and the Benelux-countries signed the Treaty of Brussels. The Brussels Treaty Organisation – as it was then called – provided for collective self-defence and economic, social and cultural collaboration between its signatories. In 1954, the Brussels Treaty was modified to include Germany and Italy, thus creating the WEU. The WEU is a European organisation for the purposes of cooperation on defence and security. The membership of the WEU expanded to include all current EU countries except for Denmark, Ireland, Austria, Finland and Sweden, which have observer status. The candidate countries have a special status.

Given the predominant role of NATO, the WEU remained essentially a ‘dormant’ organisation. It was reactivated somewhat during the 1980s. The Treaties of Maastricht and Amsterdam made the WEU an “integral part of the development of the Union” and allowed the EU to avail itself of the WEU to implement decisions which have defence implications. The Amsterdam Treaty also raised the perspective of an eventual integration of the WEU into the EU framework.

At the 1999 European Council in Cologne, the EU took a major step toward establishing its own military capabilities and placed the Petersberg tasks at the core of the process of strengthening the European Security and Defence Policy (ESDP). The European Council considered that the integration of the WEU into the EU institutional framework was not necessary, despite the fact that it was foreseen in the Amsterdam Treaty. Rather, those functions that the WEU assumed in the field of the Petersberg tasks would be transferred to the EU. The WEU's main remaining area of responsibility is the collective defence provided for in Article V. The transfer of that responsibility to the Union has not yet taken place.

The experience of the WEU highlights the fact that flexible integration with a limited number of Member States can be a viable solution in cases where not all members share the same political will (i.e. regarding defence). The WEU has also been characterised by an inclusive trend in that ever more Member States have become associated to it. The Treaty-based link between the EU and the WEU has opened the door for the Union itself to take on defensive tasks.

1.3. Social Protocol

In the early years of European integration, social policy was essentially considered as an adjunct to economic policy. The EC focused mainly on the coordination of social security systems for migrant workers and the equal pay principle.

EU social policy received a fresh impetus in the 1980s under the instigation of the French socialists, President François Mitterand and Commission President Jacques Delors. This led *inter alia* to the signing by all the Member States - save Britain - of the Community Charter on the Fundamental Social Rights of Workers (or 'Social Charter'). During the negotiations on the Maastricht Treaty, calls were made to integrate the Charter in the Treaties, but this was rebuked by the UK. A separate 'Protocol on social policy' was thus concluded, which catered for a closer cooperation on social matters between these 11 Member States. This meant that from 1993 onwards there were in fact two distinct legal bases for social policy measures: the EC Treaty itself and a separate agreement from which the United Kingdom had opted out.

This illustrates that flexibility can provide a solution to cases where not all Member States share the same political beliefs. The opt-out of the UK however also strained relations with the participating Member States. Several Member States believed that the UK derived an unfair competitive advantage by having opted out of the Protocol. In 1997, the British government finally agreed to the incorporation of the social protocol in the Treaties.⁶

1.4. EMU

The development of EMU by the Maastricht Treaty further expanded intra-EU flexibility. The Treaty provided that EMU was to be achieved in three stages. Transition to the third stage of a common currency was subject to the achievement of a high degree of durable convergence, measured on the basis of the Maastricht convergence criteria. Member States which were unable to fulfil these criteria would be granted a derogation.

The Treaty not only provided for flexibility in terms of capacity, but also in terms of political will. Thus, the Treaty granted an opt-out to the UK and Denmark, exempting them from the requirement to move to stage three.

The use of convergence criteria has been rather successful. Indeed, convergence was strong during the run-up to the third stage, but has faded since. This underlines the need for strong mechanisms of surveillance and coordination, even after the cooperation has begun.

The functioning of the Eurozone has provoked a rather strong centripetal dynamic. Most of the 'outs' as well as the candidate countries have declared their intention to participate, both for economic reasons (lower interest rates, abolition of transaction costs etc.) and political ones (influencing policy-making).

Flexibility in EMU also led to a complicated relationship between 'outs' and 'ins.' This problem is particularly manifest in the institutional framework, since some decisions, which regard mainly the Eurozone-members are in fact taken by ECOFIN as a whole, giving non-members a say on Euro-matters. This problem will be exacerbated by enlargement, since it will lead to a bigger group of 'outs' within ECOFIN. In turn, this will make it more difficult for the Eurozone members to achieve the necessary majorities within ECOFIN.

1.5. Lessons to be drawn from previous experiences

Previous experiences with flexibility, which aimed at fostering deeper integration, have been quite successful and have in many cases been accompanied by centripetal effects. Thus, flexibility has not always been the end-stage but often a stepping stone towards further communitarisation for all Member States.⁷ This must not hide the existence of (important) exceptions, like the persisting "opt-outs" of various countries in the context of EMU.

The previous experiences also illustrate certain dangers. The relation between the 'outs' and the 'ins' inevitably becomes very complicated. In case of deeper integration outside the EU framework, the prerogatives of the 'outs' may well be affected. Moreover, some forms of flexibility, such as UK opt-out on the Social Charter, may

be perceived as unfair by the others Member States. Finally, and this is the most fundamental lesson, flexibility greatly increases the complexity of law-making and management, both externally and internally. Some flexible regimes are indeed characterised by a Byzantine complexity.

2. Enhanced cooperation in the Treaty

2.1. An innovation of the Amsterdam Treaty...

The revolution in terms of numbers and heterogeneity which Eastern enlargement will bring, led many to query whether a single framework of rules and policies could still be made to apply evenly to a range of such varied members.⁸ The extension of the EU's action scope into areas of 'high politics,' together with the ill-adapted institutional framework, further added to these doubts.

Thus, during the run-up to Amsterdam, many calls were made for the incorporation in the Treaties of a general enabling clause, allowing Member States that are willing and able to embark upon a deeper integration in certain domains without being blocked by the others, whilst ensuring the rights and interests of both the 'ins' and the 'outs.'

Notably, these calls were made for disparate and even contradictory reasons. They not only stemmed from 'integrationist' countries which saw it as a possible substitute for QMV and a useful additional management tool, but also from less integration-minded countries that wanted to limit the tendency for extra-EU cooperation or saw it as a politically more expedient alternative to a federal Union.⁹ The convergence of these contradictory wishes led to the introduction in the Amsterdam Treaty of a general mechanism of 'closer cooperation' (since Nice called 'enhanced cooperation') allowing a group of Member States to use the EU framework to develop policies which would only be binding for them. Thus, Amsterdam turned the 'exception' of Maastricht into a constitutional principle.¹⁰

2.1.1. A limited scope

Amsterdam provided, however, for a limited *scope* of enhanced cooperation. Member States could only make use of the mechanism in the first and the third pillars. Enhanced cooperation in the area of common foreign and security policy was excluded.

In its stead, the Amsterdam Treaty foresaw the possibility of 'constructive abstention' in this pillar (Art. 23 §1 TEU).¹¹ The mechanism of constructive abstention 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 obliged to apply the decision, but accepts that the decision commits the Union.

Secondly, the Member States concerned shall refrain from any action likely to conflict with or impede Union action. Thirdly, if the members qualifying their abstention represent more than one third of the weighted votes, the decision shall not be adopted. The scope of constructive abstention includes all unanimous Council decisions taken in the second pillar, including military ones.

2.1.2. Strict conditions

The *conditions* triggering enhanced cooperation were also rather strict. Enhanced cooperation could only be used as a last resort. Amsterdam furthermore provided that it should not affect the *acquis* and the competences and rights of non-participating Member States, nor discriminate between nationals of Member States. The interpretation of the compliance with these conditions is rather difficult to make. It is for instance difficult to think that an enhanced cooperation could not discriminate between nationals of Member States.

2.1.3. Heavy procedures

The Amsterdam Treaty *procedures* were very heavy. They provided for a veto right for every Member State that opposed enhanced cooperation (the 'emergency brake'). Furthermore, a majority of Member States was required to launch an enhanced cooperation.

At that time, many observers considered that its scope, conditions as well as its implementing procedures were overly strict, and therefore excluded the use of enhanced cooperation in practice. Hence the call to revise its provisions during the Nice IGC.¹²

2.2. ...facilitated by the Treaty of Nice¹³

2.2.1. An increased scope

The Treaty of Nice made a substantial leap forward by introducing the possibility for enhanced cooperation in the area of CFSP (Art. 27b TEU). Still, enhanced cooperation in the second pillar could only be used for the *implementation* of a joint action or a common position (Art. 27b TEU). In that way, enhanced cooperation in the second pillar remains limited to measures implementing agreed policies, rather than setting new policies, which continue to be decided by the Council by unanimity.

Moreover, Nice excluded the use of enhanced cooperation for issues having military or defence implications.¹⁴ This created a large problem, since it is not easy to define foreign policy initiatives which have no military implications. In some cases, it is of course easy, in others much less obvious.

2.2.2. Revised conditions

Nice did not really manage to loosen the general conditionality imposed upon enhanced cooperation. In some aspects, Nice actually even further circumscribed its use. Indeed, an important condition has been added, whereby enhanced cooperation shall not undermine the internal market and economic and social cohesion (Art. 43 (e) TEU). What scope this article leaves for enhanced cooperation in the first pillar is unclear, a fortiori in areas where the *acquis* is already substantially developed. Notably, enhanced cooperation must contribute to enhancing the process of integration.

Other strict conditions have been maintained. For instance, the condition that enhanced cooperation may not constitute a barrier to or discrimination in trade between the Member States nor distort competition between them has been maintained (Art. 43 (f) TEU).

On the other hand, some conditions have been made less strict. The condition that enhanced cooperation may only be used as a last resort is maintained, but a certain (unspecified) time limit is provided ("*within a reasonable period*"), with the verification of this stipulation left to the political discretion of the Council (Art. 43a TEU). Moreover, the conditions that the *acquis* as well as the competences and rights of non-participating Member States should not be *affected* are loosened by saying that they should be *respected* (Art. 43 (h) TEU). The condition that enhanced cooperation may not discriminate between nationals of Member States was abolished.

2.2.3. Simplified procedures

The Nice Treaty has loosened the procedure for setting in motion an enhanced cooperation. The minimum number of Member States required to establish enhanced cooperation was set at eight, whereas the Amsterdam Treaty stipulated that the majority of Member States was needed (Art. 43 (g) TEU). Thus, the ratio of Member States needed to establish an enhanced cooperation will be reduced with the successive enlargements of the EU.

In the first and the third pillar, the possibility of opposing enhanced cooperation (the "emergency brake") has been removed. It has been replaced by the possibility for a Member State to take up the matter with the European Council. After that matter has been raised before the European Council, the Council may nevertheless act by qualified majority on any proposal for enhanced cooperation ("*ralentisseur*"). Furthermore, when enhanced cooperation concerns an area which comes under the codecision process, the assent of the European Parliament is required. In other areas, the European Parliament is merely consulted.

In the second pillar, the authorisation for enhanced cooperation is given by the Council after receiving the opinion of the Commission, but here the "emergency brake" is maintained. The European Parliament only has the right to be informed.

At first sight, the Nice changes may appear positive. Nevertheless, the use of enhanced cooperation remains severely restricted in many aspects and substantial treaty reforms concerning its scope, procedures and conditionality are required for it ever to be used. The Convention presented itself as the perfect arena for correcting these deficiencies.¹⁵

2.3. ...and possibly further fine-tuned in the Constitutional Treaty

The Convention's draft Constitutional Treaty¹⁶ does not modify the substantive conditionality of enhanced cooperation much. The procedural provisions and its scope have been substantially reformed. We will not fully analyse the different changes¹⁷ but limit ourselves to some important reforms.

2.3.1. Extension of its scope to the entire foreign and defence policy

A big step forward has been taken in the area of CFSP, by providing that enhanced cooperation in this area is no longer restricted to the mere implementation of a joint action or a common position. Also, an enhanced cooperation concerning matters having defence or military implications is no longer excluded. Hence, enhanced cooperation will apply across the board for both foreign and defence policy. The possibility to veto an enhanced cooperation in this domain has been abolished.^{18 19}

It is worth noting that the Convention envisages some specific mechanisms of cooperation in the field of defence. It is still to be determined to what extent the general provisions of enhanced cooperation apply to these mechanisms. It is doubtful whether enhanced cooperation *sensu stricto* could also be used to set in motion these specific kinds of flexible arrangements. The text remains somewhat ambiguous on this point.

First, the Convention proposes that the Union can entrust the execution of a task to a limited group of Member States.²⁰ Second, provision is made for Member States, which fulfil higher military criteria and wish to engage upon more demanding military tasks, to establish a structured cooperation.²¹ Somewhat obscurely, the appropriate provisions of enhanced cooperation are applicable, notwithstanding the specific provisions on structured cooperation.²² Third, the Convention also envisages the creation by the Council, acting by QMV, of a European Armaments, Research and Military Capabilities Agency.²³ The agency shall be open to all Member States wishing to be part of it. Fourth, until the establishment of a common defence,²⁴ shall be established within the Union, in close cooperation with NATO. It shall be open to all Member States wishing to be part of it. Finally, the draft Treaty provides that those Member States which together establish multinational forces may also make them available to the common security and defence policy.²⁵

2.3.2. Reduction of the number of procedures

Another improvement in the Convention's draft is the substantial simplification of the mechanism, thanks mainly to the abolition of the pillar system. There are now only two different procedures: one for the Common Foreign and Security Policy (CFSP), and one for all the other domains. The special procedure for the third pillar is abolished. The European Parliament must now give its consent to all cooperation efforts, except those in the area of CFSP.²⁶

2.3.3. Conditional initial participation

A novelty consists in foreseeing that the authorizing decision can now lay down conditions of initial participation to the enhanced cooperation. At present, only the subsequent participation of Member States after the cooperation has been established can be subjected to certain conditions. This novelty will make it possible to take into account objective differences during the initiation of the enhanced cooperation and thus, to exclude those States, which do not fulfill them.²⁷ In that way, the initial participation would no longer merely depend on the simple will of Member States, but also on their capacity to participate.

The conditions of participation will be the same for the Member States which participate initially in the enhanced cooperation and for those which join afterwards. In that way, the possible insertion of objective conditions for initial participation reins in the discretionary power of the Commission, or the Council in the area of CFSP, in deciding on the demands of Member States to participate in an enhanced cooperation after its creation.

2.3.4. A passerelle clause for changing the decision-making mode

The Convention also foresees the possibility for the participants of an enhanced cooperation to decide unanimously to change the applicable decision-making mode. This allows for a shift to QMV in areas where unanimity still applies as well as to codecision of the European Parliament in areas where this is not foreseen.²⁸ It thus allows the participating Member States to resort to QMV and codecision in the relevant policy field. This should improve the policy-making effectiveness and legitimacy of the enhanced cooperation at hand.²⁹

2.3.5. A higher threshold for setting in motion an enhanced cooperation

In one area concerning enhanced cooperation, the Convention's draft does mark a step backwards. Indeed, the minimum number of Member States required to set in motion an enhanced cooperation is now set at one-third instead of 8 Member States as in the Nice Treaty.³⁰ This will mean that the minimum threshold will continually rise in a Union of 28 and more. In turn, this will render its use more difficult. Moreover, it may mean that after new enlargements an enhanced cooperation which

was already set in motion may no longer bring together the required number of participants.³¹

The need for such a fixed threshold is questionable, as the 'critical mass' required will depend on subject-matter. The gatekeeper roles of the Commission, the European Parliament and the Council in the authorisation procedures and the relative openness of enhanced cooperation are sufficient to avoid the emergence of competing cores³² and limit the cost of such initiatives. These institutions could always set a threshold in their authorisation decision if necessary.

