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IGC 2000: Enhanced Co-operation

‘Enhanced co-operation’ or ‘flexibility’ in the EU allows arrangements whereby some Member States may, subject to certain criteria, move ahead of others in the process of European integration.

Although not originally on the agenda of the Intergovernmental Conference (IGC), reform of the existing ‘enhanced co-operation’ provisions was formally added in June to the agenda of institutional reforms that the IGC aims to resolve at the Nice European Council from 7 to 9 December 2000.

This paper considers the ideas put forward in recent months, both within the context of the IGC and outside it, on the future structure of an expanded European Union and the pace of integration among the Member States.

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Summary of main points

As the EU enlargement negotiations continue, EU leaders are negotiating reforms to the EU institutions to accommodate a Union of 28 members or more within the next 10 to 15 years. The Intergovernmental Conference (IGC) that opened in February and is due to conclude in December with the *Treaty of Nice* aims to amend the EC Treaties to allow for this expansion.

Some of the institutional issues remain outstanding from the last IGC in 1996-97, when they proved too contentious to resolve. In addition to institutional matters, such as the size and composition of the Commission, votes in the Council of Ministers and the extension of Qualified Majority Voting,¹ closer or enhanced co-operation is now also on the agenda.

The debate on the pace of European integration is not new, and at the last IGC in 1996-97 various scenarios were suggested to allow some Member States to pursue objectives compatible with the Treaties that other States could not or did not want to follow. The terms then included 'concentric circles', 'variable geometry', 'two-tier', 'hard core', 'multi-speed' and 'multi-track'. Brief explanations of these are given in **Appendix 1**. The Treaty of Amsterdam includes strictly limited provisions allowing for enhanced co-operation, although these have not been used.

The debate has been further enlivened in recent months by the German and French political leaders setting out their visions, sometimes in a very personal capacity, on the future structure of Europe. If moves were made towards a more federal structure, France and Germany would be the 'motor', the leaders of a core group of Member States that would pursue some actions alone or ahead of other Member States. The protagonists are the German Foreign Minister, Joschka Fischer, the French President, Jacques Chirac, and the French Foreign Minister, Hubert Védrine. Other European leaders, including the British Prime Minister, Tony Blair, have contributed to the debate.

Recent proposals seek to make enhanced co-operation possible as a last resort in all areas of Union policy-making and activity, including the Common Foreign and Security Policy, but not in areas within the exclusive competence of the Union, such as the internal market and economic and social cohesion.

The British Government has maintained that a federal model is not appropriate for the EU, and has suggested that the future lies in an intergovernmental approach, based on co-operation among nation states. However, the Government does not rule out enhanced co-operation in some areas, subject to strict criteria.

¹ See Research Papers 00/49, *Intergovernmental Conference 2000: the main agenda*, 19 April 2000, and 00/83, *IGC 2000: from Feira to Biarritz*, 27 October 2000

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I Enhanced Co-operation

‘Flexibility’, ‘enhanced co-operation’, ‘closer co-operation’ and ‘differentiated integration’ are descriptions of an existing arrangement whereby a group of Member States might proceed with a measure or action ahead of, or without, the rest of the Union, but inside the Treaty framework, that is to say, using the EU institutions and procedures. It allows for other Member States to opt into such measures by request, according to procedures set out in the Treaty.

EU enlargement has provided the stimulus for a renewed discussion of this concept and for reforming the provisions introduced in the *Amsterdam Treaty* in 1997 (see below). The German government, backed by Italy, and with the somewhat ambivalent support of France, has been the main proponent of the idea in the present IGC. These States see it as a way of allowing Member States to progress towards integration at a pace faster than that of the slowest or most reluctant Member. It allows co-operation in certain areas that would be functional for one group of states but an “unnecessary burden for others”.²

Britain, Sweden, Denmark, Spain and Finland have been wary of reforming the present closer or enhanced co-operation provisions, for fear that this could lead to the creation of a two-tier Europe. Many commentators view Denmark’s rejection of the euro in a referendum on 28 September as signalling the beginning of a two-speed Europe. Whether or not Britain and Sweden join EMU, the Danish opt-out from the EU’s most ambitious economic and political project to date is perhaps enough to make the need for flexibility a reality.

II The Amsterdam Treaty Provisions

Enhanced co-operation was introduced in the Amsterdam Treaty in a new Title VII containing Provisions on Closer Co-operation,³ with specific provisions applicable in Title VI (police and judicial co-operation)⁴ and the Treaties Establishing the European Communities (TEC).⁵ The provisions allow a majority of Member States to adopt measures, excluding the Common Foreign and Security Policy (CFSP, see below), that apply only to themselves. There are strict substantive and procedural conditions. Closer co-operation must not affect the *acquis communautaire*, nor the interests of non-participating States, and must only be used as a last resort. Any such action must be within the limits of EC competence and must not distort competition between Member States. Following a request from Member States, the Commission proposes such action, with the Council approving it by QMV. However, under Article 11.2 TEC a Member State objecting to a proposal can require the decision to be taken by unanimity in the European Council, thereby allowing a national veto over the proposal. The Amsterdam provisions reflect a compromise between those Member States

² Eric Philippart, “Flexibility vital to speed up integration”, *European Voice*, 18-24 May 2000

³ *Treaty on European Union* (TEU), as amended by Amsterdam, Articles 43-45

⁴ TEU as amended by Amsterdam, Article 40

⁵ Article 11

that wanted the triggering of enhanced co-operation to be decided by QMV (e.g. Germany, France, the Benelux countries), and others (e.g. Britain, Sweden, Denmark, Portugal, Spain and Greece) that wanted unanimity.

Article 46 TEU emphasises the role of the European Court of Justice (ECJ) in monitoring the application of the mechanisms for closer co-operation. It is interpreted as meaning that the Court will rule in disputes among participating States. This could present the Court with some sensitive and highly political issues and it would probably be cautious about interpreting the Treaty conditions too strictly in case Member States wishing to pursue such a course did so anyway, outside the EU framework.⁶

The quorum needed under Amsterdam for enhanced co-operation is a majority (currently eight) of Member States. However, proponents of reform argue that with enlargement this should be fixed at eight, rather than continue as a majority of States.

No measures have been adopted under existing provisions on closer co-operation since Amsterdam came into force in May 1999. This is perhaps because the mechanism is complex and because there are still doubts about its justiciability. It could be that the desire for such action has simply not arisen among a sufficient number of States.

Eric Philippart evaluates the present Amsterdam arrangements as follows:

First, the current compromise is clearly biased in favour of the proponents of the status quo, the number of constraints put on the group willing to cooperate more closely being unduly high. Second, the system seems to endorse a new 'self-help' philosophy, with no reference being made to solidarity mechanisms. Third, closer co-operation has been excluded from the second pillar, while it could be useful for security and defence matters.

The new system therefore needs to be substantially improved to be made less vulnerable to blockages, more attractive to discourage the use of extra-EU co-operation and less worrying for member states unable to participate in new initiatives. Its scope should also be widened.⁷

Amsterdam does not provide enhanced co-operation arrangements for the Common Foreign and Security Policy (CFSP), but the rules for decision-making under Amsterdam do allow more flexibility in the 'second pillar'. There is a balance between unanimity and QMV, with the most important decisions of principle (Common Strategies or general guidelines) to be taken by unanimity in the European Council and most implementation to be decided in the Council of Ministers, where QMV is available in certain circumstances. Under Article 23(1) the basic voting rule for CFSP in the Council of Ministers is unanimity. Where unanimity

⁶ The original Schengen Accord was an intergovernmental initiative but it was incorporated into the Amsterdam Treaty, with opt-in provisions for the UK and Ireland.