2.4. Experiences with enhanced cooperation

Here we can be short. There are to date no experiences with enhanced cooperation yet. Still, its establishment has been envisaged on several occasions, and has often proven instrumental in undermining the opposition of a recalcitrant Member State, such as the Italian government's opposition to the European Arrest Warrant in 2001, or in unblocking a stalemate at the European level, as for instance was the case for the European Company statute.³³

3. Typology of flexible integration

Flexible integration comes in many forms and under many names. This complicates the debate on it. Hence, it is important to set out a clear typology of the different forms of flexible integration. In turn, this will make it easier to assess the pros and cons of the different variants.³⁴

Any categorisation will inevitably be fluid and open for interpretation. One possible way of categorisation, which we believe to be instrumental for our purposes, is to make a distinction on the basis of two axes of differentiation, the first one concerning the scope of the cooperation (3.1), and the second one relating to the treaty base of the flexible arrangement at hand (3.2).

3.1. The scope of the cooperation at hand

A first way of distinguishing different variants is to categorise them according to the scope of the flexible arrangement. Broadly speaking, we believe there to be three different levels. It is very important to distinguish them.

The lowest level would concern a limited group of Member States adopting a *punctual decision*, possibly motivated by the obstruction of one or two Member States. A second level covers the hypothesis where a limited group of Member States try to implement a program of action, comprehending a whole set of measures, in one spe-

cific domain. We will speak here of *ad hoc groups*. A third level relates to configurations where a group of Member States with a fixed composition would proceed in different areas at the same time. We will call such a group an *avant garde*.

The first level does not create many technical problems. The third level on the reverse can generate a lot of legal problems, especially if this *avant-garde* decides to modify some elements of the constitutional system of its members and/or to define some kind of collective management of its relations with the European Union.³⁵ Though this perspective has sometimes been mentioned in a fleeting and allusive way by some speeches, it does not seem realistic in the present context. It will thus not be covered in the present analysis, which will deal with the four hypotheses mentioned below.

3.2. The treaty base of the flexible arrangement

The second axis of differentiation relates to the treaty base of the flexible arrangement at hand. A major distinction line is obviously the question whether the flexible arrangement takes place *inside or outside the treaties*.

It is however necessary to further specify the different possible forms of flexible integration taking place inside the treaties. Arguably, *flexible integration inside the treaties comes in three subvariants*:

- a pre-determined flexible arrangement;
- the enhanced cooperation mechanism;
- constructive abstention.

The first variant takes place at the primary law level. The other two will take place at the secondary law level. Obviously, the different forms described above could come with a different scope. This gives us the following matrix:

	Outside	Inside		
		<i>Pre-determined</i>	<i>Enhanced cooperation</i>	<i>Constr. abstention</i>
<i>Punctual decision</i>				
<i>Ad hoc group</i>				
<i>Avant garde</i>				

3.2.1. Flexible integration outside the Treaties

Flexible integration arrangements outside the treaties are as old as the treaties themselves. As a general rule, Member States may, in matters coming within their competence,³⁶ exercise their powers individually or collectively and may conclude agreements or conventions between them.³⁷ The introduction in the Treaty of the provisions on 'enhanced cooperation' does not preclude the Member States from entering into such cooperation outside the Treaties.³⁸ The only constraint imposed by EU membership on such cooperations is that in doing so, these Member States have to respect the primacy of EU law as well as the duty of sincere cooperation under the Treaty. Therefore, they should not take measures which could conflict with or impede the attainment of the objectives of the Treaty.

Extra-EU flexible integration could come with a variable scope. It may concern a punctual decision or undertaking. Ad hoc groups could be set up in a specific domain. There exist many examples of this, notably in the area of defence (e.g. Occar). A broader scope is obviously also conceivable. An avant garde could indeed proceed to further integration outside the treaties in different areas at the same time.

3.2.2. Predetermined flexibility

This variant concerns cases where the Treaty itself sets up a flexible arrangement and lays down the specific procedures and the participating Member States. Examples of such arrangements are EMU, Schengen (after Amsterdam) and the Title IV TEC provisions regarding the UK, Ireland and Denmark. The Convention's draft provision on 'structured cooperation'³⁹ contains a lot of elements of pre-determined flexibility. Here also, the scope could vary.

3.2.3. Enhanced cooperation

The enhanced cooperation provisions could concern different ad hoc groups. It is also conceivable that an avant garde proceeds in different domains by means of this mechanism.

3.2.4. Constructive abstention⁴⁰

Constructive abstention is a variant of flexible integration, which allows Member States to decide not to participate in a single decision or action, while allowing others to go ahead. It is an expedient instrument to avoid the blockage by one or two Member States. Obviously, this form of flexible integration could also take the form of ad hoc groups.

Its scope is currently limited to unanimous Council decisions taken in the second pillar (including military ones). The question arises however whether it would be advisable to use this mechanism in other domains as well and for other sorts of decisions, for instance decisions taken by QMV.^{41 42} The usefulness of this instrument outside

the realms of CFSP would merit closer attention and in any case requires a careful assessment of the rights and obligations of the 'outs' and the 'ins.' This would lead us beyond the scope of the current paper.

4. Potential applications of flexible integration

In what follows, we will identify cases in which the different forms of flexible integration could be used. For reasons of brevity, we have limited ourselves to seven domains: EMU (4.1), taxation (4.2), social policy (4.3), defence (4.4), foreign policy (4.5), the area of freedom, security and justice (4.6), and environment (4.7). The centripetal or centrifugal effect of the flexible arrangements in these domains will greatly depend upon the nature of the flexible experiment at hand.⁴³

4.1. EMU

One could have the impression that the introduction of the Euro has exhausted the potentialities and requirements of EMU. This is a mistake. With the set-up of the ECB and the successful launch of the Euro, the 'M' of EMU indeed seems pretty much established. Still, for the sake of the long-term viability of EMU, monetary policy must be underpinned by a coherent and coordinated economic policy. This has always been the coordinated approach of the Maastricht Treaty. But the 'E' of EMU remains lacking (which explains at least partly the weak growth of the last years). Moreover, the external and internal credibility of the Euro requires clear mechanisms of representation and single lines of communication.

The unfinished state of the institutional framework of EMU makes it difficult to meet these challenges.⁴⁴ The experience so far shows that the decentralised intergovernmental approach to economic governance is heavily deficient. Clearly, a reinforcement of cooperation in the field of EMU is therefore required. This could involve both a strengthening of the current pre-determined flexibility provisions on EMU (4.1.1) as well as a stronger cooperation outside the EMU Treaty provisions (4.1.2).⁴⁵

4.1.1. Strengthening the pre-determined flexibility provisions on EMU

The current EMU arrangements do not allow the 'ins' to fully ensure their common interests. The cooperation between the 'ins' should thus be strengthened in various ways. Some of these reforms will require Treaty change.

4.1.1.1. *Recognising the Eurogroup as an informal discussion forum*

The Eurogroup has been useful as an *informal* forum for debate between ministers, the ECB and the Commission. Still, the right for Eurozone ministers to hold restricted and confidential meetings, together with the ECB President and the responsible Commissioner, should be explicitly recognised in the Treaty. In this respect, the Convention has followed the Franco-German proposal of recognising the Eurogroup as an informal discussion-forum in a protocol.⁴⁶

In any case, in the perspective of a minority Eurogroup in an enlarged Union, there is a need to strengthen the functioning of the Eurogroup. This could imply a strengthening of the roles of the Commission and the ECB and a clearer description of its working methods.⁴⁷ As such, the Eurogroup could become the 'arena' for a systematic surveillance of the exchange rate and the appropriate body for preparing the decisions taken by the Ecofin-Council in its format restricted to Eurozone-members (cf. 4.1.1.2). The need to formalize further the Eurogroup will depend on the evolution of the group during the next years, and on the recognition of the specificities of the Euro area in the ECOFIN.⁴⁸

The question of the presidency of the Eurogroup merits close attention. The Convention's draft provides for the election of a president for two-and-a-half years by a majority of the ministers of the Member States having adopted the Euro. This presidency will thus not necessarily overlap with that of the ECOFIN-chair. This will bring about further complication. For reasons of transparency and efficiency, it would have been better to have the responsible Commissioner chairing the Eurogroup. This could also ease the fears of the 'outs' that the Eurogroup would become some kind of directorate, which they are unable to influence.

4.1.1.2. Further recognising the Euro area specificity in ECOFIN procedures⁴⁹

After enlargement, the relations between 'ins' and 'outs' of the Eurozone will be dramatically changed in favour of the outs. As a result, the current decision-making procedures may no longer adequately provide for the close coordination which the Eurozone members need.

Calls are therefore made for those countries sharing a single currency to be equipped with the necessary means to take the increased interdependence of their policies more into account. Today, the Treaty provides for a limited number of decisions where only the Eurozone-members are entitled to vote (art. 122 TEC). A larger number of decisions taken by the Ecofin-Council in its restricted format could be envisaged.

The Convention has only very partially taken up this challenge. The only extensions concern the decision on the Eurozone section of the Broad Economic Policy Guidelines (BEPGs)⁵⁰ and the clause allowing the Eurozone states to adopt additional measures to strengthen economic and budgetary coordination.⁵¹ The Euro area specificity could be further acknowledged within the ECOFIN decision making process. This could concern matters regarding the Stability Pact for Eurozone members (decisions on excessive deficits, early warnings, recommendations for Eurozone members), and accession of new members to the Eurozone.⁵² The restricted Ecofin could also be entitled to take measures which are intended to cope with difficulties stemming from the economic situation or to assist a Member State from the Eurozone in severe difficulties (art. 100 TEC).

A more far-reaching reform would be to allow this “Euro-Ecofin Council” to adapt autonomously its own rules of procedure, subject to a ‘call-back’ procedure by the Commission or by a number of Member States. Moreover, this Council could be granted the right to adopt policy guidelines by QMV upon a Commission proposal, when the latter has determined that a particular situation requires a common policy response.⁵³

4.1.2. Improve cooperation outside the Treaty-provisions on EMU

At the same time, economic policy cooperation could be improved by having recourse to other forms of flexible integration which do not require treaty reforms.

4.1.2.1. An economic policy charter of the Eurozone

The increased interdependence, brought about by monetary Union, justifies that different coordination mechanisms are set in place for the Eurozone. Thus, the Euro-Ecofin-Council could endorse an ‘*economic policy charter*’,⁵⁴ drawn up together with the Commission, the Employment and Social Affairs Council in ‘Euro-format’ and the ECB, after consultation of the social partners.⁵⁵ This charter would serve as a code of conduct guiding the economic and employment policies in the Eurozone and foresee the available instruments to respond to shocks affecting the area or some of its members. It could moreover include an *overall fiscal policy stance*, which acts as a guideline for the national stability programmes. This fiscal policy stance should also set upper limits to tax cuts which are not compensated by expenditure cuts, and the approval of the Euro-Ecofin-council would be required for exceeding these limits. The charter could also contain some kind of rainy-day-fund arrangement for the Eurozone members.

4.1.2.2. A stabilisation fund

EMU creates a need for an economic stabilisation mechanism, given the possibility of asymmetric shocks (esp. in an enlarged EMU) and the relative absence of ‘shock absorbers’ (i.e. price and wage flexibility, labour mobility, and budget redistribution). The EU should assist its Member States to absorb asymmetric shocks, especially since monetary-exchange rate policies have been given up and the fiscal manoeuvre space is limited by the Stability and Growth Pact (SGP).⁵⁶ Such a mechanism could provide additional leeway in case a Member State is confronted with an asymmetric shock or with a need to pursue painful structural reforms whilst having to comply with the SGP limits.

It could therefore be envisaged to set up a stabilisation fund⁵⁷ among the Eurozone members, which would be activated when a Member States exhibits an excessive GDP growth differential compared with the EU average trend. The fund could be financed by means of the ‘seigniorage’-revenues of the ECB. In case of economic shocks, it could partially replace the contribution to the EU budget of the Member States in question.

4.1.2.3. Flexible cooperation on structural economic reforms

EMU also entails increasing the flexibility of markets (labour, capital and goods), thus making it less vulnerable to economic shocks. This will be the prime responsibility of the Member States. Tackling such supply-side problems creates the confidence to stimulate demand and may thus lead the ECB to take on a more accommodating macro-economic stance.

If progress with structural reforms falters (which seems to be the case now), it is conceivable that a limited number of Member States take the lead and embark upon ambitious structural reforms in several domains.⁵⁸ This could touch upon several areas, such as taxation (see 4.2), social policy (see 4.3), entrepreneurship, research and development,⁵⁹ education,⁶⁰ innovation policy, etc. This could be done by means of enhanced cooperation in certain domains. In other domains, where the EU's competence is less (or not) developed, it could be envisaged that certain Member States set up an Open Method of Coordination amongst themselves, or move towards more binding coordination methods if such methods prove ineffective.

4.2. Taxation

The requirement of unanimity has been a tremendous obstacle for the EU-15 in this domain. In a Union of 25 Member States, with an even greater heterogeneity of tax systems, progress will be simply impossible in case the unanimity requirement is maintained. In time, this could have a detrimental impact on the functioning of the internal market. The forest of 25 and more different sets of national tax systems remains a major impediment to the free movement of capital, services and labour, and thus an obstacle to the functioning of the single market. A more harmonised tax system could provide for greater simplicity and efficiency.⁶² In the context of rapid economic and technical change there is also a need for a swift adoption and modernisation of legislation. As the Convention failed to make leeway for QMV in this domain⁶¹, enhanced cooperation between a limited number of Member States may provide a possible way forward.

As regards *indirect taxation*, enhanced cooperation could provide a way forward in the area of environmental and energy taxation (see 3.5.1). It could possibly also be used for a further harmonisation of excise duties.

Concerning *direct taxation*, some progress could possibly be made in the field of corporate taxation. We do not call for the Union to establish top-down a single *tax rate*. A harmonisation of *tax bases* however could improve the competitiveness of European industry by lowering high compliance costs and avoiding double taxation and protectionist regulations. If this proves impossible to achieve in the EU-25, enhanced cooperation could be used by some Member States as a basis for harmonising the tax base of certain companies (e.g. SMEs, the European Company etc.).⁶³

The conditions prohibiting any barrier to or discrimination in trade as well as any distortion of competition between Member States need not necessarily be contrary to flexible integration arrangements in this field. Such initiatives, to the extent that they improve the functioning of the internal market, could in fact even lead to exactly the opposite.

4.3. Social policy⁶⁴

It is important to realise that, even before the UK opt-out from the Social Charter, softer forms of flexibility have long been tested in the social field.⁶⁵ This flexibility has not only come about in the choice of instruments (directives setting only minimum standards, soft law processes) and the methods of implementation, but also within the legislative measures themselves.⁶⁶ The reasons for this flexible integration stem from important differences between Member States with respect to their welfare state institutions as well as their normative social beliefs.⁶⁷

Given Europe's big diversity in welfare state structures, there is admittedly no single European social model on which to converge. The adoption of minimal European standards must not only be economically viable in less-wealthy countries, but also compatible with existing industrial relations and welfare state institutions. The prospect of an enlarged and socially more diverse Union will require even more differentiation in terms of both the regulatory framework and the procedures in the social field.

Therefore, any 'Europeanisation' of social policy should allow different groups of countries to maintain and develop their own solutions in response to their specific economic and institutional conditions and their understanding of social solidarity. This obviously calls for continuing flexibility in the choice of instruments and within the legislative measures themselves. Enhanced cooperation may also be a useful instrument in such a 'defensive' Europeanisation of social policy. As such, countries financing health care through compulsory health insurance could harmonise their regulations for the licensing and remuneration of service providers; countries considering the partial privatisation of public pension systems could harmonise their regulations of investment options, and yet other countries could agree on common standards for systems of means-tested basic income support.⁶⁸

Enhanced cooperation can also provide the foundations for a more 'positive,' proactive Europeanisation of social policy. Possible examples are the creation of a 'European work contract' or the full cross-border portability of pension rights among certain Member States. It should also be possible for a limited group of states to set in motion an Open Method of Coordination (OMC) on specific subjects, even if not all the Member States want to participate, after the approval of the Commission.

EMU also requires a strengthening of the macro-economic dialogue with the social partners, in particular in order to coordinate the collective bargaining processes in the Eurozone. The Cologne process turned out to be a fudge in this respect. Provision could be made for an extended social dialogue among the Eurozone-members, supported by an Employment and Social Affairs Council in 'Euro-format.' Moreover, it could be envisaged to allow the Eurozone-members (or a certain number of Member States) to declare social agreements, which the Council itself does not approve, generally binding on their territories only.⁶⁹

Some fear that flexible integration in this field could lead to the distortion of the level-playing field in the Union. Still, the distortion of the level-playing field may not be all that big, since economic competition tends to be most acute among countries at similar levels of economic development. Moreover, flexible integration between some countries could simplify greatly the life of enterprises in the Union, which are currently confronted with many different national systems. Furthermore, as the experiences with the European Works Council (EWC) directive show, measures adopted by a few Member States will not necessarily be confined to national borders but will instead be extended to non-participants as well, giving them an incentive to sign up as well.⁷⁰ This exemplifies the possible centripetal effect of flexible integration in this area. Nonetheless, the use of flexible integration in this field could still prove to be divisive in some cases.

4.4. Defence⁷¹

Defence is probably the area where flexible integration is the most probable.⁷² Indeed, both military capacity and political will to use it differ greatly in this domain. Unfortunately, the Treaty of Nice excludes the possibility for enhanced cooperation in this area. Opening up this possibility has been one of the primary achievements of the Convention.⁷³

A selective and intelligent use of flexible integration may bring significant benefits to the Union's external 'identity' in this area, without necessarily undermining internal cohesion. Anchoring it in the treaty may also prevent it from taking shape outside the common institutional framework and could be helpful in finding more effective budgetary solutions for common policies. Still, to the extent that such flexible arrangements remain bound by the current strongly intergovernmental procedures, the value added may not be all that big.

Progress in this area seems imperative, since the US is no longer likely to assume the responsibility for Europe's security. Such progress could also provide the basis for a (much-needed) reinvigoration of NATO. Finally, a European defence force could also strengthen the executive arm of the UN, thereby beefing up the credibility of the multilateral order.

4.4.1. Integration of multinational forces in the EU framework

The character of multilateral troops like *Eurocorps*, *Eurofor*, *Euromarfor* and other instances of pragmatic defence cooperation outside EU structures is not quite clear for the moment. In this respect, the Convention's draft Treaty provides that Member States may make the multi-national forces they establish available to the common security and defence policy.⁷⁴

4.4.2. Capabilities: a Euro-defence group

Europe currently lacks the necessary capabilities and, linked to that, the required defence budget. Both the quantity and the quality of Europe's defence spending are largely insufficient for the ambitious tasks it has set itself. In quantitative terms, military spending has decreased constantly over the last decade in almost all Member States. The main problem lies however in the quality of European defence spending, i.e. the way in which Member States allocate their limited resources. Indeed, many European countries still have force structures geared to territorial defence, with massive manpower requirements. The bloated force structures associated with mass armies drain the bulk of limited defence budgets. As a result, the share of equipment and R&D expenditure in the defence budget is much too low.

Setting convergence criteria,⁷⁵ as was done for EMU, in order to generate policy convergence in defence capabilities may therefore be useful. Such criteria could be of a mixed nature, both military (e.g. force preparedness, interoperability, deployment capabilities) and economic (e.g. proportion of defence budget in relation to GDP, the proportion of equipment and research expenditure in the defence budget).

Several arguments plead in favour of setting such convergence criteria:

- 1) The use of convergence criteria could give a formal touch to the cooperation in this field.
- 2) In turn, this could allay fears of a *directoire* and provide greater legitimacy.
- 3) As shown by EMU, an external constraint, embedded within a common European endeavour, may be helpful in enforcing controversial reforms domestically.
- 4) The 'bottom-up approach' seems incapable of delivering sufficient convergence.⁷⁶
- 5) The potential for free-riding would be reduced.⁷⁷

The Convention's text provides for an embryo of such a defence Eurogroup in its article on structured cooperation.⁷⁸ Still, the criteria would be laid down in a protocol attached to the Treaties. Therefore, it will require the approval of every Member State, which may be rather difficult. Also, it entails the risk that certain Member States want these criteria to be set very low so that their entry is facilitated. It would have been better to lay down the convergence criteria in a declaration or in a common strategy.⁷⁹ Moreover, the fact that these criteria and the participating Member States are set out in a protocol raises difficult revision and accession problems.⁸⁰

4.4.3. Defence equipments: a European armaments agency

Another reason for the poor quality of defence spending stems from the fact that defence procurement is fragmented and nationally focused, leading to an unnecessary duplication of industrial capacities and equipment and a dispersion of scarce financial means. The EU is therefore in dire need of a common coordinating framework for defence industries, and a unification of procurement policies.

Several intergovernmental initiatives have been unfolded, but progress has been limited so far.⁸¹ The Convention proposes the creation of an armaments agency⁸² to be established by QMV and open to all Member States wishing to be part of it. The task of the agency is to promote effective procurement, to support defence technology research, and to strengthen the industrial base of the defence sector. Importantly, it shall also evaluate the Member States' military capabilities.

This agency should promote inter-operability and help in filling the gap in terms of strategic equipment (transport, communication). It could moreover cater for a pooling of resources and a limited 'role specialisation,' ascribing specific functional roles to certain Member States. Pooled resources could be put at the disposition of the EU (and even NATO).

There are several questions which are still open concerning the Agency. It is unclear what the Commission's role will be. It is also an open question how exactly the Member States can participate in the Agency. It is not clear what its relation will be with Occar (Organisation for Joint Armament Cooperation), Lol (Letter of Intent) & WEAG (Western European Armaments Group).

4.4.4. Collective defence clause

A collective defence clause constitutes another possibility for flexible integration in the defence field. The Convention proposes a 'closer cooperation' on mutual defence open to all Member States, until such time as the European Council has decided in favour of a common defence.⁸³ A declaration (not a protocol!) attached to the Treaty shall list the participating Member States. Participating at a later stage would simply require the declaration of that intent to the European Council. The draft does not spell out conditions for participation nor does it lay down clear working arrangements for putting in practice such a mutual defence.⁸⁴

4.4.5. Training & HR management

Flexible integration could also be useful in the field of training and general human resources management. Training programmes for certain forms of intervention could be run jointly by a limited number of Member States and qualification standards harmonised. In due time, the possibility for setting up a joint military college between these countries should be explored. Exchanges of officers should be promoted.

4.5. CFSP

Flexible integration in the area of CFSP is rather unlikely. Indeed, the credibility of the Union's CFSP may be negatively affected if a common action or position is not supported by all the Member States. Flexible integration would still take place inside a strongly intergovernmental framework. Still, some reforms could be envisaged.

4.5.1. Constructive abstention

The Amsterdam Treaty excluded the use of enhanced cooperation in the second pillar, but instead provided for the possibility of constructive abstention in case of unanimous decisions (art. 23 §1). Some measures should be considered to facilitate the use of this mechanism.

Thus, the possibility for constructive abstention in QMV-decisions should also be envisaged. The result would be that the abstaining Member States would not be obliged to apply the decision and would remain unbound by it.⁸⁵ Furthermore, after having declared its constructive abstention, there should no longer be a role for the abstaining Member States in the implementation of the decision taken following its abstention. Finally, the use of constructive abstention could be extended to European Council decisions.

Nonetheless, it must be emphasized that the perspectives of closer cooperation in this field will remain limited. An initiative decided with constructive abstention is bound to have less political impact. Hence the need to look for more “operational” projects in the domain of foreign policy.

4.5.2. Pilot Groups⁸⁶

The rotating Presidency is often said to fail in terms of policy continuity. Still, this partly stems from the fact that the interests of the Member States in terms of external policy vary. In that way, the rotating presidency has been instrumental in ensuring that certain salient foreign policy issues are put (back) on the agenda. According to the Convention's draft provision, the Foreign Minister will conduct the CFSP, chair the Foreign Affairs Council, and externally represent the Union.

This might make it more difficult for the Member States to have their foreign policy interests ensured. Therefore, the Treaty could make it possible that different groups of Member States develop different external accents under the umbrella of the EU, leaving in any case the final word to the EU itself. More concretely, a limited group of Member States could be authorised to take the lead in developing a pro-active policy towards specific topics, under the supervision of the Council.

Such “pilot groups” would be in charge of policy preparation, elaboration and implementation in certain domains. This could concern both geographical areas (Mediterranean, Central-Africa, Baltics) as well as certain subject matters (landmines,

disarmament, fight against terrorism, etc.). For this, the Member States of the pilots groups could pool their assets (financial resources, mediation efforts, development cooperation, etc). Each pilot group would include at least three Member States. The Foreign Minister would be closely involved. Decisions concerning the EU as a whole would still be taken by the Council.

4.5.3. Closer diplomatic cooperation

The recommendations of the Convention include the establishment of EU embassies. The Commission's delegations would become EU embassies, staffed by officials from the Commission, the Council Secretariat and seconded members from the diplomatic services of the Member States.

If these proposals are not endorsed by all Member States, nothing prevents the other Member States to proceed on their own by strengthening the cooperation between their national diplomatic services and with the Commission's delegations, especially concerning domains where these Member States already have embarked on deeper cooperation (e.g. defence, monetary policy). The set-up of a common diplomatic academy between them could be envisaged. Notably, all this could allow for substantial budgetary savings and strengthen the 'European reflex' in foreign affairs amongst the Member States.

In due time, these Member States could also proceed to common seats in certain international institutions.

4.6. Area of freedom, security and justice

If the current burdensome decision-making and implementation procedures prove impossible to reconcile with the increased heterogeneity in both capacity and policy orientation in the enlarged Union, then enhanced cooperation could be used in order to bring integration further. Four forms in particular merit closer attention: joint border control teams, joint police forces, a European judicial area and common intelligence networks.^{87 88} At the same time, the current pre-determined flexibility arrangements in this field are clearly in need of a rationalisation.

4.6.1. Rationalisation of the pre-determined flexible arrangements

The different exemptions governing the positions of the UK, Ireland and Denmark are terribly complex and hamper policy-making. A critical reappraisal of these derogations and a rationalisation of the procedures are required.

4.6.2. Joint border control teams

The Commission has proposed to support the Member States with a European Corps

of Border Guards. Work is underway to establish such an agency, but it is given a fairly limited role. The Convention's text contains a vague reference to such a body.⁸⁹ If the establishment of a genuine border agency turns out to be too contentious or too ambitious, nothing prevents a limited group of Member States from proceeding to an enhanced cooperation between themselves, possibly by means of a joint border corps for specific tasks or for emergency situations. This could be accompanied by a common instruction manual and even joint training. If this is put in place, then the relation with the Schengen provisions, the out-countries as well as the burden-sharing mechanisms obviously merit close attention. The increased cooperation of coast patrol forces of certain Mediterranean countries already provides a first indication of such an enhanced cooperation.

4.6.3. Joint police forces

Europol currently lacks operational powers. It is more an information centre with some investigation powers but without enforcement capabilities. The Convention's draft has not substantially strengthened Europol's powers. Enhanced cooperation could make it possible for some Member States to create a police corps for specific tasks. Members of the corps would have the same enforcement and investigation powers in the territory of all participating Member States. Policemen of this corps could move freely within the area (notably in the case of 'hot pursuit') and have the right to have arms and use force whenever necessary. The recent initiative for a Belgo-Luxembourg-German police office could be a precursor in this respect. A link with Europol would obviously be very much desirable. The set up of such joint forces would not be all that revolutionary, as provision is now already made for 'joint investigation teams' composed by officials from a limited number of Member States.⁹⁰

This force would not only be dealing with internal matters (e.g. cross border policing), but could also be charged with external tasks, possibly through its integration in the EU civil force.

4.6.4. European judicial area

The Convention has made some useful proposals in this respect. Still, in case certain Member States refuse to go further in this area, enhanced cooperation could provide a way forward. This would imply that the participating Member States embark upon a greater harmonisation of the definitions of incriminations and sanctions as well as their procedures, and a permanent exchange of information. Enhanced cooperation may also be a means to allow Member States to opt-out from a certain action or decision.

The Convention has proposed the creation of a European Prosecutor, but this establishment must occur by unanimity.⁹¹ Enhanced cooperation could also cater for a safety valve here to circumvent recalcitrant members. Hence, willing Member States could set up a common prosecutor's office, which would be able to investigate and

prosecute specified crimes arising in the relevant area and bring them to the competent national jurisdictions.

4.6.5. Common intelligence networks

A closer cooperation between the intelligence forces of several Member States would entail many benefits. Indeed, the more intelligence services share their information, the more valuable the results are for each of them. There are also substantial economies of scale.⁹² Moreover, the confidence required for the exchange of information may be easier to bring about in a context where only a limited number of Member States are involved. A link with (common) police forces and Europol seems desirable in any case. An enhanced cooperation in this respect could build upon the Council recommendation of 26 April 2002 on multi-national ad-hoc teams for exchanging information on terrorists in the pre-criminal investigative phase.

4.7. Environment

Provision is already made for the Union to take into account objective differences between the Member States in the field of environment, by catering for (temporary) derogations in case of objective differences in situation.⁹³ Obviously, the use of such derogations could be intensified in the future.⁹⁴ Yet, flexible integration *sensu stricto* may still turn out to be necessary, since environmental conditions will differ greatly among Member States in the enlarged Union and not all Member States will share the same aspirations.

4.7.1. Environmental taxes

Enhanced cooperation could be useful for taking environmental measures of a fiscal nature. Currently, such measures still require unanimity in the Council (art. 175 § 2 TEC). This has frustrated any effort to proceed in this area. The Convention's draft opts for the status-quo.⁹⁵ Kyoto makes progress in this field a necessity and enhances its acceptability. In some cases, such measures could also improve the functioning of the internal market.

Several possibilities for flexible integration exist in this field⁹⁶:

- carbon tax
- excises on energy products (diesel, kerosene...)
- an extended Euro-vignette, accompanied by appropriate reforms in car taxation
- fuel taxes on civil aviation
- emissions trading
- pesticides

4.7.2. Setting higher environmental standards⁹⁷

Enhanced cooperation could offer environmental 'leaders' the opportunity to set a higher standard in their territories. More concretely, it could be used to render an existing directive more stringent, or to adopt certain regulatory norms in not yet harmonised areas.

Given the requirement of non-discrimination, the application of these higher standards would have to be limited to the Member States participating in the enhanced co-operation. The 'outs' would only have to comply with the relevant EU-wide or national regulations. Since the enterprises of the countries not involved in such a co-operation would not suffer a disadvantage (they may even have an advantage), these countries would probably not oppose enhanced co-operation. Such cooperation will probably only be embarked upon if the expected economic impact of the new standards does not exceed an economically supportable level.