⁷ Eric Philippart, "Flexibility vital to speed up integration", *European Voice*, 18-24 May 2000

cannot be achieved, Article 23(1) gives individual Member States or small groups of States the opportunity to register a ‘constructive abstention’ in order to allow the majority to go ahead. However, the abstaining State or States have to accept that the decision commits the Union as a whole and must not undermine it subsequently, although they are exempted from implementation of it. If the number of Members recording their abstention represents more than one third of the votes, weighted in accordance with TEC 205, then the decision is not adopted. This does not apply to decisions with military implications, where unanimity would apply.

Article 23(2) provides for a derogation from the general rule of unanimity in the case of the adoption of Joint Actions, Common Positions and other decisions based on Common Strategies, as well as for the implementation of Joint Actions and Common Positions. In these cases decisions can be taken by QMV. Approval requires at least 62 votes in favour from at least 10 Member States. However, this paragraph also allows for a national veto, since a Member State can reject the adoption of any decision by QMV for “important and stated reasons of national policy”. In other words, a vote is not taken and the particular act in question is not authorised.

Another element of flexibility under Amsterdam is evident in Article 17.4 of the CFSP Title, which provides the possibility of:

closer co-operation between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such co-operation does not run counter to or impede that provided for in this Title.

It could be argued that CFSP is perhaps more suited to enhanced co-operation arrangements than other areas, since there is already a variable degree of commitment to European security structures. Some Member States are members of the Western European Union (WEU) and NATO, while others are not, and there are already bilateral defence arrangements, such as Eurocorps. Some of the applicant states are already in NATO, but others might or might not join. Such defence and security arrangements might be brought into the EU framework under the auspices of enhanced co-operation. There might be no right to veto such arrangements but there is little a Member State can do at present to stop a bilateral defence initiative from being pursued by a group of Member States on an intergovernmental basis, as long as there is no conflict with their CFSP obligations.

III French and German Proposals

At bilateral meetings in May and June 2000, a framework was established by the French and German governments for co-operation in the IGC negotiations. On 19 May 2000 informal Franco-German talks resulted in a co-ordinated approach to the IGC, with the emphasis on enhanced co-operation as the way for an enlarged EU to proceed. *Le Monde* reported that France and Germany had reached agreement in principle on the main IGC issues, including the need to abolish the possibility of a veto against the triggering of the present mechanism for ‘enhanced co-operation’.⁸

At the 75th Franco-German summit in Mainz on 9 June 2000 various common positions were adopted. The *Times* suggested that Gerhard Schröder and Jacques Chirac were “tread[ing] softly to avoid offending Britain” and that the meeting had been overshadowed by the suggestion of the French Defence Minister, Alain Richard, that Britain and not Germany was the natural, and indeed preferred, partner to France on security issues.⁹ A joint initiative was not published following the meeting, apparently “lest it be regarded by the rest of Europe as a ‘Diktat’.”¹⁰ The *Independent* ventured:

That explanation may also be a way of papering over the cracks. France and Germany may have drawn closer together in recent months, but there are differences of emphasis in many areas, and out-right hostility in others. Talks about co-operation in defence have been strained by pointed remarks from Paris lamenting Germany’s commitment and lauding British pragmatism.¹¹

In addition to supporting a formula for closer co-operation in the EU, French and German leaders have described in recent speeches a distinct vision of Europe in which they form the *avant garde* in moves towards European integration.

A. Joschka Fischer’s Speech

On 12 May 2000 the German Foreign Affairs Minister, Joschka Fischer, made a speech in which he set out his personal vision for the future structure of Europe - a distinctly federal structure.¹²

He proposed that a limited number of present EU Member States should sign a new ‘Treaty of Europe’ which would eventually form the basis of a European federation. He was sceptical of the Union being able to cope with an enlarged membership, even if basic

⁸ *Le Monde*, 2 June 2000

⁹ *Times*, 10 June 2000

¹⁰ *Independent*, 10 June 2000

¹¹ *Independent*, 10 June 2000

¹² Speech to Humboldt University, Berlin, “From Confederacy to Federation - Thoughts on the finality of EU integration”. Full text of speech can be found on the German Embassy website at: <http://www.german-embassy.org.uk>

institutional reforms are agreed at the current IGC. He envisaged a three-stage development to accommodate a diverse membership of 27-30. The first stage would involve “tighter co-operation” in certain areas for those Member States that wanted to participate. The second stage would alter the nature of the Union by establishing a “centre of gravity”, comprising a limited group of States which would negotiate a new Union Treaty. This would lead to the third stage, a European Federation with a two-chamber parliament. The resulting Union would be a two-part Union consisting of the core group of politically advanced states and the less integrated peripheral members. Fischer concluded by saying that this was his “personal vision for the future: from closer co-operation towards a European constituent treaty and the completion of Robert Schuman's great idea of a European Federation”.

B. French Reaction and Proposals

The response from France came swiftly, and put the German proposal into perspective with regard to the IGC and the French Presidency agenda. First to respond was the Foreign Minister, Hubert Védrine, who said in an interview for *Le Monde* that the Fischer vision “maps out a long-term prospect, well beyond the Intergovernmental Conference”.¹³ However, he endorsed the relaxation of provisions for enhanced co-operation and its inclusion on the IGC agenda, saying:

... we have reached the same conclusions that this would allow not just pragmatic co-operation on concrete issues, but also a leap forward for States wishing to press ahead with political integration.¹⁴

Mr Védrine compared Mr Fischer’s “centre of gravity” with what others have called the “hard core” and with what former Commission President, Jacques Delors, referred to as a “federation of nation states”. In all of these he identified advantages: simplicity and ambition; and disadvantages: the risk of a split between the vanguard and rearguard, as well as problems of national sovereignty.¹⁵

On 16 May 2000 Mr Védrine said that the French Presidency “would not put forward proposals that would divide Europeans, but would try to achieve the most ambitious consensus possible”.¹⁶ For the time being, putting into place enhanced co-operation would be a Presidency priority, and:

If we achieve that ... we can then, from concrete and pragmatic co-operation, proceed, if the States concerned decide to and in a democratic manner, towards more ambitious projects.¹⁷

¹³ 13 May 2000

¹⁴ Translation of *Le Monde* report, French Embassy website at: <http://www.ambafrance.org.uk>

¹⁵ Ibid

¹⁶ From: <http://www.diplomatie.gouv.fr/europe/actual/wedeuro22.html>

¹⁷ From: <http://www.diplomatie.gouv.fr/europe/actual/wedeuro22.html>

The Foreign Minister later expanded on this in reply to a question as to whether enhanced co-operation was the first step towards an EU vanguard, a hard core, or an alternative to a hard core. He said:

It isn't an alternative. In my view, it makes two things possible, and, precisely, it's a way of reconciling those who have a purely pragmatic concept of the future of Europe and those who have a more futuristic or federalist position. It permits two developments: it allows a few countries to cooperate more closely in a specific area or do more together. So firstly the countries work together in a sphere which is of interest to them and not the others and secondly this development prefigures the general direction in which Europe is moving. The value of the so-called enhanced co-operation mechanism - it's a bit like what we did at the beginning with the euro - is precisely that it allows both these developments, while avoiding for the time being the somewhat theoretical, abstract debate between defenders of the exercise of national sovereignty and federalists, or between realists and utopians. What we want above all is for Europe to move forward, not get bogged down and for it to remain capable of operating, even of operating better. This will be our priority during the presidency.¹⁸