5. The ten commandments of flexible integration

1. Flexible integration has been a positive element in the European integration process. This is true for initiatives taken outside the treaties (Schengen) or inside the treaties (EMU, social protocol), or in case of occasional obstruction (arrest warrant). This must always be remembered. The concept nevertheless presents important drawbacks, due to the sometimes extreme complexity of the institutional process.
2. This being said, the experiences of the past have limited relevancy. The context has changed. There are now detailed treaty provisions. The *acquis* has developed. The EU now deals with new domains of competence. The enlargement of the Union will give another political meaning to the concept.
3. The treaties presently define complicated procedures for flexible integration inside the Treaties. They do not preclude it outside the Treaties. This element is not sufficiently remembered, both by advocates and adversaries. It also makes the debate more complex.
4. The decision process to launch a flexible integration project will be made more difficult, in any case, by enlargement. Even reaching a qualified majority with 25 Member States will not be easy, especially with the raising of the decision ceiling decided by the Nice treaty.
5. The legal complexities generated by flexible integration can be quite high. They also tend to increase, according to the level of ambition of the involved project. Consequently, the possible use of enhanced cooperation cannot be considered as a compensation for an insufficient reform of the institutional system, and a fortiori for an insufficient extension of qualified majority voting.
6. A lot of people now make speeches that do not identify the kind of enhanced cooperation which is envisaged, that do not contemplate a precise domain of action, and that do not examine seriously the conditions imposed by the treaties. This type of rhetoric will be counterproductive in a long term perspective, because it blurs the stakes whilst stimulating the oppositions.
7. Flexible integration – sometimes under the form of enhanced cooperation - will happen eventually. Not as a means to exert pressure, or as a political lesson, but because it will be inevitable to surmount the paralysis of an enlarged Europe that has not been prepared by serious institutional reforms during the last 10 years. Other instruments to accommodate the increased diversity will not do. Buying off recalcitrant Member States or eliminating diversity through assistance programmes will soon expose the limits of budgetary solidarity. Soft law methods will quickly face an implementation gap.

8. For the sake of clarity, it is absolutely essential to distinguish five different projects (see chapter 3) : flexible integration outside the Treaties, punctual decision, ad hoc group, avant garde (in the present setting of the Treaties), and avant garde relying on an autonomous institutional regime. After analysis, two of them remain useful for the near future. The first one envisages the implementation of a new policy, or at least a set of initiatives, in the framework of enhanced cooperation defined by the treaty. The second one consists in a new initiative outside this framework.
9. Enhanced cooperation will be easier in a context in which the *acquis* remains limited. It will also be easier if it is meant to be largely executive. This covers for example a better coordination of economic policies, the creation of common police units, or the organisation of integrated military elements. Areas of competence sharing one or two of these characteristics should be considered as a priority.
10. Flexible integration will have a limited impact in foreign policy and defence. In the field of foreign policy, which is essentially declaratory, the absence of some Member States will strongly reduce the impact of any initiative. In the field of defence, the integration of more ambitious initiatives inside the framework of the treaties represents little, because this framework remains strongly intergovernmental in that domain. The added value of such an integration becomes thus quite limited. An analysis of the legal constraints, the political context and the various opportunities suggest that the development of economic and social cooperation remains probably the most likely domain for a significant initiative in the near future, though there are also potentialities in the field of police and justice cooperation, especially for operational initiatives.

- 2 For an analysis: F. TUYTSCHAEVER, Differentiation in European Union law. Hart Publishing, 1999.
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- 4 H. WALLACE, W. WALLACE, Flying together in a larger and more diverse European Union. WRR, 1995. C.-D. EHLERMANN, Increased differentiation or stronger uniformity? EUI Working Paper RSC no. 95/21.
- 5 J. MONAR, Justice and home affairs in a wider Union: the dynamics of inclusion and exclusion. ESRC 'One Europe or several' Programme working paper 07/00.
- 6 B. RACINE, E. PHILIPPART, Rapport sur les Coopérations Restreintes dans les domaines de l'environnement, de la recherche et développement, de l'éducation et de la politique sociale. In: Rapport du Commissariat Général du Plan sur l'Union européenne et les coopérations renforcées, La Documentation française, 2004 (forthcoming). C.-D. EHLERMANN, op. cit.
- 7 F. TUYTSCHAEVER, op. cit.
- 8 For a critical analysis of the implications of enlargement for the EU: F. DEHOUSSE, W. COUSSENS, The enlargement of the European Union. Opportunities and threats. In: Studia Diplomatica, Vol. LIV, 2001, No. 4.
- 9 L. METCALFE, Flexible integration in and after the Amsterdam Treaty. In: M. DEN BOER, et al. (eds.), Coping with Flexibility and Legitimacy after Amsterdam. EIPA, 1998.
- 10 See H. WALLACE, Flexibility : a tool of integration or a restraint on disintegration ?, in K. NEUNREITHER and A. WIENER (eds.), European integration after Amsterdam - Institutional dynamics and prospects for democracy, Oxford, Oxford Univ. Press, 2000, pp. 153-174.
- 11 The Convention's draft (article III-201) merely changes the threshold, which is a logical consequence of the new voting system (1/3 of Member States representing 1/3 of the population).
- 12 For an overview of the debate : A. STUBB, Dealing with flexibility in the IGC, in E. BEST et al. (eds.), Rethinking the European Union. IGC 2000 and beyond. Maastricht : EIPA, 2000.
- 13 S. RODRIGUES, Le traité de Nice et les coopérations renforcées au sein de l'Union Européenne. In : RMCUE, no. 444, janvier 2001. X. YATAGANAS, The Treaty of Nice: the sharing of power and the institutional balance: a continental perspective. <http://www.jeanmonnetprogram.org/papers/01/010101.html>. J. SHAW, Enhancing cooperation after Nice : will the treaty do the trick ? In: M. ANDENAS, and J. USHER (eds.), The treaty of Nice and beyond - enlargement and constitutional reform. Oxford, Hart Publ., 2003, pp. 207-238.
- 14 T. JAEGER, Enhanced cooperation in the Treaty of Nice and flexibility in the Common Foreign and Security Policy, European Foreign Affairs Review, Autumn 2002, pp. 297-316.
- 15 For a possible reform of the treaty provisions: E. PHILIPPART, A new mechanism for enhanced cooperation for the enlarged European Union, Notre Europe, 2003. J. SHAW, Flexibility in a 're-organised' and 'simplified' treaty. In: CMLR, Vol. 40, No. 2, 2003.
- 16 Draft Treaty establishing a Constitution for Europe. CONV 850/03 (18 July 2003). For a global analysis of the Convention's results: F. DEHOUSSE, W. COUSSENS, Le Traité Constitutionnel de la Convention pour l'Europe: un nouveau pas pour l'intégration européenne? In : Courrier Hebdomadaire, no. 1808-1809, 2003. F. DEHOUSSE, W. COUSSENS, The Convention's draft Constitutional Treaty. Old wine in a new bottle? In: Studia Diplomatica (forthcoming).

17 For a concise overview: M. DOUGAN, The Convention's draft Constitutional Treaty : A 'tidying-up exercise' that needs some tidying up of its own. [Federal Trust Constitutional online essays](#) no. 27/03 (2003).

18 Yet, this interpretation is contested by some Member States. Indeed, according to some interpretations, the decision to embark upon an enhanced cooperation in the area of CFSP needs to be taken unanimously under the Constitution.. Note that this would be a step backwards as compared to the Nice Treaty.

19 The IGC looks set to mark a step backwards in this respect. Indeed, the Italian Presidency proposals for the Naples Ministerial Conclave (CIG 582/03 Add 1, 25 November 2003) provide that the Council shall decide unanimously on enhanced cooperation in the CFSP field.

20 Article III-211.

21 Article III-213.

22 Article III-213 § 5.

23 Article III-212.

24 Articles 40 §7 III-214. For the fate of these clauses in the IGC, see 4.4.4.

25 Article 40 §3.

26 Articles 43, III-325 and III-326.

27 Article III-324.

28 Article III-328.

29 Here too, the IGC looks set to mark a step backwards. Indeed, the Italian Presidency proposals for the Naples Ministerial Conclave (CIG 582/03 Add 1, 25 November 2003) envisage the suppression of this clause.

30 Article 43.

31 Still, the minimum participation threshold only seems to apply at the moment of authorisation.

32 In this respect, it should not be forgotten that article 45 TEU (article III-329 of the Convention's draft) provides that the Council and the Commission shall ensure that the activities undertaken in the context of enhanced cooperation are consistent with each other and with the policies of the Union.

33 E. PHILIPPART, [A new mechanism of enhanced cooperation for the European Union](#). Notre Europe, 2003.

34 For a similar exercise: E. PHILIPPART, M. SIE DHIAN HO, From uniformity to flexibility. The management of diversity and its impact on the EU system of governance. In: G. DE BURCA, J. SCOTT, op. cit. E. PHILIPPART, M. SIE DHIAN HO, [The Pros and Cons of closer cooperation within the EU. Argumentation and recommendations](#). WRR Working Paper 104, 2000.

35 This would approach the 'enhanced Union'-scenario as described in: E. PHILIPPART, M. SIE DHIAN HO, Flexibility and the new Constitutional Treaty of the European Union. In: J. PELKMANS, et al. (eds.), [Nederland en de Europese grondwet](#). Wetenschappelijke Raad voor het Regeringsbeleid, Amsterdam, 2003.

36 Hence, such cooperation is excluded in areas falling under the exclusive competences of the Union. It is also excluded in areas of concurrent competence where the exercise of this competence by the Union has pre-empted that of the Member States. See: B. DE WITTE, Old-fashioned flexibility: International Agreements between Member States of the Union. In: G. DE BURCA, J. SCOTT, op. cit.

37 K. LENAERTS, [Cooperation in the second and third pillars of the European Union](#). Introduction to the colloquium organised by the Royal Institute for International Relations and the National Bank of Belgium on 'Models of cooperation within an enlarged Union.' Brussels, January 28 2003

38 The current Treaties contain some explicit recognitions of this fact. [Article 17 TEU](#) holds that the Treaty does not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and NATO, provided such cooperation does not run counter to or impede the Union's CFSP. This clause does no longer figure in the Convention's draft, but this should not be interpreted a contrario that such cooperation is now precluded.

39 Article III-213.

- 40 For an analysis: E. PHILIPPART, M. SIE DHIAN HO, Flexibility and the new Constitutional Treaty of the European Union. In: J. PELKMANS, et al. (eds.), Nederland en de Europese grondwet. Wetenschappelijke Raad voor het Regeringsbeleid, Amsterdam, 2003.
- 41 The 1/3 threshold could thus provide for an Ioninna-like compromise for taking salient decisions.
- 42 F. SCHARPF, Problem-solving effectiveness and democratic accountability in the EU. PfifG Working Paper 03/1.
- 43 For a general analysis with theoretical background: F. MILNER, A. KOELLIKER, How to make use of closer cooperation? The Amsterdam clauses and the dynamic of European integration. European Commission Forward Studies Unit, Working Paper, 1999.
- 44 For an excellent overview : L. NAVARRO, As the Euro prepares for take-off: a critical review of the first three years of EMU. Notre Europe European Issues No. 9, October 2001.
- 45 For an ambitious approach: COMMISSARIAT GENERAL DU PLAN, 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, présidé par Jean Pisani-Ferry. In: Rapport du Commissariat Général du Plan sur l'Union européenne et les coopérations renforcées, La Documentation française, 2004 (forthcoming). For an excellent analysis of possible reforms : THE NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY, Effective policies in the pan-European Union. Report no. 65 (2003).
- 46 Protocol on the Eurogroup.
- 47 L. BINI SMAGHI, G. TABELLINI, How to improve economic governance? The coordination of macroeconomic policies in Europe. Aspen European dialogue Redesigning Europe. Rome 28 February 2003.
- 48 See 1.1.2.
- 49 It is doubtful whether recourse could be had to the provisions on enhanced cooperation for such an extension, especially given the conditionality that the rights and interests of those Member States which do not participate therein must be respected.
- 50 Article III-91.
- 51 Article III-88.
- 52 See also Commission Communication. For the European Union. Peace, freedom, solidarity, COM (2002) 728.
- 53 COMMISSARIAT GENERAL DU PLAN, op. cit.
- 54 P. JACQUET, J. PISANI-FERRY, Economic Policy coordination in the Eurozone : what has been achieved? What should be done? CER Essay January 2001.
- 55 In fact, the 'enabling clause' in article III-88 of the Convention's draft could provide such a legal base.
- 56 For a thorough analysis: B. ARDY, The EU budget and EMU. South Bank European papers no. 1/2001.
- 57 For a general overview: EUROPEAN COMMISSION, The Economics of Community public finance. European Economy, 1993, no. 5.
- 58 J. W. OOSTERWIJK, Europa in een hogere versnelling. Economisch-Statistische Berichten, 9-1-2004.
- 59 It should be noted that article 168 TEC already provides that in implementing the multi-annual framework program, supplementary programmes may be decided on involving the participation of certain Member States only, which shall finance them subject to possibly Community participation. Article 169 TEC furthermore provides that the Community may make provision for participation in R&D programmes undertaken by several Member States outside the EU framework. The experience with these forms of flexible integration has not proven very successful.
- 60 For a survey of flexible integration in the area of environment, RSD, education and social policy : B. RACINE, E. PHILIPPART, op. cit.
- 61 Articles III-62, III-63 and III-130.
- 62 K. LANNOO, M. LEVIN, An EU-company without an EU-tax? A corporate tax action plan for advancing

[the Lisbon process](#). CEPS research report, April 2002.

63 See also: EUROPEAN PARLIAMENT, Directorate-General for Research, [Taxation in Europe: recent developments](#). Economic Affairs Series 131, 2003.

64 B. RACINE, E. PHILIPPART, *op. cit.*

65 See: C. BARNARD, Flexibility and social policy. In: G. DE BURCA, J. SCOTT (eds.), *op. cit.*

66 For instance, the Council Directive 94/95/EC on European Works Councils provides that where an agreement was already in existence by a certain moment in time, the obligations under the directive do not apply. The Working Time Directive 93/104/EC provides further examples. For instance, Member States can obtain an individual opt-out on the maximum 48-hour working week provided certain conditions are satisfied. Also, collective agreements between social actors implementing the directive could derogate from its standards.

67 M. RODRIQUEZ-PINERO ROYO, Flexibility and European Law: a labour lawyer's view. In: G. DE BURCA, J. SCOTT (eds.), *op. cit.*

68 F. SCHARPF, Legitimate diversity: the new challenge of European integration. [Cahiers européens de Science Po](#) 1, 2002.

69 Art. 139 TEC.

70 Indeed, many foreign companies have extended this directive to their UK employees, while British MNOs were obliged to set up EWCs on the continent. Thus, the UK could not fully insulate itself from the effects of a directive it did not adopt nor negotiate. C. Barnard, *op. cit.*

71 The authors would like to thank Dr. Sven Biscop (Security Department - Royal Institute for International Relations (IRRI-KIIB)) for his valuable help with this chapter. For information about the mini-defence summit see: S. BISCOPE, *Rebellen in de Navo, voortrekkers in de EU? Een post-Irak regime voor het veiligheids- en defensiebeleid*. In: [Internationale Spectator](#), June 2003. For a general appraisal of the issue of flexible integration in the area of defence: COMMISSARIAT GENERAL DU PLAN, *Perspectives de la Coopération Renforcées dans l'Union Européenne. Rapport de l'atelier sur les coopérations renforcées dans les domaines de la sécurité et la défense*. In: [Rapport du Commissariat Général du Plan sur l'Union européenne et les coopérations renforcées](#), La Documentation française, 2004 (forthcoming).

72 For an excellent analysis: A. MISSIROLI, CFSP, defence and flexibility. [ISS Chaillot papers](#) 38, 2000.

73 For a more general overview: A. MISSIROLI (ed.), Flexibility and enhanced cooperation in European security matters: assets of liabilities? [ISS Occasional Paper](#) 6, 1999.

74 Article 40 §3.

75 A. MISSIROLI, European security and Defence: the case for setting convergence criteria. In: [European Foreign Affairs Review](#), 4/1999. F. HEISBOURG, The EU needs defence convergence criteria, [CER Bulletin](#), June 1999.

76 A. MISSIROLI, [Defence spending in Europe : is Europe prepared to pay for improved capabilities?](#) Paper given at the conference on ESDP organised in Paris on 13-15 December 2001 by the Cicero Foundation.

77 A. MISSIROLI, *op. cit.* 2000.

78 Article III-213.

79 A. MISSIROLI, *op. cit.* 2000.

80 It should be noted that the IGC may come up with a substantially modified clause on structural cooperation. Indeed, the Italian Presidency in its final document (CIG 60/03 ADD 1) proposes some important changes. Thus, the structured cooperation will no longer be established by the Treaty. Instead, Member States willing and able to participate in this cooperation shall notify their interest to the Council, which shall within three months decide by QMV on its establishment and the list of participating Member States. The Council in its restricted format shall decide by QMV on the subsequent participation of new Member States, as well as on a possible suspension of a Member State. All other decisions will be taken unanimously. Notably, non-

participating will no longer be excluded from the deliberations in this restricted Council. The Protocol now only contains the military criteria, which are however of a mainly qualitative nature.

81 M. NONES, A test-bed for enhanced cooperation: the European defence industry. In: The International Spectator, Vol. XXXV, No. 3, 2000.

82 Article III-212.

83 Article III-214.

84 It looks likely that the IGC will revise the provisions in the Convention's draft Treaty on closer cooperation. The Italian Presidency proposes some important changes in its final document (CIG 60/03 ADD 1). The clause no longer seems limited to willing Member States, but seems applicable to all. However, the specific nature of the defence policies of certain Member States shall be unaffected. For EU-members who are also a NATO-member, the latter shall remain the foundation of their collective defence and the body responsible for its implementation. The language has also been rendered somewhat less obligatory. Hence, the principle seems widened in scope but reduced in significance.

85 THE NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY, *op. cit.*

86 S. KEUKELEIRE, Directorates in the CFSP/CESDP of the European Union: a plea for 'restricted crisis management groups.' In: European Foreign Affairs Review, 2001/1. For a critical analysis: T. SAUER, Directoria als remedie voor het GBVB? In: Internationale Spectator, December 2002.

87 For a general appraisal of enhanced cooperation in the area of Justice and Home Affairs: COMMISSARIAT GENERAL DU PLAN, Les coopérations renforcées en matière de justice et affaires intérieures: un outil d'intégration. Rapport de l'atelier présidé par G. Canivet. In: Rapport du Commissariat Général du Plan sur l'Union européenne et les coopérations renforcées, La Documentation française, 2004 (forthcoming). See also : The Netherlands Scientific Council for Government Policy, *op. cit.*

88 For an analysis of potential risks: G. DE KERCKHOVE, Un espace de liberté, de sécurité et de justice aux dimensions incertaines. Quelques réflexions sur le recours aux coopérations renforcées en matière de justice et d'affaires intérieures. Y. LEJEUNE (ed.), Le Traité d'Amsterdam : espoirs et déceptions. Bruylant, 1999, p. 289.

89 Article III-166.

90 Framework Decision JAI/2002/465, OJ L 162, 20 June 2002. For an overview: F. DEHOUSSE, J.GARCIA MARTINEZ, La coopération policière et judiciaire européenne : les lents progrès d'un nouveau projet européen. Studia Diplomatica, Vol. LV, N° 4.

91 Article III-175.

92 F. MILNER, A. KOELLIKER, *op. cit.*

93 Article 175 TEC § 5 holds that if a measure involves costs deemed disproportionate for the public authorities of a Member State, the Council may grant that state a temporary derogation.

94 For an analysis : B. RACINE, E. PHILIPPART, *op. cit.*

95 Article III-130.

96 K. SCHLEGELMILCH, Energy Taxation in the EU and in some Member States: Looking for opportunities ahead. Heinrich Böll Foundation, 1999. EUROPEAN ENVIRONMENT AGENCY, Environmental taxes: recent developments in tools for integration, November 2000.

97 This section is based on: S. BAER, et al., Closer cooperation, a new instrument for European environmental policy? EIOP, vol. 4, 2000, no. 13.

FLEXIBLE MEANS TO FURTHER INTEGRATION¹

By Giovanni Grevi

Executive Summary

On the eve of enlargement, the process of European integration risks running into stalemate. Serious controversy between Member States has undermined the basis for constructive dialogue on shared priorities. In this context, some national leaders have called for a two-speed Europe, where more ambitious countries would form a pioneer group and lead the others by furthering integration. Many Member States have reacted negatively to these proposals fearing that they could be left behind as 'second-class' members. More generally, the debate on flexible integration is inconsistent and confused. This paper calls for an improvement in the quality of this debate. The paper then moves on to assess different forms of flexible integration and outlines proposals on what should be done through 'flexible' means.

The expected resumption of inter-governmental negotiations on the draft Constitutional Treaty and the desire for an early conclusion of the Intergovernmental Conference (IGC), during the Irish Presidency, are encouraging signs. This paper, however, argues that the Union urgently needs a new, thriving political project to unlock the current blockage, outline shared objectives and mobilise public opinion and decision-makers. It is essential that national governments endorse a common position. In this perspective, flexibility should be a means to an end. All countries should advance in the same, broad direction. However, they should be able to do so at different speeds, on different subjects. It is a matter of accommodating diversity in a single political and institutional framework in a pragmatic, but not casual, fashion.

The Union does not need, at this stage, a 'hard core,' and there is no evidence that a group of countries is willing to form one. Member States should pursue flexible integration, where necessary, by different means on different issues, under the scrutiny of the common institutions, so as not to undermine the political cohesion of the Union, and policy coherence. This paper explores ways in which this should be done, and what initiatives should be undertaken.

Cooperation outside the Treaty framework, micro-flexibility, pre-determined flexibility and enhanced cooperation are four basic models of differentiated integration. Closer cooperation outside the Treaty remains a 'safety valve' in case of prolonged stalemate, but is not the most appropriate means to ease current political tensions within the Union. Micro-forms of flexibility, anchoring exemptions in EU law or allowing for constructive abstention, can be occasionally useful in such domains as economic competitiveness, environment, social policy, CFSP and JHA. Pre-determined forms of flexibility, such as EMU, played a very important role in the past, and can still help progress in the domain of defence, for example, as well as in extending the powers of the Euro-Ecofin Council. It is, however, essential that decision-

making remains transparent and inclusive. Enhanced cooperation, finally, as provided for by enabling clauses in the treaties, is a very useful mechanism for making progress in a number of areas, from corporate taxation to police cooperation, while ensuring that the common institutions are fully involved.

These different forms of flexible integration, with the exception of flexibility outside the Treaty, which should remain a remedy of very last resort, should be used in implementing a common political project, reflecting renewed political cohesion. Member States should take part, together with the common institutions, in shaping a new project for the Union. This paper offers some suggestions on how to trigger this new, ambitious process.

Key recommendations

1. National leaders should improve the quality of the debate on the future of Europe, and flexible integration in particular. Mutual accusations should stop; suspicion should give way to trust. Confidence among Member States is essential for a sensible dialogue on shared priorities. The first step in this direction should be the adoption of the draft Constitutional Treaty by the end of June.
2. Cooperation between the EU institutions, notably the Commission, and national governments should be the basic starting point for the tabling of any credible proposal on future shared political priorities.
3. Member States and the EU institutions should take on the drafting a new project for Europe – a political project setting out the priorities of European integration, together with a concrete action plan. All EU countries should endorse this common project.
4. Once common objectives are agreed, national governments should determine the issues on which they wish to integrate faster, using flexible means to advance in the same direction.
5. Flexibility should not undermine the single political and institutional framework of the enlarged Union, or the transparency and efficiency of decision-making
6. Member States should use closer cooperation outside the Treaty framework only as the very last resort – a ‘safety valve’ to enable progress in case of serious political crisis.
7. Micro-flexibility should be used, under the supervision of the Commission and of the European Court of Justice (ECJ), to accommodate diversity in specific legal acts, or in political decisions. Micro-flexibility should enable progress in the fields of economic competitiveness, environment, social policy, Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA), among others.
8. Members of the Economic and Monetary Union (EMU) should improve the arrangements for the economic governance of the Eurozone by broadening the scope of the decisions that the Euro-Ecofin can adopt. This should be done either by amending current Treaty provisions in the final stages of the (IGC), or by pursuing enhanced cooperation initiatives.
9. Willing and able Member States should fulfil the objective criteria established to enter structured cooperation in the domain of defence. These countries should pursue their cooperation in an inclusive and transparent fashion, to as to minimize divisions and promote the international profile of the entire Union.

10. Enhanced cooperation should become the preferential instrument for implementing flexibility. The involvement of the common institutions and other procedural guarantees will minimise divisive effects and will maximise centripetal forces. Member States should use enhanced cooperation to make progress on, for example, corporate taxation, police cooperation, criminal justice cooperation, and social policy.

1. The state of the debate

From Maastricht to Nice

Flexible integration – entailing a variety of forms of closer cooperation among different groups of countries within or outside the Union – has a long history. The debate on how best to accommodate diversity in a single legal framework started well before the major institutional developments of the 1990s.² After the Treaty of Maastricht, however, following the inclusion of Monetary Union in the Treaties and with new waves of enlargement approaching, the debate became more vigorous. It was no longer merely a matter of allowing for limited exemptions or for episodic agreements outside the Treaties. The question was how to develop a Europe at different speeds, or at variable geometries.

Many variations on the theme of flexibility, or differentiated integration, were put forward after Maastricht. The then British Prime Minister, John Major, preferred a Europe *à la carte* in which the Member States would be free to choose, depending on the circumstances, the policy areas in which they intended to step up their involvement.³ A German Christian Democrat paper, written by Wolfgang Schäuble and Karl Lamers, published on 1 September 1994, outlined a very different perspective. The authors advocated greater cooperation between a group of integration-minded countries prepared to have closer links in the fields introduced by the Maastricht Treaty: EMU, CFSP and defence policy and internal security. This paper envisaged a ‘*Kerngruppe*’, or ‘core group.’⁴ The then French Prime Minister Eduard Balladur, made the perspective of a hard-core more palatable by putting forward the idea of a Europe organised in ‘concentric circles’ with different degrees of integration but sharing a core set of policies and institutions.⁵

Some foresaw a Europe *à la carte* as a recipe for weakening political integration. The then Belgian Prime Minister, Jean-Luc Dehaene, went further, observing that the concept called into question “*a number of global balances which have been struck over time between particular Community policies; ...the risk of lack of coherence would grow if each could choose what suited him and abandoned the policies which did not suit him.*”⁶ Others, however, saw some form of differentiated integration as the only way to prevent further political cooperation from being blocked. It is clearly a double-edged sword.

A few years later, in the run up to the IGC in 2000, the discussion on closer cooperation took on new public momentum with the speech that the German Foreign Minister, Joschka Fischer, delivered in Berlin on 12 May 2000 entitled “*From Confederacy to Federation - Thoughts on the finality of European integration.*”⁷ In it, Fischer expressed deep concern that the alternative for the EU, faced with the irrefutable challenge posed by eastern enlargement was either erosion or integration, and went on to question whether the answer to the twin challenges of enlargement and deepening lay in enhanced cooperation in some areas. Further differentiation would be inevitable in a more heterogeneous Union and “*(t)o facilitate this process*

is thus one of the priorities of the intergovernmental conference." Fischer was not alone in stressing the relevance of flexibility for the success of integration in an enlarged Union. Former Commission President Jacques Delors suggested that a "*federation of nation-states*" should conclude "*a treaty within the treaty*" with a view to making far-reaching reforms of the European institutions.⁸ Former German and French leaders, Helmut Schmidt and Giscard D'Estaing expressed similar views, although they placed the Euro-12 at the centre.⁹

Fischer argued that, sometime within the next ten years, the EU would be confronted with this alternative: "*will a majority of Member States take the leap into full integration ... (or)... will a smaller group of Member States take this route as an avant garde, i.e. will a centre of gravity emerge comprising a few Member States which are staunchly committed to the European ideal and are in a position to push ahead with political integration?*" In his vision, closer cooperation does not automatically lead to full integration: it is an incremental process. "*Initially, enhanced cooperation means nothing more than increase intergovernmentalisation under pressure from the facts and the shortcomings of the Monnet Method.*" Fischer, therefore, stressed that a clear political choice needed to be made. Jacques Chirac, the French President, in his speech before the Bundestag on 27 June 2000, shared the view that Member States wishing to go further in integration must be allowed to do so, introducing the concept of a 'pioneer' group. While Chirac did not explain the details of his project, he seemed to foresee an intergovernmental model of cooperation for the pioneer group, which would be co-ordinated by a Secretariat. Tony Blair responded in October 2000 that, while some initiatives of Treaty based 'enhanced cooperation' could be envisaged, talks of a hard-core would prove divisive for the Union.¹⁰

Nice, the Convention and the IGC

Following the meagre achievements of the Treaty of Nice, with only limited improvements to the provisions on enhanced cooperation,¹¹ a new debate on the Future of Europe was launched to pave the way for the Convention to be set up in February 2002. No new major models of flexibility were introduced into the debate at this stage, although two statements deserve mention. In June 2001, Commissioner Pascal Lamy and a number of French politicians were the first to call for an explicitly Franco-German core to lead the Union, structuring their cooperation at an institutional as well as at a policy level.¹² Other countries would subsequently join the Franco-German tandem at the centre of the core. Commissioner Michel Barnier, on the other hand, pointedly raised the fundamental question behind flexibility in October 2001: 'What do we want to do together?'¹³ Depending on the response, it would be possible to assess whether a common political project could provide the basis for further integration, or whether different projects could co-exist. Michel Barnier went further, arguing that this question should not only be posed for economic policy or security policy, but also should address the future of the internal market, regional policy and competition. Once differences are explicitly acknowledged, it is possible to define the most suitable way to organise flexibility.

Debate on flexible integration continued 'in the corridors' during the proceedings of the Convention, but leaders at the European and at national level clearly felt that it would have been inappropriate to openly discuss differentiation when a common institutional framework for the Union was sought. In this context, however, a number of calls were made to extend some form of flexibility to the fields of security and defence policy. A well-known Franco-German contribution in November 2002 advocated the creation of a pioneer group in defence policy, somewhat loosely related to the Treaty framework through a Protocol.¹⁴ This design would eventually lead to the formulation of 'structured cooperation' in the Constitutional Treaty.

All in all, the 'politically correct' reluctance to speak openly of differentiated integration and multiple speeds held until the end of the IGC, with the failure to agree on the text of a Constitution for Europe. The sudden interruption of negotiations at the Brussels Summit last December sparked a new, powerful stream of statements and declarations on the need for flexible integration. Essentially, the same people repeated the same points, but much more forcefully than in the past: the gloves were off. Jacques Chirac commented that, in the absence of an agreement on institutional reform, a pioneer group "will provide an engine, an example that will allow Europe to go faster, further and better."¹⁵ German Chancellor Gerhard Schröder used particularly strong language arguing that "if we do not reach a consensus in the foreseeable future, a two-speed Europe will emerge."¹⁶ Even Commission President Romano Prodi - understandably quite cautious in opening avenues for departures from the traditional Community model of uniform integration - seemed to have reached a certain degree of exasperation: "We can't stop Europe and there will come some day the moment in which somebody ... must give example to go on, because Europe can not always go at the speed of a very slow wagon ... Some day, if we are unable to take a common position, somebody must give example as always happens."¹⁷

Irish Prime Minister Bertie Ahern, the new President of the Union, tried to minimise the growing rift between advocates of an *avant garde* and the others by dismissing the idea of a two-speed Europe as "fundamentally wrong." José María Aznar, former Spanish Prime Minister, observed that "there is already a Europe with several speeds" and there is no need to formalise any neater distinction between Member States. It is obvious that the political climate has changed. From Maastricht up to the end of the IGC in 2003, the debate on flexible integration remained largely theoretical, as the pressure of enlargement was growing but remained a somewhat future perspective. Now, as enlargement approaches, all countries are positioning themselves in an effort to either maximise their influence or to limit their perceived marginalisation.