Jean-Pierre Chevènement, the then French Interior Minister, commented on the Fischer speech on public television on 21 May that Germany "had not yet recovered from the derailment of National Socialism", thus implying that Germany still had expansionist tendencies. He later apologised for his remark, which he maintained had been misinterpreted. The *Frankfurter Allgemeine Zeitung* reported on Chevènement's subsequent analysis of the Fischer vision, in which he said that the proposals "were actually more progressive than earlier German standpoints". He added that: "The important role of statehood for European unity has been touched upon for the first time ever." However, he thought Mr Fischer's recognition of statehood did not go far enough: "In my view, the nation remains the framework for democratic debate."¹⁹ *Agence France Presse* commented: "... the French reaction to Fischer's proposals has been ambivalent, welcoming the return of a lost sense of Euro-idealism, but cautious about the cost to national sovereignty implicit in the federal plan."²⁰

On 27 June 2000 President Chirac addressed the German *Bundestag*.²¹ Once a Gaullist 'euro-sceptic', Mr Chirac has become an enthusiastic supporter of European integration. In what has been described as a forceful and passionate speech, he called on Germany to join France in leading moves towards European integration and to set out a timetable for the process. He proposed a European constitution within a few years and a 'pioneer group' of EU States that wanted to move faster than the others towards closer integration in political and economic matters.

¹⁸ Hubert Védrine in interview with LCI, 31 May 2000, at <http://www.ambafrance.org.uk/db.phtml?id=4060>

¹⁹ *Frankfurter Allgemeine Zeitung*, English language version on-line, 28 May 2000

²⁰ *Agence France Press World Reporter*, 19 May 2000

²¹ From French Embassy website at: <http://www.ambafrance.org.uk/db.phtml?id=4160&a=1>

Mr Chirac referred to the apparent stalling of the integrationist drive in recent years and said: “We will not allow the European structure to be destroyed”. He insisted, however, that nation states would be indispensable in a future Europe and that the allocation of responsibilities between different levels of government had to be clearly defined. He warned against the creation of a “European super-state”. Responding specifically to the Fischer proposals, President Chirac stopped short of using the word ‘federation’, although he did refer to the existing federal elements of the EU, including the European Central Bank. He also warned of the ‘danger’ of conducting a superfluous debate on the distant goal of a federation.

President Chirac used the term ‘pioneer group’ to describe those states forming the ‘motor’ of integration.²² His speech offered some comfort to the strong sovereignty camp in France, including Jean-Pierre Chevènement, on the left, and Charles Pasqua, the former Interior Minister, on the right. Both have argued on several occasions that Europe must have democratic foundations to survive and common fora for political debate. Mr Chirac called for citizens to be included in the political process, in order to overcome the old, ‘elitist’ model of Europe. He believed that Germany and France should be the first countries to create a public forum for intra-European discussion.

The *Frankfurter Allgemeine Zeitung* commented:

So far, it is comforting to see that Berlin and Paris have come considerably closer. The Germans have relinquished an ideal that may have been appropriate for the original six-member Europe, but that has no chance of being realized in a European Union with 27 members. The French accept that the European-style nation state cannot stand alone any more in the world stage. They know it takes more than mere co-operation among Europe’s nations to fulfil their dreams of a political, economic and scientific powerhouse.²³

The Dutch MEP and political scientist, Bob van den Bos, was more cynical about the French and German proposals, which, he argued, did not advance the idea of European integration and lacked practical applicability. In his view, the supra-national solution is the only viable one :

Chirac’s proposal to let a group of pioneer countries cooperate more intensively has a double political intention. It is both a confirmation of his aim of allowing France and Germany take the lead again and also a courteous rejection of Fischer’s idea of institutionalising the central group.

Whichever countries are given the pioneer status and how their co-operation can be fitted into the European institutions remains completely unclear. All the suggestions

²² The former European Commission president, Jacques Delors, spoke of an ‘avant garde’ and a “federation of nation states”, and the German foreign minister used the term “centre of gravity”.

²³ *FAZ* English version, 27 June 2000

about a two-speed Europe can only lead to one conclusion: not one European government has an adequate solution to the problem of differentiated integration speeds.

In essence, Chirac did no more in Berlin than package the old Gaullist vision in Fischerian jargon. The noisiness with which France and Germany praise their common leadership function masks the disagreement about a common destination. Unfortunately, this reconciliation does not mean progress for Europe. That will not happen until we unambiguously choose the path of a supra-national Europe.²⁴

IV Expert and Academic Comment

Christian Deubner, in a study based on hearings at parliamentary and official levels, suggested two dominant rationales for enhanced co-operation. One was the attitude of those Member States “who wanted to open the institutional framework for their own enhanced co-operation initiatives, thereby increasing their integration potential for all”.²⁵ The other supporters of enhanced co-operation were those “who wanted to prevent future initiators of co-operation ventures from realising them outside the community”.²⁶ In the first category Deubner placed Germany and France, which he described as “makers rather than takers of integration, confident that they would always participate in the important groups of enhanced co-operation and have a decisive say in their creation”. The second category, of which Deubner gave the Netherlands as an example, represented those Member States which, “because of their inferior weight and political means, or ability, could not hope to initiate such projects themselves and ... wanted to gain a voice in defining the kind of initiative which they have to follow”. A third view, represented in Deubner’s study by Spain and to a certain extent Denmark, identified “a risk rather than an opportunity in letting enhanced co-operation enter into the treaty framework and be widely applied”.²⁷ Deubner summarised the concerns of some Member States, including those in favour of more integration, as follows:

A widely shared concern common here [i.e. among supporters of integration] and also among the principal opponents of enhanced co-operation, is the fear of destroying traditional power balances in EU policymaking, of an unacceptable reduction of their negotiating clout in the EU, where opposition to initiatives is often a means for states to get their own favoured policies accepted in exchange for agreeing to the wishes of initiators, or of being absent from decision - (or opinion -) making circles, the decisions of which might affect their interests.

²⁴ Bob van den Bos, D66 MEP, “Supra-national Europe is the only answer”, *European Voice*, 3 August-6 September 2000

²⁵ Christian Deubner, *Harnessing Differentiation in the EU: Flexibility after Amsterdam, A Report on Hearings with Parliamentarians and Officials in Seven European Capitals*, Stiftung Wissenschaft und Politik, Forschungsinstitut für Internationale Politik und Sicherheit, July 1999, p 66

²⁶ Ibid, p 66

²⁷ Deubner, p 67

Professor Helen Wallace was sceptical about flexibility in her Memorandum to the House of Lords Report on the 2000 IGC. She described it as a “poisoned chalice”, and set out the possible dangers of including it in Treaty amendments:

One danger is that flexibility becomes a vehicle for extensive opting out of collective regimes by one government after another. Thus a reform ostensibly designed to facilitate initiatives might turn out to be the driver of a large wedge between the real insiders and the rest. The UK has no interest in the development of mechanisms that create first and second class members of the EU. The second danger is that flexibility is used as a tool to deny the new member states a real voice in the EU process. This is not a good basis on which to accept new member states unaccustomed to the give-and-take of constructive consensus-building.²⁸

Wallace’s fears about first and second class members were considered by Kerstin Junge, who suggested that enlargement will make reform of the present provisions inevitable, even at the cost of an initial ‘disintegrative’ effect, given the homogeneity between existing and future Member States. Junge concludes:

... it is also clear that closer co-operation in its present form can only mark the beginning of the institutionalisation of differentiation in the Treaties. Given the increasing tension between deepening and widening, differentiation will gain in importance in the European integration process. In order to be able to fulfil its increasingly important role closer co-operation will have to be reformed, perhaps in the direction of flexible integration. While the disintegrative forces of a less restrictive flexibility clause are obvious, it will become necessary at least to abandon the majority requirement and the national veto. This will make closer co-operation much easier to apply and thus create a basis on which the instrument can fully develop its advantages over uniform integration. In the longer run a clearer definition of the common base and an extension of areas of application will be required.

If reforms in this direction are successfully introduced the new flexibility clauses will become a viable instrument to counter the disintegrative forces of the ever greater political heterogeneity of the EU and to ensure that the progression towards an ever closer union of at least a few member states to be possible.²⁹

Ben Hall, of the Centre for European Reform, is not sure about the inevitability of the need for enhanced co-operation:

... it is easy to exaggerate the need for flexibility. What is remarkable is the degree of consensus amongst the member-states about the EU’s common projects. And the applicant countries are, by and large interested in signing up to the whole acquis, as much for the benefits it would bring as for the need to comply with the entry criteria.

²⁸ Professor Helen Wallace, CMG, Sussex European Institute, House of Lords Select Committee on the European Union, *The 2000 Inter-Governmental Conference*, 18 July 2000, HL 92, 1999-2000, p 33

²⁹ Kerstin Junge, *Flexibility, Enhanced Cooperation and the Treaty of Amsterdam*, 1999, p 60

The extent of closer co-operation will depend on whether countries such as France and Germany attempt to use it, not so much because they have no alternative, but because they prefer doing business that way.³⁰

Hall is also sceptical about the motivation of some proponents of more enhanced co-operation, particularly France and Germany. He states:

For those countries keenest on further and faster integration, flexibility is as much a symbol of their ambitions as a route to fulfilling them. For some, ambitious rhetoric is more important than the reality of implementation. Ironically, the French and German governments, which are most determined not to be held back by their more cautious partners, are hardly at the vanguard of closer integration at the 2000 IGC. France opposes extending QMV to trade policy, asylum and immigration. The German government is still haggling with the Länder about how much more power for the EU they are prepared to concede.

The debate on flexibility tells us as much about how certain countries, especially France, perceive their influence in Europe, as about how to improve policy-making in an EU of two dozen members. The original six members of the Union share a certain nostalgia for the way things used to be run. But decision-making is now more open and alliances more fluid. In particular, the influence of the Franco-German axis has been diluted. This trend is likely to continue, as the boundaries of the European Union are extended eastward. France and Germany wish to put themselves at the centre of a smaller, elite group where their relative influence will be greater.³¹

V Enhanced Co-operation and the IGC

Enhanced co-operation was not on the IGC agenda outlined at the Helsinki European Council in December 1999. This focused on the so-called Amsterdam ‘leftovers’, but provided for a discussion of “Other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam”.³² Helsinki also stipulated that matters might be added to the IGC agenda during the preparatory phase and as negotiations progressed.

France and Germany, supported by the European Commission and the Portuguese Presidency in the first half of 2000, wanted closer co-operation to be added to the IGC agenda. This was formalised at the Feira European Council on 19-20 June.

³⁰ Ben Hall, “How flexible should Europe Be?”, Centre for European Reform Working Paper, October 2000

³¹ Hall, p 21

³² Helsinki European Council Presidency Conclusions, 10-11 December 1999

A. French Presidency Proposals

On 1 July 2000 France took over the EU Presidency, the management of the IGC and preparations for the Nice European Council. A French Presidency document on the follow-up to the Feira summit, submitted to a ministerial meeting of the IGC in July, stated:

The main issues for discussion have been narrowed down to: (1) the implementing conditions (veto, minimum number, other conditions, etc.) and (2) the operating conditions. The Presidency considers that closer co-operation has become a central Conference topic and that, before we embark on any detailed drafting of provisions, the process of clarifying the concept of closer co-operation, identifying its various possible forms and how to make it more operational needs to be taken further ...³³

A subsequent Presidency Note to the IGC in July on *Closer Co-operation* put five questions to the Preparatory Group with a view to preparing and guiding discussions:

- Are the current authorisation conditions contained in the TEU (articles 40,43,44 and 45) and the TEC (Article 11) one of the factors accounting for the failure to make use of the closer co-operation introduced by the Treaty of Amsterdam?
- If so, what are the most restrictive conditions which the IGC should look at as a matter of priority?
- In the new Treaty, should the authorisation conditions be the same for all areas of closer co-operation? Or should they be different depending on the sector, even within the same pillar?
- Should closer co-operation using the Union institutions be introduced in the CFSP area?
- Can certain types of closer co-operation outside the institutional framework help to achieve the Union's objectives? If so, should the links between such closer co-operation and the Union be examined?

The Preparatory Group met on 4 September to discuss closer co-operation. The Presidency put forward the following guidelines as a basis for further proceedings:

- i) the need to regard closer co-operation as a factor of integration, not segregation, and to draw the relevant conclusions in terms of both the principles and the mechanisms governing such co-operation;
- ii) the fact that the benefits of closer co-operation and the potential risks it may pose for the cohesion of the Union's activities vary greatly depending on the area in question, and the importance of taking that into account when establishing the conditions for resorting to such co-operation;
- iii) the consequent need to rule out, in practice, recourse to closer co-operation in certain areas and, conversely, to facilitate its use in others (in particular by making the veto more flexible);

³³ CONFER 4755/00, 5 July 2000.

- iv) the fairly generally acknowledged value of establishing provisions to allow closer co-operation in the CFSP field.³⁴

The paper also emphasised general principles on the application of enhanced co-operation that aimed to dispel the fears of some Member States, and of the applicant states, that it might be a potentially fragmenting force that could lead to a ‘two-tier’ Europe. One suggestion was that a minimum of one third of Member States should be required to trigger enhanced co-operation, “but the conditions for granting approval for triggering enhanced co-operation could be modulated dependent on the number of participants”.³⁵ The Presidency document was generally well received by governments, according to a report in *Agence Europe*.³⁶ The same report noted that “the camp of total opponents to enhanced co-operation [in which it included Britain] is diminishing”.

The Presidency submitted a Note on enhanced co-operation on 4 October, in which it reiterated the emphasis on the need to respect the spirit and the remit of the Treaties. In a list of General Principles, the document stated:

1. Closer co-operation should:
 - (a) be aimed at furthering the objectives of the Union and protecting and serving its interests;
 - (b) respect the provisions of the Treaties, the *acquis communautaire* and the single institutional framework of the Union;
 - (c) concern areas that fall within the competence of the Union and of the Communities to the exclusion of areas falling within the exclusive competence of the Community;
 - (d) not restrict trade between Member States, nor distort competition between them;
 - (e) involve a minimum of [one third of the] or [x] Member States.
2. Closer co-operation must not affect the powers, rights and obligations of those Member States which do not participate therein.
3. Closer co-operation must be open to all Member States, which have the right to join in at any time.
4. Closer co-operation may be engaged in only when it has been established within the Council that its objectives cannot be attained with the support of all Member States.³⁷

³⁴ CONFER 4766/00, 30 August 2000

³⁵ *Ibid*

³⁶ *Agence Europe*, 6 September 2000

³⁷ CONFER 4780/00, 5 October 2000

B. The German-Italian Proposal

Germany and Italy presented a joint contribution on 4 October, in which they expressed their support for the European Parliament in making enhanced co-operation a “gravitational force in order to allow the Union to achieve progress”.³⁸ The proposal viewed enhanced co-operation in an enlarged Union as ‘indispensable’ and set out to show how an “open, functional avantgarde” could achieve its own objectives, while respecting the Community institutional framework, without prejudicing Community aims or the *acquis communautaire*, and allow other States to join as and when they wished. The text suggested that the Amsterdam provisions have not been applied because they were poorly drafted (“which were drafted ... at the very last moment”) and was mindful of historical precedents for co-operation among Member States taking place outside the institutional framework, such as Schengen, which it thought should be avoided. The proposal rejected the “Europe à la carte” formula (see **Appendix II**), whereby individual Member States might seek to opt in and out of policies or actions they did not like, and stressed that enhanced co-operation arrangements would have to be used “in a selective and politically responsible manner”.