The meeting in Berlin between the leaders of France, Germany and the UK on 18 February 2004 is the most prominent example of these tactical moves. Once again, the way national leaders see and define flexible integration initiatives differs widely. While the protagonist of the trilateral summit played it down as constructive cooperation between three key countries, with no willingness to take over the running of

the Union, the Italian Foreign Minister Franco Frattini responded that “*There cannot be a directoire. There cannot be a decisive nucleus which would run the risk of posing a threat to European integration.*”¹⁸ The latest statements by Jacques Chirac¹⁹ and Joschka Fischer²⁰ explicitly ruled out the option of a two-speed Europe, which their governments seemed to favour two months ago. The German Foreign Minister, in a U-turn with respect to his famous Humboldt speech, felt that the Union needs to “*command a continental weight*” to matter on the global scale. The ‘centre of gravity’ formula he championed four years ago would not be adequate to provide the Union with the resources it needs to become a strong international actor. Forms of closer cooperation could be used occasionally, but should not undermine the unity of a Europe of 25. The French President, even more surprisingly, made a whole-hearted plea for a Union able to advance at 25, envisaging only a limited scope for open and inclusive forms of flexibility.

2. The vocabulary of flexibility

Twelve years after the Treaty of Maastricht, the debate on flexible integration has taken many directions and has grown more confused. Before assessing the political context of such a debate on the eve of enlargement, a guide to the terminology loosely used in speeches and other contributions seems useful to measure the difference of specific proposals.²¹

Flexible Integration, Differentiated Integration, Closer Cooperation: broad definitions that encompass all the more specific models listed below, entailing some form of differentiation in the pace or domain of integration between different groups of Member States.

The casual approach

Europe à la carte: the culinary metaphor of a *Europe à la carte*, as favoured by former British Prime Minister John Major, describes a Union in which Member States are free to choose the policy areas in which they would like to cooperate more closely.

Variable geometry: the simultaneous pursuit by different groups of Member States of different priorities, with or without overlap.

The Treaty-based approach

Enhanced cooperation: the Treaty arrangement whereby a group of at least eight Member States can work together in a particular field even if the others are unable or unwilling to join initially, with the possible entry of latecomers always maintained.

Structured cooperation: introduced by the Convention on the future of Europe, it

enables Member States that fulfil the criteria set out in a separate Protocol, and have made a commitment to military capabilities, to establish permanent cooperation in the security and defence domain.

The multi-paced approach

Two-speed or Multi-speed: the possibility that a particular core group of Member States may decide to move faster than others down the path of integration.

Concentric circles: indicates a Union structured out of subsets of Member States with differing levels of integration, as advocated by former French Prime Minister Édouard Balladur.

Avant garde: the term used by Jacques Delors to indicate a group of Member States that would map out the way to European integration and drive the process forward.

Pioneer group: introduced by Jacques Chirac, it describes a group with its own secretariat, built around a Franco-German motor, which would forge deeper integration.

Hard core: the *Kernueuropa* proposed by Wolfgang Schäuble and Karl Lamers, in which the Member States participating in the third stage of monetary union would constitute a “hard core” with the goal of advancing integration.

Centre of Gravity: the updated version of *Kerneuropa* proposed by Joschka Fischer in 2000.

3. The stalemate of integration

For too long the debate on flexible integration has been punctuated with calls to undertake groundbreaking policy initiatives, followed by a return to business as usual. The provisions on enhanced cooperation, enshrined in the Treaty of Amsterdam and amended by the Treaty of Nice (and now again by the draft Constitutional Treaty produced by the Convention), have never been applied. Efforts to introduce provisions for differentiated integration in key policy domains, such as European security and defence policy and economic governance, have met with considerable opposition. The Convention has broadened the scope for flexible integration in both these domains, but progress is still limited and the recent IGC has watered down some of the Convention’s achievements.²² This was done for the sake of appeasing fears of exclusion by some, and of respecting the red lines drawn by others. The jury is still out on the final output of the IGC, but an assessment of the current political context, and perspectives for flexible integration, need not wait.

Institutional negotiations are still blocked although, following the results of Spanish elections, a window of opportunity seems to have opened up for a quick resumption.

Member States have expressed divergent positions on the priorities of the EU budget after enlargement, and its overall amount. Members of the Euro-zone are divided on the interpretation and application of the Stability and Growth Pact, and on the management of their public finances. Barriers have been put up to slow down the free circulation of people within the larger Union. Overall, the Union is approaching the biggest challenge in its history with little confidence in its future and insufficient mutual trust between the soon-to-be 25 Member States. As correctly stated after the Brussels Summit, the lesser degree of trust that exists between the Member States, the greater the importance placed on votes.²³

Of even greater concern is the widening gap between policy perceptions and priorities among Member States, on the one hand, and EU institutions, notably the Commission, on the other. The resolve of the Commission to take governments to Court for the alleged breach of the Stability Pact, as well as the Commission's Communication on the new financial perspectives 2007-2013, were received with a mix of irritation and indifference by a number of national governments, notably those of larger countries.

The heated exchanges of the last few months, however, should be put in perspective. It is understandable that sensitivities are exacerbated when discussions on the common institutions, war and peace, and money are intertwined, and when the interlocutors are as many as 25, if not 28 as in the Convention. It is a fact of life that the Union of 25 will be more diverse and heterogeneous than ever in the past, and by a wide margin. In this context, some shock of 'tectonic' adaptation is to be expected. What really matters is that these shocks remain circumscribed to a particularly dense, and tense, political conjuncture, and do not become a structural feature of the enlarged Union, whose long-term viability would in such case be in question.

The challenge is how to reconcile the legitimate diversity of capabilities, interests and preferences, with further integration.²⁴ The solution is, according to many, a different pace of integration in different policy domains. This is a sensible perspective, and few would criticise it in the abstract. Politically, however, suggestions that some states might move faster than others raises considerable suspicion, and tensions. These concerns should be overcome with a view to enabling the Union, or sub-groups of countries within the EU framework, to deliver effective policy options and meet citizens' expectations.²⁵

4. The debate on flexibility: three problems

A number of national leaders have implicitly acknowledged the critical state of European integration and have called for a new start by a few virtuous countries to show the way to the others. The ‘others’, however, have declined the invitation to follow, and responded that it is not the time to divide Europe just when it is re-uniting after decades of enforced separation. In their opinion, the perspective of a two-speed or several-speed Europe would undermine the equality of Member States, and create barriers. The key reason for the complete mismatch of the arguments of those who want to lead, and of those reluctant to follow, is that the majority of contenders are not serious about this discussion. It is now time to have a serious debate about flexibility, and indicate what should be done, and how. This requires openly addressing three basic problems, namely: language, substance, and credibility.

The first problem is linguistics. Language is a good test of intellectual coherence, and therefore sound political reasoning. There is a world of difference between, for example, calling for a ‘core-group’ or for enhanced cooperation, although both terms entail some form of differentiated integration. This is not always appreciated. Even Jacques Delors recently observed that: “*I say differentiation and in Poland and the Czech Republic one replies they don’t want a two-speed Europe.*”²⁶ It is essential that interlocutors attribute the same meaning to the same words: this is the basis of any meaningful conversation.

Secondly, there is a problem of substance. None of the advocates of differentiated integration have outlined the policy areas where closer cooperation could be undertaken, and who could be involved. An exception to such vagueness is possibly defence policy, as proven by the considerable institutional progress brought about by the Convention under the formula of ‘structured cooperation,’ and by the agreement of the three major powers in the EU – the UK, France and Germany – to set up a joint planning cell and, most recently, joint battle groups. On the other hand, it is still difficult to assess the degree of actual political cohesion behind these moves. Furthermore, defence is a case apart: on all other major issues on the EU policy agenda, it is hard to detect any credible initiative on the part of willing and able Member States to pursue closer cooperation.

Credibility is, in fact, the third big problem when it comes to pushing for further integration at different speeds. The strongest advocate of such a scenario, France, abuses the rhetoric of the Franco-German axis as the engine of European integration. That is historically correct, although it would be fair to acknowledge that France has been at the origin of as many blockages as advancements. Turning to the Union of today, however, Franco-German rhetoric does not stand the test of reality. First, the more one calls for an *avant garde* without taking any major concrete initiative to make it real, the less credible that advocacy is.²⁷ Second, France and, to a lesser degree, Germany, have alienated most of the potential supporters by fuelling speculation of a growing large-small divide among EU countries. Fears of an emerging *directoire* of

big powers have narrowed the scope for open and constructive debate. From this standpoint, the recent 'trilateral' meeting in Berlin, involving the UK, does not help in easing tensions. Third, although many of the proposals submitted by France and Germany during the proceedings of the Convention made sense, action by the two countries outside of the Convention did not win them many friends. Regardless of the merits of specific decisions, the attitude of the two governments on the question of Iraq and on the application of the Stability and Growth Pact resulted in more - not less - division between EU Member States. The latest statements by Jacques Chirac and Joschka Fischer, recalled above, demonstrate that previous references by France and Germany to a two-speed Europe were not to be taken too seriously.

Language and concepts should be used in a more precise way. The substance of initiatives should be spelt out clearly. Credibility should be restored. The quality of the debate should be improved, to explore what initiatives should be undertaken by 'flexible' means.

5. Defining a political project

Flexibility can be envisaged in many different forms, and on many different issues. As outlined in the comprehensive and detailed analysis developed by Franklin Dehousse and Wouter Coussens in this Working Paper, flexible integration can enable the adoption of specific measures, it is a negotiating tool, and it can be undertaken within the Treaty framework, or outside it. The authors outlined the scope of what is legally possible, on the basis of existing provisions and of the innovations introduced by the Convention.

From a political standpoint, however, the faltering pace of European integration should be the central concern. Recent, sometimes overplayed, divisions between national governments have exposed the real possible scenario of increasing fragmentation, both in the politics and in the legal order of the Union.

In commenting on the evolution of flexibility over previous decades, British academic Neil Walker argued that *"flexibility is not an end in itself, but an ubiquitous device which can serve quite different – even diametrically opposed – end-games"* and stressed that *"Flexibility, therefore, is a "non-project." It is not the product of a single fixed or even evolving vision. Rather it has unfolded in a sequence of strategic negotiations and gambits, of policy-driven initiatives within discrete sectors, and of accommodations of new geopolitical forces. Its composition is marked not by design, certainty and consensus, but by contingency, ambiguity and disagreement."*²⁸ It is questionable whether this analysis can be applied to all cases of flexible integration. Take, for example, the very clear and far-sighted political vision inspiring the establishment of Monetary Union in the Treaty of Maastricht.

On the other hand, considerable casualness and short-term pressures have determined the vast majority of differentiated integration initiatives, and particularly those taken at the micro-level, consisting of the adoption of one or more specific measures. Within limits, there is nothing wrong with finding pragmatic solutions to developing a long-term project and, at the same time, accommodating specific interests: that became almost customary practice in building the Single Market.²⁹ But, although expediency might do the trick from a legal standpoint, it cannot replace political vision.

What the Union needs is a new political project. Political leadership by the Member States and European institutions is badly needed to identify new long-term priorities, and to bring together a set of key initiatives to achieve them. Flexibility will probably be required to translate this project into practice and make progress at a faster pace than it would be possible at 25. Member States should agree on the direction and purposes of this political project, and should accept that some countries are willing and able to integrate further, on specific subjects or broader policy domains.

In a Union of 25, flexibility should be a means to an end. Flexibility works well, in its many forms, when it is applied to a design with the aim of disclosing new opportunities, not shutting doors, inhibiting partners or drawing fault lines.³⁰ The elaboration of a sustainable political project for the enlarged Europe, and its flexible implementation, require overall political cohesion, policy coherence, efficiency and transparency.

6. Cohesion, coherence, efficiency and transparency

Political cohesion

At a time when the political and, in turn, economic cohesion of the Union is openly questioned, mutual trust and solidarity are supreme public goods to be jealously guarded against any further unravelling. No initiative of differentiated integration should undermine EU cohesion. Not only can flexible integration only succeed if broadly supported, but also one of the explicit objectives of differentiation should consist of enhancing cohesion, at least in the medium-term.

From this standpoint, one of the litmus tests of political leadership will be to dispose of the harmful cleavage between large and small countries. This is the reason why the perspective of a 'trilateral' cartel to guide the Union, evoked by the frequent meetings at the top level including the United Kingdom, France and Germany, raises serious reservations. Of course, this is not to say that this scenario of closer cooperation among the Big Three should be ruled out. Flexibility, however, should be considered a viable solution if other options have been explored and have proven impractical. It should develop in an inclusive manner and it should reflect a political project in the interest of the Union, and not of some of its most powerful mem-

bers. In the case in point, the trilateral *entente* is a by-product of controversy on many political fronts, but follows little attempt to bridge the gaps through the channel of the common institutions, and by involving all players. On the contrary, the steady flow of letters between issue-based 'gangs' of national governments seems to sideline the common institutions and their proposals submitted in the attempt to promote the common interest. From the point of view of pan-European political cohesion, meetings between the Big Three could be accepted only if they formed the platform of a much wider political project submitted to all partners for fully-fledged discussion. In other words, it should be about decision shaping and not decision-taking.

Transparent decision-making

Transparency is an important pre-requisite of political cohesion. Flexibility can take on different forms, but the transparency and inclusiveness of decision-making should be ensured under all circumstances in bodies where formal decisions can be adopted. Again, the distinction between decision shaping and decision taking matters. All Members States should be involved, to some extent, in shaping important decisions. This would enable outsiders to make their views clear to countries engaged in closer cooperation. Decision taking, on the other hand, only concerns the countries undertaking closer cooperation, since relevant decisions will apply to them only. This is the logic underpinning enhanced cooperation as envisaged by the treaties.

It should be reckoned that making procedures transparent for outsiders does not amount to making them more understandable, although it is surely a useful step in that direction. Developing simultaneous but separate paths of closer cooperation would not help the public and external partners to better understand the functioning of the European Union. Complication of the functioning of the Union is likely to follow any 'flexible' initiative, but outlining a clear and possibly precise plan of initiatives to re-launch the process of integration could circumscribe the risk of a further loss of popular confidence. People would be able to endorse shared objectives, and this would put additional pressure on the governments of non-participating Member States to join the front-runners. In fact, the dynamics triggered by differentiation could enhance public debate on the course of integration, and raise awareness of what is at stake in different domains.

Policy coherence

Central to the overall efficiency of the Union is the coordination of different policies. Policy coherence and efficiency are closely linked. The Commission, responsible for ensuring the consistency between initiatives of closer cooperation and common policies, should play a pivotal role in scrutinising differentiated integration. If flexible forms of cooperation will be used extensively, there is a case for the Commission to produce on a yearly basis an annual report on the progress of different initiatives, and their overall coherence, along the lines of the report on the implementation of the principle of subsidiarity.

Efficient procedures

Progress of different groups of countries towards closer cooperation should also lead to more effective policy-making among those involved. In time, this would enhance the efficiency of the Union itself, once more Member States join the advanced groups. In this perspective, countries willing to make real progress should accept abandoning unanimity between them, and applying majority voting to the adoption of any decision in the domain of closer cooperation. It is of great importance that, as envisaged by the Convention text, Member States involved in closer cooperation can move towards majority voting and the application of co-decision, with a view to promoting efficient and democratically legitimate decision-making. The so-called *passerelle* procedure, allowing for this transition, should be promptly re-introduced in the text of the Constitutional Treaty when IGC negotiations are resumed.³¹

To sum up, political cohesion, policy coherence, the efficiency and the transparency of decision-making are the four key pre-conditions for the long-term sustainability and success of flexible integration.

7. What should be done by ‘flexible’ means?

Flexibility can take many different forms. It would be paradoxical to impose stiff rules and uniform paradigms when trying to promote more flexible forms of integration. One has to be flexible about flexibility. On the other hand, however, not all forms of differentiation are equally suitable for translating an overall political project into practice.³² Member States, in cooperation with the common institutions, should find the right mix of instruments and procedures to adjust an ambitious political project to a very diverse reality, without overstressing the political and legal framework of the Union. Four broad categories of flexibility can be reviewed in this perspective. At the same time, some suggestions are provided as to what ‘flexible’ initiatives should be launched by Member States to further European integration, by drawing concrete examples, where relevant, from the previous contribution to this working paper.