C. Biarritz

At the Biarritz informal European Council on 13-14 October, the need to amend the Treaty provisions on closer co-operation was one area of discussion in which there was unanimous agreement. Although no formal decisions were taken, reports indicate that a majority was in favour of abandoning the right of a Member State to veto closer co-operation arrangements among other States.

D. Presidency Progress Report

On 3 November 2000 the French Presidency published a *Progress Report on the Intergovernmental Conference on institutional reform*.³⁹ In sections 7.1- 7.4 the Report sets out articles on enhanced co-operation in all three pillars and conditions for applying it. An enhanced co-operation situation would be agreed by QMV in the Council of Ministers and there would be no possibility of veto. Enhanced co-operation should be used only as a ‘last resort’ (Clause B), i.e. not just when there is no agreement in the Council of Ministers.

Clause G sets out the procedure for applying enhanced co-operation, including the possibility for referral to the European Council before the Council of Ministers takes a decision.⁴⁰ It is not clear what power the European Council would have if, following a request for referral by a member of the Council, it disapproved of the proposal. The Council of Ministers would still be the ultimate arbiter in the decision to allow a proposed arrangement to proceed, although the political weight of the European Council might influence its decision.

³⁸ CONFER 4783/00, 4 October 2000

³⁹ CONFER 4790/00, 3 November 2000

The Presidency Progress Report includes the CFSP in its proposals for enhanced co-operation, stating that the provisions in Articles 11 to 28 of Amsterdam shall apply, unless otherwise provided in specific Clauses (Clauses A-F and J). Clauses A to F set out the general conditions for applying enhanced co-operation, including the use of the EU institutions and mechanisms laid down by the Treaty. The procedures for decisions on participation in enhanced co-operation and the decisions adopted by those Member States would be subject to the institutional processes of the EU. These would involve above all the Council, acting by QMV, but also, as set out in Clause J, the opinion of the Commission on the consistency of the proposal with the policies of the Union, and a very limited role for the EP (which would only be informed of the proposal).

E. Paris Meeting and Proposals

The Preparatory Group met informally in Paris on 4-5 November, when a revised Presidency Note on enhanced co-operation was discussed.

Concerns about fragmentation and a two-tiered Union are perhaps behind the inclusion in Clause C (Participation of Member States) of the requirement that the “Commission and the Member States parties to enhanced co-operation shall ensure that as many Member States as possible are encouraged to take part”.⁴¹

The revisions also take account of the areas of defence and security not dealt with in the Progress Report. Clause J states that the implementation of a common strategy, a joint action or a common position, and the promotion of initiatives in the field of security and defence could be the objects of enhanced co-operation. Clause K would give a greater role to the Council and a lesser role to the Commission in the first instance. A request for an enhanced co-operation arrangement would be made to the Council and forwarded to the EP and the Commission for information, with an opinion from the latter on its consistency with Community policies. At least eight States would be needed to establish enhanced co-operation in the implementation of a common strategy, a joint action or common position, but for the promotion of a security initiative, the support of at least four Member States would be needed. In all cases, the decision to proceed would be taken by QMV in the Council.

Clause L would give the High Representative for the CFSP (currently Javier Solana) the task of ensuring that all Member States and the EP were kept “fully informed of enhanced co-operation in the CFSP area”.

⁴⁰ The Amsterdam Treaty provides for a matter to be referred to the European Council “for decision by unanimity”, Article 11

⁴¹ CONFER 4798/00, 9 November 2000

F. Ministerial Conclave and New Proposals

Ministers considered a revised enhanced co-operation text at a ministerial conclave on 19 November. It stated that the last Presidency text had given rise to concern in four areas.⁴² One was the need for an explicit reference to the internal market as defined in Article 14(2) of the TEC. Another was the role of the Commission in the proposals concerning the CFSP. Some delegations wanted the Commission's role to be enhanced in this area, and there was also support for unanimity in the Council of Ministers in the event of a negative opinion from the Commission on a proposed arrangement. Some ministers were also doubtful whether it would be appropriate to have fewer than eight Member States in a CFSP proposal (the Presidency text proposed a minimum of four under Clause K(3)). There was also a split among delegations over the inclusion of a specific provision on security and defence, the procedure for establishing enhanced co-operation and the proposed QMV voting rule in the Council for authorisation.

Clause D of the revised text proposes that enhanced co-operation established on the basis of Clause K should be in accordance with Article 23(2), second and third sub-paragraphs, requiring 62 votes in favour from at least 10 Member States for the adoption of decisions. The new text adds in Clause J that enhanced co-operation in the CFSP area may relate to "initiatives in the field of security and defence contributing to the acquisition of crisis management capabilities".⁴³ It also removes the purely QMV voting procedure from Clause K(3), stating that authorisation by the Council to proceed shall be in accordance with Article 23(2), second and third sub-paragraphs. The second sub-paragraph provides that if a Council member intends to oppose a measure "for important and stated reasons of national policy", a vote shall not be taken, and "The Council may, acting by qualified majority, request that the matter be referred to the European Council for decision by unanimity".

VI UK Views

A. Government

In its White Paper, *IGC: Reform for Enlargement: The British Government's Approach to the European Union Intergovernmental Conference 2000*, the Government stated:

The Government feels that a stronger case will have to be made in order to justify changing procedures that were agreed only in 1997 and which have not yet been put to the test, or indeed used at all. The conditions governing the use of closer co-operation were intended to ensure that too much flexibility did not undermine the Single Market, or could not be used against the interests of a minority of Member States. Those remain important objectives.⁴⁴

⁴² CONFER 4803/00, 17 November 2000

⁴³ See Research Paper 00/84, *Common European Security and Defence Policy: A Progress Report*, 31 October 2000, for information on the EU defence initiatives in this area

⁴⁴ Cm 4595, February 2000

The Foreign Secretary commented in the context of the French and German suggestions that “most Member States agree with us that there is no case for a federal superpower”.⁴⁵ He said on the BBC radio *Today* programme on 29 June that the EU had to be a “Europe of Member States who are equal states” and that it “would be damaging for Britain if there was an inner core in Europe and we accepted that we are not in that inner core”.⁴⁶

In a House of Lords exchange Foreign Office Minister Baroness Scotland said of enhanced co-operation:

We are not opposed to it and recognise that in an enlarged EU it may prove useful. The Amsterdam IGC also agreed certain conditions governing the use of enhanced co-operation intended to ensure that it protected the coherence of the EU, in particular the single market. The issue for the IGC is whether those conditions are too restrictive. We will examine proposals for change carefully.⁴⁷

The Foreign Secretary has continued to support an intergovernmental approach. At an informal Council of Ministers meeting in Evian on 2-3 September 2000, Mr Cook suggested that Britain was willing to engage in the debate on the future structure of the EU, but that this should be based on strong nation states. The *Financial Times* summarised his views:

Europe should do those things that nation states could not do alone, such as creating greater prosperity and dealing with such issues as environmental problems, crisis management and crime. ... the democratic deficit in the EU “should be solved by drawing on the lively and healthy democracies we have in our nation states”.⁴⁸

The Government has said that it is “willing to support carefully defined enhanced co-operation”.⁴⁹ In a speech in Warsaw on 6 October the Prime Minister spoke about the need for and the challenge of EU enlargement. He outlined his views on the future structure of Europe.

In a world with the power of the USA; with new alliances to be made with the neighbours of Europe like Russia; developing nations with vast populations like India and China; Japan, not just an economic power but a country that will rightly increase its political might too; with the world increasingly forming powerful regional blocs – ASEAN, Mercosur; Europe’s citizens need Europe to be strong and united. They need it to be a power in the world. Whatever its origin, Europe today is no longer just about peace. It is about projecting collective power. That is one very clear reason, quite apart from the economic reasons, why the central European nations want to join. So a limited vision of Europe does not remotely answer the modern demands people place on Europe. The difficulty, however, with the view of Europe

⁴⁵ HC Deb, 18 July 2000, c 200

⁴⁶ Quoted in the *Times*, 30 June 2000

⁴⁷ HL Deb, 24 July 2000, c 7

⁴⁸ *Financial Times*, 4 September 2000

⁴⁹ *Financial Times*, 5 October 2000

as a superstate, subsuming nations into a politics dominated by supranational institutions, is that it too fails the test of the people. There are issues of democratic accountability in Europe - the so-called democratic deficit. But we can spend hours on end, trying to devise a perfect form of European democracy and get nowhere. The truth is, the primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe - national parliaments and governments

...

Europe is a Europe of free, independent sovereign nations who choose to pool that sovereignty in pursuit of their own interests and the common good, achieving more together than we can achieve alone. The EU will remain a unique combination of the intergovernmental and the supranational. Such a Europe can, in its economic and political strength, be a superpower; a superpower, but not a superstate.

...

Efficient decision making in an enlarged Union will also mean enhanced co-operation. I have no problem with greater flexibility or groups of member states going forward together. But that must not lead to a hard core; a Europe in which some Member States create their own set of shared policies and institutions from which others are in practice excluded. Such groups must at every stage be open to others who wish to join. I agree with Guy Verhofstadt that enhanced co-operation is an instrument to strengthen the Union from within, not an instrument of exclusion. That is why enhanced co-operation must not be used to undermine the single market or other common policies. In particular, we must not invite new members to come into the European Union and then consign them to second-class membership.⁵⁰

In a Parliamentary Written Answer in November Mr Vaz said that the Government supported the principle of enhanced co-operation in an enlarged Union, but “subject to important safeguards”:

Enhanced co-operation must remain open to all at any stage; it must not undermine the single market or other common policies and it must not lead to a hard core in which some member states create shared policies and institutions from which others are in practice excluded.⁵¹

B. Other Parliamentary Views

1. Shadow Cabinet

Ben Hall commented that greater flexibility, because it implies greater respect for national traditions, “has a seductive charm for eurosceptics as well”.⁵² William Hague has supported greater flexibility as a way of preventing more Union-wide integration and preserving the

⁵⁰ FCO website at: <http://www.fco.gov.uk>

⁵¹ HC Deb, 2 November 2000, c 557W

⁵² Hall, p 3

independence of the nation state. In exchanges following the Prime Minister's statement on the Feira summit, Mr Hague said:

Was it not the ideal time to set out a comprehensive vision of a Europe that is more flexible, outward looking and reformed? Why did the right hon. Gentleman not stand up at Feira for the vision of a more flexible Europe in which nation states can work together? Is it not time that he put the case for greater flexibility, given that he was apparently ambushed by President Chirac and Chancellor Schroeder, who told him that they would proceed with closer integration themselves, whether he liked it or not? Why does the Prime Minister instead continue to be carried further down the alternative, integrationist route?

....

In the meantime, the cases for real reform in the EU and for flexibility are not being put, so the case for ever-further European integration is winning by default. While the Cabinet is busy tearing itself apart, Europe continues to move in the wrong direction.⁵³

The Shadow Foreign Secretary, Francis Maude, said in a speech in Berlin in June:

A modern European Union must accommodate those who wish to retain their nationhood, while accepting that others may wish to abandon their own. I could not support the Commission's proposal for "reinforced co-operation" to be created by QMV. That would allow smaller groups of member states, as few as a third, to proceed with schemes of closer co-operation on their own, using the EU's institutions. It would be rash to give up the veto on such schemes of new integration.

But I will say this: that I would expect the presumption to be against Britain exercising its veto, save where necessary to protect our national interests. A readiness to allow others to proceed in this way would of course provide the opportunity for those countries concerned to retain a robust national independence to develop such a relationship within this more heterogeneous Union.

Joschka Fischer's view is that such an arrangement would allow a hard core, built around France and Germany, to forge ahead alone. I believe this is unlikely. The notions of inner circle and outer tier, of concentric rings, of first and second class members; these belong to yesterday.

Far more likely an outcome is the gradual development of a Europe of interlocking and overlapping groupings, of nations, as the Economist predicts, combining in different combinations for different purposes and to different extents. Europe has already edged in this direction, with the Maastricht opt-outs, Schengen and the single currency. John Major's speech at Leiden in 1994 foreshadowed such a Europe.

⁵³ HC Deb, 21 June 2000, c 341

But if such a hard core did emerge, perhaps based around the Euro 11, however much we might regret it, it is not obvious that people who believe in the sovereign right of nation states to decide their own destiny should be seeking to prevent other nation states from dissolving themselves.

Some may fear that accepting condemns Britain to being forever on the edge, excluded from the heart of Europe. This misses the point. A network Europe in a network world would not have a centre for anyone to be “at the heart” of. Equally there may be some in Britain who reject such an idea simply because it is supported by prominent pro-Europeans on the Continent; who see in it some dark plot.

This is old-think. There are some who might oppose it on the grounds that there is always a tendency for countries to give up their opt-outs. But we must point out that no country has ever been compelled to give up an opt-out; when Britain signed the Social Chapter, it was a democratically elected Government that exercised a free choice to do so.

There is nothing inevitable about an opt-out being subsequently surrendered, as the continued robust health of the single currency opt-out in Britain and Denmark amply attests. So greater flexibility would reduce the constant tension between those countries which feel the process of integration is going too slowly and that others are holding them back, and those which feel they are being dragged against their will into a superstate.