Flexible integration outside the Treaty

Flexible integration arrangements outside the treaties are as old as the treaties themselves. As a general rule, Member States may, in matters coming within their competence, exercise their powers individually or collectively and may conclude agreements or conventions between them.³³ The introduction into the Treaty of the provisions on ‘enhanced cooperation’ does not preclude the Member States from entering into such cooperation outside the Treaties.³⁴ The only constraint imposed by EU membership on such cooperation is that in so doing, these Member States have to respect the primacy of EU law as well as the duty of sincere cooperation under the Treaty. Therefore, they should not take measures which could conflict with or impede the attainment of the objectives of the Treaty.

The scope of flexible integration outside the Treaty can vary from a specific domain, such as R&D, environment, education, social policy or armament cooperation,³⁵ to a fully-fledged 'Union within the Union', where some Member States set up new institutional structures to foster their integration across the board.³⁶ Overall, this form of flexible integration has performed a constructive role in the past: the *acquis* developed by a few countries was eventually translated into the Treaties, thereby proving the progressive and centrifugal potential of flexibility. This was notably the case with the Social Charter and the Schengen border cooperation. The experience of the Western European Union, and the establishment of multi-national forces including different groups of Member States, have also cleared the path for a more pronounced role for the Union in military affairs.

In the current political climate, however, Member States should not undertake major initiatives outside the Treaty framework. These would inevitably be perceived as a source of division, motivated by mutual resentment, and not as a useful 'laboratory' of future integration. The rather emotional reaction by a number of countries to the original formulation produced by the Convention, of the mechanism of 'structured cooperation' in the domain of defence, shows that tensions are high. It should be stressed that structured cooperation was not even placed outside the Treaty framework, but simply insinuated more separation between the 'ins' and the 'outs' than is the case under the standard Treaty rules of 'enhanced cooperation'. Resentful reactions to the famous trilateral meeting in Berlin on 18 February prove the same point.

Political cohesion would be the first casualty of initiatives outside the Treaty, and the efficiency and transparency of decision-making would be likely to follow suit. In fact, it is hard to detect a strong push towards setting up quasi-federal, accountable structures between some Member States. Some sort of loose, basically intergovernmental coordination, maybe supported by a light secretariat, would be a much more likely scenario, with predictable consequences. Again, the recriminations in the run up to the Summit in Berlin were largely determined not so much by substantial disagreement but by the impression that the vast majority of countries, and EU institutions guaranteeing their equal rights, were excluded and decision-making would be secretive. Policy coherence could also be damaged, given the essential role that the Commission should play in overseeing that different strands of flexible integration are at least compatible, if not mutually reinforcing. Democratic and judicial control mechanism would be seriously weakened. In a Union of 25, sidelining the common institutions further is the safest recipe for disaster, running straight into structural crisis.

Under the current political circumstances, Member States should conceive flexible integration outside the Treaty only as a 'safety valve.' The failure of enlargement might indeed entail the need for some form of differentiation outside a weakened and discredited Treaty framework, in the intention of re-launching political integration. But Member States should not take advantage of this option if all alternatives have not been exhausted. For the time being, anyway, the political will to seriously proceed in this direction, and use this extreme form of differentiation to give shape

to an ambitious political project, seems very distant. Pretty much all other initiatives – important though more limited in scope – can be launched within the Treaty framework so as to enhance a sense of commonality and involvement.

Micro-flexibility

This form of flexibility touches the opposite end of the spectrum of differentiated integration. Flexibility is included in specific legislative measures or is expressed through constructive abstention from controversial decisions in the domain of CFSP. As previously noted, ‘flexible’ legislation has been adopted in a number of policy areas to accommodate specific national interests without preventing the progress of the common *acquis*.³⁷ The inclusion of specific temporary exemptions from otherwise uniform obligations has been standard practice for building diversity into legislation, when exceptions could be motivated with the particular economic and social situation of a country.³⁸ The difference between these exemptions and ‘constructive abstention’ is that all Member States take part in the adoption of the measure where exemptions are enshrined, whereas the abstaining country does not take part in a decision that will never apply to it.³⁹

A different legal technique to accommodate diversity in EU decision-making consists of adopting framework legislation, setting minimum standards for harmonisation, and soft law, avoiding binding commitments in favour of benchmarking practices. Although these legal tools do not necessarily entail types of flexible cooperation, but simply lead to a looser legal framework, their adoption reflects the need for flexibility in shaping common rules, and accounting for existing differences.⁴⁰

The problem with micro-flexibility is the potential ‘Swiss-cheese-syndrome,’ whereby an increasing share of EU law would become either inapplicable to some countries, or so soft that it would not be taken seriously. It is not a matter of defending absolute legal uniformity, which has been largely a myth in the past, and is not realistic for the future. It is however, a question of making differentiation manageable and understandable. The Commission and the Court of Justice will play a key role in this, but their ability to monitor increasingly diversified legislation should not be pushed to the limits. The newly envisaged instruments of ‘delegated regulations,’ included in the Constitutional Treaty, might boost the role of the Commission, since it is entrusted with the definition or amendment of some non-essential elements of European laws or framework laws, within clearly established limits set by the legislator and under its scrutiny.⁴¹ This could prove to be a useful mechanism for accommodating diversity in EU law, and perhaps avoiding recourse to more divisive forms of flexibility. If ‘flexible’ legislation will become a regular feature of EU decision-making, the Commission should perhaps establish a special unit to look after policy and legal coherence under the responsibility of the President.

The acceptance of micro-flexibility inevitably entails a price in terms of transparency, but that could be worthwhile if stalemate situations are avoided and additional

political tensions. In fact, political cohesion is not directly threatened by micro-flexibility. On the contrary, the smooth running of legislative activity, taking into full account diverse needs and priorities, could help defuse confrontation. From this standpoint, many have envisaged in the past a trade off between the application of qualified majority voting and the need for flexibility: where the former applies, the latter would not be required. Additionally, enabling flexibility should not become an excuse for hindering the extension of majority voting. Although the elimination of unanimity is desirable for facilitating decision-making in a Union of 25, it should be recognised that this will be an incremental process, and that a number of sensitive decisions will continue to require the agreement of all. Moreover, in those cases where majority voting applies, it is not always politically advisable to make full use of it, and thus force some Member States into uncomfortable minorities. Forms of micro-flexibility might help overcoming stalemates without an all-out confrontation. This form of flexible integration cannot be the sole, or main, basis for implementing a comprehensive political project for the future of Europe, but could become a practical 'management' tool in specific circumstances. Member States should enshrine forms of micro-flexibility to enable progress in the field of economic competitiveness, environment, consumer protection, social policy, CFSP and JHA, among others.

Pre-determined flexibility

This broad definition covers various forms of flexible integration. It includes cases where the rules delimiting the policy substance of closer cooperation, and the criteria for joining it, are enshrined in the Treaties. Monetary Union has been set up this way, building on the Treaty of Maastricht. The original formulation of 'structured cooperation' in defence, as envisaged by the Convention, belongs to this category of flexibility as well, although that provision has been substantially amended by the following IGC. Future cooperation in the context of the newly established European Armaments Agency amounts to a form of pre-determined flexibility too, except in the event that all countries decide to join the Agency. For the purposes of this classification, however, it seems useful to extend the definition of pre-determined flexibility to include those cases in which some Member States benefit from permanent opt-outs from entire policy areas, and these opt-outs are formally recognised by the Treaties. The 1993-1997 UK opt-out from the Social Chapter⁴² as well as the UK, Irish and Danish opt-outs from the Schengen *acquis* (following its incorporation in the Amsterdam Treaty), and from Title IV TEC, are the main examples of this form of differentiation. Both these opt-outs and the Monetary Union introduced differentiation in primary, Treaty-level - EU law - thus marking a turning point in relation to measures entailing micro-differentiation at the level of secondary law, EU legislation.

Pre-determined flexibility can be healthy for the Union, although it clearly reflects quite a serious difference between Member States on policy priorities and targets. It is not a matter of dissenting on one specific measure in this or that respect. Differentiation is envisaged by the Treaties when a deep political fault line has already divided national governments on important issues. Political differences,

however, do not necessarily entail or follow, hostile confrontation. In the case of EMU, as well as on the occasion of the inclusion of the Schengen *acquis* in the Treaties, those countries wishing not to be involved in closer cooperation in these policy domains have freely decided to stay out, and have accepted the legitimate desire of others to advance. Still, the heavy procedures required to accommodate all different interests render arrangements for pre-determined flexibility very complex and difficult to manage. This, in turn, risks undermining the efficiency of actions undertaken by the 'insiders.' Also, Treaty revision procedures require unanimity, which may well hamper adjustment to evolving circumstances and the correction of sub-optimal policy set-ups.

Notwithstanding these downsides, EU political cohesion is not undermined by pre-determined flexibility, if it abides by certain conditions. These conditions chiefly include the openness and the transparency of the initiatives aimed at closer cooperation through pre-determined flexibility. Both requirements are matched by Monetary Union: any country willing and able to match the Maastricht criteria to join EMU can do so, and decision-making is sufficiently transparent. Non-EMU countries are excluded from the deliberations of the informal Euro-Group, where the Finance Ministers of countries belonging to the Euro-area meet, in the attempt to define common political guidelines. The Euro-Group, however, is deprived of decision taking powers, which involves all Member States within the Ecofin Council. This, although only Eurozone members can take part in voting on a limited range of issues of special relevance for the management of Monetary Union, such as the appointment of the members of the European Central Bank (ECB) executive board or the decisions to use coercive means under the excessive deficit procedure. The condition for the desirable extension of the powers of the Euro-Ecofin is, therefore, that policy shaping in the Council remains open to all, although Eurozone members can informally consult in the Euro-group, *ex-ante*, and are the only ones entitled to take a given set of decisions, *ex-post*.

In this perspective, members of the Eurozone should enhance the role of the Euro-Ecofin Council building upon the current form of pre-determined flexibility. The amendment of current Treaty provisions would of course require the unanimous agreement of all Member States. Alternatively, Eurozone members can take the initiative and use the rules of Treaty-based enhanced cooperation. The powers of the Euro-Ecofin should be expanded to cover a wider range of decisions pertaining to the economic governance of the Euro-area. Eurozone members should, for example, adopt a fiscal policy stance establishing upper limits to tax cuts unparalleled by cuts in expenditure. Members of the Eurozone, and in particular France and Germany, should show true willingness to overcome previous controversies, strengthen the economic governance of Monetary Union to regain – over time - the confidence of smaller countries.

The problem with 'structured cooperation' on defence, as framed by the Convention, lies with the exceedingly exclusive character of this form of differentiation: some countries were expected to quasi 'self-appoint' themselves to be part of this cooper-

ation, and other countries would have been excluded not only from decisions pertaining to 'structured cooperation,' but also from relevant deliberations. Structured cooperation added the 'exclusivity' of decision *shaping* to the 'exclusivity' of decision *taking*. That was not acceptable to a number of countries, and was rejected during the IGC. The last version of Article III-213, produced by the Italian Presidency, opens up decision shaping - the phase of deliberation in the Council - although decision taking is quite sensibly reserved for those countries taking part in structured cooperation. Also, the development and evolution of structured cooperation would entail, according to the latest draft, the full involvement of the European institutions in monitoring the respect of the criteria set out in a separate Protocol. It seems that, following these radical changes, structured cooperation is now much closer to a standard form of enhanced cooperation than to pre-determined flexibility. Willing and able Member States should undertake structured cooperation as a matter of priority, and strengthen the Union's CFSP and European Security and Defence Policy (ESDP) by leading them.⁴³

Pre-determined flexibility should not, in principle, threaten policy coherence, if countries are genuinely committed to the rules. After all, unanimous agreement is required for this type of arrangement to be inserted in the Treaty. That seems enough of a guarantee against initiatives aimed at introducing undue discrimination between Member States. Also, the presence of objective criteria to set up this form of flexibility and to determine the conditions for accession enhances the predictability of policy decisions, and prevents abuse to the disadvantage of outsiders. The implications of opt-outs for coherence and - more broadly - political cohesion, however, raise serious reservations. Quite differently from EMU or structured cooperation arrangements, opt-outs often depend on last-minute political deals at the highest level, with scant consideration for the impact on the legal framework of the Union, and systemic complication. There is little 'objectivity' in opt-outs, and few guarantees against free-riding. All in all, opt-outs cannot and should not be ruled out, but should be used sparingly and with great care, in full consideration of the common interest and of the sustainability of the legal framework.

In future, it will be important to match provisions on pre-determined flexibility, including agreements on opt-outs, with catch-up mechanisms for countries willing to join flexible integration at a later stage, but requiring assistance to meet the requirements. The role of the common institutions should be central to the process of progressive expansion of a leading group, with a view to enhancing the centripetal effects of flexibility.

Enhanced cooperation

Treaty provisions on enhanced cooperation constitute an open-ended enabling clause empowering a group of Member States to deepen their cooperation within the framework of existing treaties, excluding policy domains belonging to the sphere of exclusive competence of the Union.⁴⁴ As described by Franklin Dehousse and Wouter Coussens, the initially tight conditions attached to the launch of enhanced cooperation have been loosened by the Treaty of Nice and by the new draft Constitutional Treaty.⁴⁵ Although their legal interpretation remains questionable, for example when it comes to assessing whether a given measure threatens the economic, social and territorial cohesion of the Union, it is safe to argue that a larger window of opportunity is now open for engaging in enhanced cooperation. At the same time, however, such a window only includes opportunities that fall within the scope of the Treaty framework. Enhanced cooperation does not enable action in matters for which the Treaty does not already provide a legal basis.

Enhanced cooperation is a very inclusive form of flexibility, and offers solid guarantees of transparency and accountability with respect to those countries not taking part in closer cooperation. The Commission has the responsibility to submit to the Council, or to reject, a request from Member States willing to launch an initiative of enhanced cooperation. The Commission also performs a gate-keeping role on the accession of new countries to the group pursuing deeper integration. In the domain of CFSP, on the other hand, this is the Council's responsibility. The Commission and the Minister for Foreign Affairs (whose fate depends on the final agreement of Member States in the IGC) are also responsible for informing all countries and the European Parliament of the evolution of enhanced cooperation. Decision shaping is open to all countries, while decision taking only involves those participating in the enhanced cooperation. As it is often the case, transparency, efficiency and legitimacy go hand in hand. The Convention has introduced a new, important provision whereby countries undertaking enhanced cooperation can establish, to apply among them, majority voting and the ordinary legislative procedure (formerly co-decision) where the Treaty still envisaged unanimity and special legislative procedures (where the Parliament is not given equal rights to the Council). As noted above, the removal of this *passerelle* clause by the IGC should be swiftly redressed, and the provision re-introduced.

The Commission and the Council are mandated to look after policy coherence as well, ensuring the overall consistency of different initiatives undertaken in the context of enhanced cooperation, and the consistency of those measures with common EU policies. The involvement of the EU institutions should exclude the risk of fragmentation into different groups of countries pursuing competing or diverging priorities. The entire Treaty-based legal framework of enhanced cooperation is conceived to ensure that the interests of all are safeguarded. The competences, rights and obligations of non-participating countries must be respected. Moreover, the Commission and Member States' part in enhanced cooperation are supposed to encourage and

facilitate the participation of the largest number of countries, so as to prevent the risk of deep-running separation between two or more groups. Since normal decision-making procedures apply, enhanced cooperation caters for better democratic and judicial control mechanisms.