In short, a diverse and flexible Europe would be a Europe able at last to be at ease with itself.⁵⁴

2. Liberal Democrat and Backbench Opinion

The Liberal Democrat Foreign Affairs spokesman, Menzies Campbell, was critical of the attitude towards flexibility taken by the Shadow Foreign Secretary Francis Maude, saying ahead of the latter’s Berlin speech:

This speech will obviously be yet another example of the visceral anti-Europeanism which has now gripped the Conservative party. The lexicon of ‘flexible’ now means ‘peripheral’ as it applies to Britain.⁵⁵

He also commented ahead of the Prime Minister’s Warsaw speech, saying: “The signs are already there. A two-speed Europe is increasingly under discussion. Britain has no place in the slow lane.”⁵⁶

⁵⁴ Address to Humboldt University, Berlin, 8 June 2000

⁵⁵ 8 June 2000, Liberal Democrat Party website at:
<http://www.libdems.org.uk/index.cfm?page=homepage&session=home&article=578>

⁵⁶ 5 October 2000, Liberal Democrat Party website

An Early Day Motion in February, sponsored by William Cash, called on the Government to reject any attempt to reform the present flexibility arrangements for fear of marginalising the UK:

That this House calls for renegotiation at the Intergovernmental Conference later this year of the provisions in the Amsterdam Treaty which provide for 'enhanced co-operation' otherwise known as 'flexibility'; notes that the doctrine is the means to establishing a hard core of a European superstate with the United Kingdom on the sidelines and therefore further totally rejects the current proposals of the Commission to re-endorse these provisions in the Amsterdam Treaty and the even more unacceptable abolition of the veto in respect of these provisions; that this House calls on Her Majesty's Government to declare opposition to the doctrine of 'enhanced co-operation' and 'flexibility'; notes that the former Foreign Secretary, the Right Honourable Sir Malcolm Rifkind described the doctrine of 'flexibility' in January 1997 as 'probably the most important issue that is being discussed at the IGC,' (for Amsterdam); notes that in the same year on 16th January the EU Presidency stated, 'EMU is probably the most highly developed form of flexibility,' and therefore calls on Her Majesty's Government unequivocally to reject the 'enhanced co-operation' and 'flexibility' provisions in the Treaty of Amsterdam and their endorsement at the next IGC, including the abolition of the veto as it applies to these provisions now proposed by the European Commission.⁵⁷

3. European Scrutiny Committee

The European Scrutiny Committee considered 'flexibility' in its report on the IGC, concluding:

72. The existing provisions on closer co-operation are so far from having ever been used that not even a proposal for their use has yet been presented. Where there has been a need to enable Member States to pursue policies which not all could accept (such as EMU) the necessary arrangements have always been negotiated on a case by case basis in an IGC. No one has yet identified measures under the existing Treaty provisions on closer co-operation which a number of Member States (whether a majority or a minority) might wish to pursue without the participation of all. It is generally the case that there are sound 'single market' reasons for preferring to legislate for the Community as a whole or not at all.

73. However, the Dutch Government has suggested that the provisions could be useful in relation to EU enlargement: in particular those applicants with the greatest difficulty in adopting the entire *acquis* might be enabled to participate in only some EU policies, leading to a form of "differentiated membership". In contrast, the Greek Government has said that any proposal to review the closer co-operation provisions will give a negative message to the applicants, implying that they will be relegated to

⁵⁷ EDM 373, 1999/2000, 9 February 2000, fifteen signatures as at 20 November 2000

second-class EU membership.⁵⁸ In practice, any attempt to differentiate between aspects of the *acquis* is likely to be as problematic for existing Member States as for the applicants: for example, how would existing Member States react if Poland suggested that it might 'opt out' of the environmental *acquis* in return for being excluded from the CAP?

74. Given that the restrictive conditions do not seem to be the reason for failure to use the provisions on closer co-operation there appears to be little point in relaxing those conditions; it would have no effect in practice. On the other hand the anxieties of the UK Government are equally misplaced. There is no need to retain an emergency brake to prevent a recourse to mechanisms for which no one has yet been able to suggest any practical purpose. Unless anyone can suggest areas in the First and Third Pillars in which closer co-operation might be appropriate⁵⁹ - in which case we would wish to give further consideration to this issue - we can see neither benefit nor harm in reviewing the provisions on closer co-operation. Discussion of this issue is a distraction from the essential tasks of the IGC.

75. However, we are more concerned about the suggestion that the closer co-operation provisions should apply also to Common Foreign and Security Policy issues. There already exists within the Treaty on European Union provision for something known as "constructive abstention".⁶⁰ The reasoning is as follows: many CFSP issues are sensitive, and the decisions on them are subject to unanimity; individual Member States may not wish to prevent a decision from being taken by using their veto, but may wish to opt out of the decision. In that case:

"When abstaining in a vote, any Member of the Council may qualify its abstention by making a formal declaration ... In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union [our italics]. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position."

The Article goes on to state that if the Member States wishing to register constructive abstention represent more than a third of the (weighted) votes in Council, then the decision falls.

76. These provisions reflect, amongst other things, the difficulties which the non-aligned Member States (Austria, Finland, Ireland and Sweden) experience with many CFSP issues, and were the result of fairly delicate negotiations leading up to their incorporation in the Amsterdam Treaty.

⁵⁸ The position papers of Greece and the Netherlands are on the *Europa* IGC website. The Bulgarians support the Dutch view, but the other applicants who have commented on the closer co-operation provisions (Cyprus, the Czech Republic and Poland) are at best very cautious, at worst hostile, to any revision of the Treaty provisions.

⁵⁹ Michel Barnier said that he thought in practice the provisions would not be used for the for the First Pillar because of the need to preserve the single market, but there was some scope for their use in Second and - unspecified - Third Pillar issues: Q 94.

⁶⁰ Article 23(1)

77. The extension of closer co-operation would undermine this compromise: it would enable Member States that wanted to go further and faster in CFSP issues to act without the support of the others. If the closer co-operation provisions were, moreover, amended to remove the emergency brake and reduce the threshold for participation, individual Member States or groups of countries could find themselves excluded. Furthermore, it would be very difficult for third countries — or even public opinion within the EU — to distinguish between EU actions and those taken by groups of Member States⁶¹, which would probably mean that non-participants in closer co-operation would nevertheless be seriously compromised by it. It is, for example, difficult to see how the Finns could maintain their 'honest broker' rôle between the EU and Russia - which proved useful during the Kosovo crisis - if groups of Member States were co-operating in actions that, in Russia's view, adversely affected her interests but in which Finland had absolutely no say. We therefore consider that the provisions on closer co-operation should not be extended to the CFSP.⁶²

4. Lords Select Committee on the European Union

The House of Lords EU Committee considered the IGC in its 11th report, published in July 2000. On the subject of flexibility the Report concluded:

We are not convinced that the issue of flexibility is as important as some Member State governments advocate. Nor are we convinced that the Treaty provisions governing flexibility are in serious need of revision. We see no need for the “emergency brake” provisions included in the Amsterdam Treaty, and no threat to the United Kingdom’s interests in its removal. We have not heard any concrete proposals for areas where reinforced co-operation might be used, and it is unclear whether the conditions in the existing Treaty provisions have, in themselves, inhibited the development of reinforced co-operation.

Discussion of flexibility has become confused with the more visionary proposals referred to in paragraph 66 above.⁶³ Although these ideas are based on the concept of flexibility, they are rather different in scope and purpose. In our view, such a development would be undesirable in principle. The evidence we received suggested that would also be unlikely in practice. There is plenty of space for flexibility within the Treaties as they stand.⁶⁴

⁶¹ As shown by recent confusion over the declaration made on 31 January by the 14 other Member States on relations with Austria.

⁶² House of Commons European Scrutiny Committee, *The 2000 Inter-Governmental Conference*, 15 May 2000, HC 23-xvii, 1999-2000

⁶³ This considers the speeches by Joschka Fischer *et al* concerning an ‘avant-garde’ or ‘pioneer group’.