Enhanced cooperation is expressly directed at strengthening the integration process by achieving EU objectives and preserving its interests.⁴⁶ Enhanced cooperation is, therefore, the sole form of flexibility endowed with a strong normative dimension. This is, at the same time, the strength and the limitation of enhanced cooperation. On the one hand, as remarked, this mechanism scores well against all the benchmarks outlined above to assess various options for differentiation. On the other hand, however, enhanced cooperation is unlikely to be the basis for a major political breakthrough, entailing deeper cooperation in one or more broad policy domains. Although more relaxed, conditionality is still quite restrictive and boundaries to Member States' initiatives are open to different interpretations. Also, as a matter of fact, it is hard to imagine the Commission and the Council comfortably authorising progress across the board by some countries, with the others acting as spectators. While the scope for enhanced cooperation is not predefined, issue-based initiatives seem much more likely to take shape than wide-ranging projects. Finally, and this is one of the least convincing aspects of the work of the Convention on flexibility, the number of countries required to launch enhanced cooperation – one third – will increase with each enlargement of the Union. This will make agreement on a set of ambitious measures increasingly difficult.

Looking at the political agenda of the Union, Member States should apply enhanced cooperation on important issues, such as harmonisation of indirect taxation in the domain of the environment and energy, or harmonisation of the corporation tax base. According to Commissioner Bolkestein, the latter might be the subject of a forthcoming Commission recommendation envisaging enhanced cooperation to overcome the opposition of Ireland and the UK.⁴⁷ Enhanced cooperation could open new perspectives in setting up higher environmental thresholds for those governments willing to commit themselves in response to strong popular demand. This would concretely demonstrate to EU citizens that cooperation at the European level can address their concerns and bring tangible results in terms of quality of life. The same is true as far as social policy is concerned. For example, some Member States should establish the full cross-border portability of pension rights across different Member States.

Enhanced cooperation also seems the most appropriate tool to allow for differentiation in the area of Justice and Home Affairs.⁴⁸ Member States should use enhanced cooperation to set up a corps of European Border Guards, as well as to enhance police cooperation to support and develop the 'hard-security' end of the range of Europol activities. In parallel to this, or by way of upgrading Europol's structures and mandate with the participation of only a limited number of national players, a fully-fledged European Intelligence Agency could be set up. This would appear particu-

larly appropriate (and, following recent terrorist attacks in Madrid, urgent) considering the high priority given to anti-terrorism operations by public opinion and governments, and the inevitable link between internal and external security.

In this perspective, it would be advisable that the same countries involved in 'structured cooperation' in ESDP set up some form of enhanced cooperation among them to boost their common police and intelligence capacities, if not all Member States are immediately ready to go down this route. These countries would therefore constitute a sort of 'security' *avant garde* across the board. Criminal justice cooperation is another natural candidate for enhanced cooperation: there seems to be a clear case for constituting a body of European public prosecutors able to pursue their investigations and intervene operatively across the territory of states participating in closer cooperation. That should of course go hand-in-hand with a close scrutiny of different systems of rights and guarantees for those subject to investigation or arrest.

8. The end justifies 'flexible' means

It is not by chance that the word 'integration' made its first entry at primary EU law level, with the Treaty of Nice in Article 43 TEU, under the chapter on enhanced cooperation. This was an important signal, since it indicated the most constructive approach to envisaging future forms of flexibility. Flexibility must become a tool for integration, at the service of a political project supported by all Member States, outlining shared priorities. Admittedly, this is more easily said than done. However, it would not be the first time in which the Union, confronted with very serious political, economic and security challenges, finds the inspiration and the collective will to shape a new vision, and plan new initiatives. Although that appears very difficult in the light of recent fragmentation and controversy among Member States, there is scope for optimism. The terrorist attack in Madrid is yet another powerful reminder of the need for cohesion, ambition and determination

The question is how to go about the elaboration of a common project. Recent achievements in one very important policy domain - external security – provide useful insights into how to shape a common political platform for a very diverse Union. The very serious turmoil over the Iraq crisis produced growing awareness that a qualitative quantum leap was needed. A common platform for decision-making was needed to promote cohesion, coherence and efficiency, and to identify shared objectives.

An innovative process was launched to draft a European Security Strategy, which proved to be a considerable success. A small group of key players within the services headed by Javier Solana produced a draft in two months. Different sensitivities and strategic cultures were reflected in this task force, and Member States felt comfortable with its work. In close cooperation with national governments, the 'Solana document' presented at the Thessalonica Summit in June 2003 became the existing

EU Security Strategy, approved at the December European Council in Brussels.⁴⁹ Some lessons can be drawn from the successful procedure 'invented' to prepare the European Security Strategy, with a view to outlining shared objectives for the Union across different policy domains. Looking at this precedent, two prerequisites are essential: limited size of the group of drafters, and inclusion in such group of individuals able to reflect the broad range of different national and political sensitivities. For the purposes of this initiative, however, a third requirement should be stressed: the participation of the common institutions, notably of the Commission. There is no Europe without the support of national governments, but it is equally obvious that there is no cohesion, coherence, efficiency and transparency without the work of the Community institutional framework, with the Commission at its core. The capital of experience and motivation, accumulated by the common institutions should be put at the disposal of this process. The widening gap between Member States and the Commission should be filled. This initiative might prove a very useful bridge.

The project should be accompanied by a detailed action plan. In drafting this concrete action plan, various forms of flexibility should be envisaged to pave the way for progress in policy domains where the direction of integration is contested, and specific national sensitivities are the strongest. Arguably, against the background of an agreed political framework, it would be much more difficult for individual Member States, or small minorities of countries, to radically oppose progress by others. A very heavy burden of proof would inevitably weigh on their shoulders. Once shared objectives, and the set of relevant implementing measures, are agreed, all governments would be able to fine-tune their position pragmatically, and possibly decide to stay out of one or more initiatives.

9. Conclusion

Is a hard-core in sight? Not really - for the time being. At this stage of the process of integration, the Union does not need a hard-core either: that would prove too divisive. Member States should discuss a shared political project with the common institutions, to fulfil the often-cited ambitions of a larger Europe. Member States should implement this project at 25 if possible, or, as a fallback, adopt initiatives that involve a smaller number of countries. This project should include initiatives directed at strengthening the economic governance of the Union, boosting sustainable growth coupled with social cohesion,⁵⁰ ensuring a fiscal level playing field for companies across the single market, and guaranteeing the internal and external security of the Union. These initiatives will vary in scope, instruments, and procedures. Broadly speaking, more differentiation is likely to be enshrined in EU law, and enhanced cooperation should become the basic procedure to allow for groups of countries to make progress in different domains.

A closer look at the Union in ten years time might reveal that, after a considerable injection of flexibility and differentiation, there will be a group of Member States that have freely decided to be part of a vast majority of initiatives, across the board. In a discrete and consensual fashion, they will have won the right to sit at the front-seat of European integration, under the scrutiny of the common institutions. The Union will then have an *avant garde*. Statements are no longer enough: medals have to be won on the field, with concrete initiatives such as the ones suggested above. If, in the span of a few years, a cohesive and inclusive *avant garde* emerges it will be to the benefit of a large and strong Europe.

- 1 The author would like to thank H. BRIBOSIA, W. COUSSENS, F. CAMERON, S. CROSSICK, F. DEHOUSSE, G. DURAND, S. GOULARD, A. HALLIGAN, and J. PALMER for their valuable comments on the draft versions of this working paper.
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- 3 William & Mary Lecture, University of Leiden, 7 September 1994
- 4 Document of CDU/CSU group at German Bundestag, Réflexions sur la politique européenne, Europe Documents, 1865/96, 7 September 1994.
- 5 E. BALLADUR, Pour un nouveau traité de l'Élysée, Le Monde, 30 November 1994
- 6 Speech to the Institut français des relations internationales, Paris, 26 October 1994
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- 9 H. SCHMIDT and V. GISCARD D'ESTAING, Time to slow down and consolidate around 'Euro-Europe', International Herald Tribune, 11 April 2000.
- 10 Speech to the Polish Stock Exchange, 6 October 2001
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- 13 M. BARNIER, "Why Europe matters - Personal note from Michel Barnier", 17 October 2001
- 14 DOMINIQUE DE VILLEPIN and JOSCHKA FISCHER, "Joint Franco-German proposal to the European Convention in the field of European security and defence policy", CONV 422/02, 22 November 2002.
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- 19 J. CHIRAC, speech at the Hungarian Parliament, 24 February 2004
- 20 J. FISCHER, interview to Berliner Zeitung, 27 February 2004
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- 23 WOLFGANG MUNCHAU, "Mistrust at the heart of the crisis", Financial Times, 14 December 2004

24 For a comprehensive overview of ways to adjust to flexibility, see E. PHILIPPART and M. SIE DIAHN HO, "From Uniformity to Flexibility. The management of Diversity and its Impact on the EU System of Governance" in G. DE BURCA, J. SCOTT (eds) "Constitutional Change in the EU - From Uniformity to Flexibility?", Hart, Oxford - Oregon, 2000.

25 On the link between flexible integration and 'output' legitimacy, see F. SCHARPF, "Problem-solving effectiveness and democratic accountability in the EU", Max Planck institute for the Study of Societies (MPIfG), Working Paper 03/01

26 Bulletin Quotidien Europe, No. 8636, 3 February 2004, JACQUES DELORS quoted by Ferdinando Riccardi.

27 On the need for France and Germany to restore their leadership, see Groupe de réflexion sur la France et l'Allemagne dans l'Union Européenne de demain, "France et Allemagne en Europe: la leadership se mérite", Europartenaires, July 2003.

28 N. WALKER, "Flexibility within a Metaconstitutional Frame: Reflections on the future of Legal Authority in Europe", in G. DE BURCA, J. SCOTT, cit. For a related set of reflections on the sustainability of a unitary legal framework, encompassing the proliferation of flexibility, see D. CURTIN, "Emerging Institutional Parameters and Organised Difference in the European Union", in B. DE WITTE, D. HANF and E. VOS (eds), "The Many Faces of Differentiation in EU Law", Interstentia, Antwerp, Oxford, New York, 2001.

29 G. DE BURCA, "Differentiation within the Core: the Case of the Common Market", in G. DE BURCA, J. SCOTT, cit.

30 On the inter-relation between flexibility and European integration see H. WALLACE, "Flexibility: A Tool for Integration or a Restraint on Disintegration?" in K. NEUNREITHER, A. WIENER (eds), "Amsterdam and Beyond: Institutional Dynamics and Prospects for Democracy in the European Union", Oxford, Oxford University Press, 2000.

31 The Italian Presidency, under pressure from a majority of national governments, has proposed to cancel Article III-328 of the Constitutional Treaty. See CIG 60/03 ADD 1, Annex 44.

32 For a detailed account of the pros and cons of different forms of flexible intergration, see E. PHILIPPART, M. SIE DIAHN HO, "The Pros and Cons of closer cooperation within the EU. Argumentation and recommendations", WWR Working Paper 104, 2000

33 Hence, such cooperation is excluded in areas falling under the exclusive competences of the Union. It is also excluded in areas of shared competence where the exercise of this competence by the Union has preempted that of the Member States. See: B. DE WITTE, "Old-fashioned flexibility: International Agreements between Member States of the Union", in G. DE BURCA, J. SCOTT, cit. and B. De WITTE, "Chameleonic Member States. Differentiation by Means of Partial and Parallel International Agreements", in B. DE WITTE, D. HANF, E. VOS, cit.

34 The current Treaties explicitly recognise this. Article 17 TEU maintains that the Treaty does not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and NATO, provided such cooperation does not run counter to or impede the Union's CFSP. This clause no longer figures in the Convention's draft, but this should not be interpreted *a contrario* that such cooperation is now precluded.

35 For a specific analysis of a number of initiatives outside the Treaties in these and other domains see B. RACINE, E. PHILIPPART, "Rapport sur les Coopérations Restreintes dans les domaines de la Recherche & Développement, de l'éducation et de la politique sociale", Commissariat Général du Plan, September 2003.

36 Jacques Delors has been the main advocate of this option, while stressing the need to preserve political cohesion and policy coherence between the envisaged 'Federation of Nation States' and the wider European Union, whose degree of integration would remain looser.

37 See G. DE BURCA in G. DE BURCA, J. SCOTT, cit. and C. D. EHLERMANN, 1984, cit.

38 For some of these flexible measures, however, the link with “*objective differences in situation*” was somewhat spurious. On some occasions, exemptions seemed to originate from diverging national interests, and not from objective differences.

39 F. SCHARPF (cit.) makes an interesting case for the generalisation of the application of constructive abstention to other policy domains. Considering the wide range of instruments available, it is not clear what added value the generalisation of constructive abstention would bring with respect to open-ended exemptions, amounting to micro-opt-outs. Abstention would perhaps highlight a stronger will of differentiation from the direction of a certain measure, but in the presence of serious differences the instrument of enhanced cooperation would be available and perhaps more suitable for those willing to advance. All in all, the case for extending the mechanism of constructive abstention across the board does not seem convincing. This reform would introduce more complication in a decision-making system already under strain, without clear advantages.

40 For the application of soft law measures in the field of social policy see C. BARNARD, “Flexibility and Social Policy”, in G. DE BURCA, J. SCOTT, cit. See also J. SCOTT, “Flexibility, ‘Proceduralisation’ and Environmental Governance in the EU”, in G. DE BURCA, J. SCOTT, cit. See also, for a wider overview, L. SENDEN, S. PRECHAL, “Differentiation in and through Community Soft law”, in B: DE WITTE, D. HANF, E. VOS, cit.

41 See Article I-35 of the Constitutional Treaty.

42 The then 12 Member States agreed at Maastricht that the Social Chapter, including a Social Policy Protocol and a Social Policy Agreement, would be attached to the Treaty but would not apply to the UK, which opted out. Following the victory of the Labour party at British elections in 1997, however, the UK opted in, and the provisions of the Social Chapter were enshrined in a new section of the Treaty of Amsterdam. See C. BARNARD in G. DE BURCA and J. SCOTT, cit.

43 For broader reflections on the scope of flexibility in the domain of security and defence see A. MISSIROLI, “Flexibility and enhanced cooperation in European security matters: assets or liabilities?”, ISS Occasional Paper, 6, 1999 and A. MISSIROLI, “CFSP, defence and flexibility”, ISS Chailot Paper, 38, 2000. See also, in particular on armaments cooperation, the recent note by A. MISSIROLI on the proceedings of a seminar at the Institute of Security Studies of the European Union on “Flexibility for ESDP: what is feasible, what acceptable, what desirable?”, 26 January 2004.

44 For an early assessment of the new provisions on enhanced cooperation introduced by the Treaty of Amsterdam, see C.D. EHLERMANN, “Differentiation, Flexibility, Closer Cooperation: the New Provisions of the Amsterdam Treaty” in *European Law Journal*, 4, 1998.

45 On the debate on flexibility in the Convention, see J. SHAW, “Flexibility in a ‘Reorganised’ and ‘Simplified’ Treaty”, in B. De WITTE (ed), “Ten reflections on the Constitutional Treaty for Europe”, EUI, RSCAS/AEL, Florence, 2003

46 Article 43 TEU, as amended by the Treaty of Nice, and Article I-43 of the Constitutional Treaty.

47 See interview of FRITS BOLKESTEIN with *Le Monde*, reported in *European Information Service (EIS)* 24 February 2004, and, more recently, the statement of Commissioner Bolkenstein at the European Parliament Committee on Economic and Monetary Affairs, 16 March 2004.

48 See the report of the atelier chaired by GUY CANIVET, “Les coopérations renforcées en matière de justice et affaires intérieures: un outil d’intégration”, *Commissariat Général du Plan*, 2003.

49 For an assessment of this document, see F. CAMERON, “The EU’s Security Strategy”, *Internationale Politik*, Transatlantic Edition, Vol. 5, Spring 2004.

50 For a view on how to improve the economic and social governance of the Union, see the proposals of the ‘Spinelli Group’ for a PES (Party of the European Socialists) programme, 11 February 2004, outlining a set of relevant measures. Text reproduced in *Bulletin Quotidien Europe*, No. 2361-2362, 27 February 2004.

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