⁶⁴ House of Lords European Union Committee, *The 2000 Inter-Governmental Conference*, 18 July 2000, HL Paper 92, 1999-2000

VII Applicant States: the Polish view

Several applicant states have submitted contributions to the IGC Preparatory Group including comments on enhanced co-operation. Poland heads the first wave of candidate states and the Polish government set out its views on enhanced co-operation, as follows:

Poland generally believes that the present provisions concerning closer co-operation provide a good starting point. One should focus primarily on using them effectively. In any case, at any revision of the provisions at least three basic considerations should be taken into account:

- It is Poland's intention to join an effective EU with all the consequences involved;
- On the other hand, closer co-operation must not lead to the emergence of a group of States not fully involved in the dynamic progress of European integration; in particular, it must not lead to a limited application of the important Internal Market principles to the citizens and businesses of the future Member States; closer co-operation should provide additional stimuli for advancing integration, in no case should it lead to the exclusion of the future Member States from important new co-operation measures;
- The proposal to formally extend closer co-operation to cover the second pillar should be approached with caution, it being a new area, undergoing very rapid change, where a range of important decisions have to be taken, including, for example, a stronger involvement of non-EU NATO Member States; it would be therefore advisable to postpone the debate on the issue until the principles of ESDP functioning are specified. hence, it is in Poland's interest for the closer co-operation formula not to be regarded as a sort of relaxing of the requirements vis-à-vis the future Member States ...⁶⁵

⁶⁵ CONFER/VAR 3967/00, 3 July 2000

VIII Conclusion

Although proponents of reform maintain that enlargement will necessitate a more flexible approach, the applicant states themselves are unlikely to want a system that might leave them behind in the European ‘slow lane’. These countries, while they have contributed to the IGC preparatory stages, will not be involved in the final agreement on Treaty amendments, and therefore will not be able to prevent the introduction of this form of flexibility. However, some have argued that the use of enhanced co-operation would be too infrequent to be of concern. According to a report in the *European Voice*, EU diplomats have said that:

... the strict conditions which would be set for invoking the enhanced co-operation mechanism mean it is only likely to be used in a limited number of areas, such as foreign policy, defence and justice and home affairs, where several member states already have formal opt-outs.⁶⁶

Enhanced co-operation is a way of avoiding Treaty ‘opt-outs’, such as those secured by Britain and Denmark from Economic and Monetary Union (EMU), and of deterring *Schengen*-type arrangements, whereby some Member States decide to press ahead with their own forms of co-operation outside the institutional and legal context of the Treaty, with no guarantee of any other Members being allowed to join the group. It brings such arrangements into the Treaty context and allows them to remain open to new members as and when they wish, albeit subject to certain restrictions.

To conclude, some of the main arguments raised during the debate centre on the following views expressed by proponents and opponents of enhanced co-operation:

- It would allow some States to pursue deeper integration by bypassing States that are unwilling or unable to proceed, while remaining open to new members;
- It would allow some States not to participate in deeper integration in certain areas;
- It would involve the use of the EU institutions and decision-making processes, thus avoiding intergovernmental action outside the Treaty framework;
- It could be a test-bed for full EU integration initiatives;
- It could lead to a political fragmentation of the Union;
- It could lead to a two-speed or two-tier Union;
- It could make the EU processes even more complex and difficult to understand;
- It could make it more difficult for national legislatures to be informed about new developments;
- It could cause problems for the Community legal system, with different laws applying in different States.

⁶⁶ *European Voice*, 12-18 October 2000

Appendix I: The Structure of Europe

The following terms were used at the IGC negotiations in 1996-97 to describe possible arrangements for the future structure of the Union.

Variable Geometry

Very similar to enhanced co-operation, this assumed that since not all Members can achieve economic, social and political harmonisation at the same pace, there should be special arrangements whereby some Member States would forge ahead while others followed at a slower pace and with long, Community-aided transition periods.

Concentric circles

This theory was based on three concentric circles structured like a wedding cake. The EU was the centre circle at the top; the middle circle was an intermediate phase similar to the current European Economic Area but called the Organisation of European Integration, and the outer circle or bottom layer included prospective member states. Movement between the circles would depend largely on developments in the applicant states.. This notion was espoused by the then French Prime Minister, Edouard Balladur, and resembled the German (CDU) proposals for a hard core of countries at the centre of the Union, with other, slower pace countries on the outside, but with an additional layer of prospective members. Mr Balladur envisaged pragmatic progress towards union: the more the EU expanded, the more it would diversify, although for some time to come, it would have a central homogeneous core consisting essentially of France and Germany. Around them would be the other Member States governed by different laws in certain areas (e.g. monetary, social, military, commercial, financial and diplomatic). In his view the EU was a unique construction which instituted solidarity among its members whilst respecting their natural diversity. It was a union open to everyone to join but did not attempt to cast all in the same mould. It accepted, at least on a temporary basis, the idea of a multi-speed Europe, which he recalled was in the spirit of the Maastricht Treaty in monetary and social matters. These, he said, should be the aims of the Union over the next ten years.

Two-tier and hard core

These two could be taken as expressions of the same idea and they formed a variation on the theme of "variable geometry": i.e. that because of the inevitable differences between the Member States, there should be one strong group of countries that would proceed with rapid political and economic integration whilst others followed at their own, slower pace. In the "hard core", a CDU/CSU plan envisaged Germany, France, Belgium, Luxembourg and the Netherlands, with the rest, including the UK, outside. The CDU/CSU paper on the subject stated that the countries in the hard core not only had to participate in all political spheres but in addition to act jointly in a more recognisably Community-orientated way than other Member States and to introduce joint initiatives in order to develop the Union further.

The hard core idea was rejected by the then British Prime Minister, John Major, and also by the then French and German Foreign Ministers, Alain Juppé and Klaus Kinkel.

Multi-track; multi-speed

Taken literally, this road/rail metaphor suggested that while all Member States would follow the same basic path towards free trade, open markets, competition etc, Members would otherwise be free to continue in a more flexible way, following national policies rather than harmonised and common policies. In some ways this view resembled the CDU approach: Europe's development would proceed on different tracks and at different speeds but within the same framework. However, there was a significant difference. The German view was tiered, with an elite group pushing ahead and a "second class" group chugging along behind, whereas the British Government envisaged not just two, but a number of tracks and speeds. Critics said at the time that this would mean a return to a Europe of nation states and that it would put the role of the EU institutions into doubt, weakening them considerably as law-making bodies.

Europe à la Carte

Accommodating the economic, political and social diversity of the Union with individual member states picking and choosing the policies that suit them and opting out of others. This has generally been viewed negatively by pro-integrationist member states and Britain was accused of not embracing the spirit of the Community in opting out of parts of the TEU, namely the Social Chapter, and commitment to the final stage of Economic and Monetary Union. Most Member States have obtained special conditions in matters about which they are particularly sensitive, whether it is the purchase of second homes in Denmark or the definition of nationality in Germany. The difference between these reservations and those of the UK has been in the scale and significance of the British ones.

Appendix II: IGC Contributions on Closer Co-operation

CONFER 4758/00, 11 July 2000, Presidency Note

CONFER 4761/00, 18 July 2000, Presidency Note

CONFER 4765/00, 28 August 2000, Frans Van Daele, Belgian Representative

CONFER 4766/00, 30 August 2000, Presidency Note

CONFER 4783/00, 4 October 2000, Gunter Pleuger, German Representative, and Silvio Fagiolo, Italian Representative

CONFER 4780/00, 5 October 2000, Presidency Note

CONFER 4786/00, 18 October 2000. Presidency Note

CONFER 4798/00, 9 November 2000, Presidency Note