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**OPTIMISING THE MECHANISM FOR  
'ENHANCED COOPERATION' WITHIN THE EU:  
RECOMMENDATIONS FOR THE CONSTITUTIONAL TREATY**

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**ERIC PHILIPPART**

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**EXECUTIVE SUMMARY**

Policy development in the EU is often impeded by member states being either unwilling or unable to participate. One way to overcome that problem is to resort to flexible approaches accommodating diversity. Convinced that an enlarged Union would require more flexibility, the current member states agreed in 1997 to introduce a new safety valve in the treaties, named 'enhanced cooperation'. Thanks to that mechanism, a group of member states may be authorised to use the EU framework to further their cooperation or integration in policy areas under EU competence whenever it appears impossible to do so with all of the member states.

There are a number of reasons why the Constitutional Treaty under negotiation should not only uphold such a mechanism, but should improve it in various respects. The future treaty should start by suppressing redundant preconditions for authorisation, introducing the possibility for a group of willing and able to gear up (i.e. adopt more efficient decision-making procedures and embrace higher ambitions), as well as extending the scope of enhanced cooperation to foreign and defence matters. It should also suppress the minimum participation threshold and clarify the *last resort* stipulation.

As to authorisation, the future treaty should simplify the proposal procedure, specify what may be included in the proposal, streamline the consultation and deliberation procedures, and provide that, for CFSP too, the authorisation is given by the Council acting by qualified majority or superqualified majority. Participation in enhanced cooperation should be open to all, provided that objective criteria are met. The same conditions should apply for initial and subsequent participation. Admission to enhanced cooperation should be managed by the Commission under a single procedure.

Regarding enhanced cooperation's operating mode, the future treaty should stick to the current system of 'institutional isomorphism' (no variable geometry in the European Parliament or the Commission). Nevertheless, participating member states should be allowed to decide, acting unanimously, that enhanced cooperation shall be governed by qualified majority instead of unanimity and/or by co-decision procedure. They should also be authorised to hold restricted meetings at an informal level. The future treaty should further introduce the possibility to differentiate between the 'pre-in' (member states willing to participate but unable to do so from the start) and the 'out' (member states unwilling to participate).

Finally, the status of the acts and decisions resulting from enhanced cooperation could be revisited. In any case, the future treaty should authorise the Council to decide by a qualified majority that the Union's budget will support enhanced cooperation's operational costs.

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**1 Brief assessment of the current mechanism for enhanced cooperation**

'Enhanced cooperation' is a mechanism allowing a group of member states to use the EU framework to develop their cooperation or integration in policy areas under EU competence. The Council may grant that facility, provided that a number of conditions are met.<sup>1</sup> The action envisaged by the group (made of at least eight member states) must be in line with the objectives of the Union, remain within the limits of the powers of the Union and not relate to matters having military or defence implications. Last but not least, this option may be undertaken only as a last resort (it must be established that the objectives of the enhanced cooperation cannot be attained within a reasonable period through 'normal' procedures).

The use of the EU framework means that, if all members of the Council take part in the deliberations, only those representing the member states that are participating in enhanced cooperation take part in the adoption of decisions. For the rest, the institutions play the role they would normally play in the development of EU policies. The decisions taken only bind the participating members ('variable geometry') which, by default, bear the operational expenditures resulting from implementation of enhanced cooperation.

This mechanism has been introduced by the Treaty of Amsterdam (1997) and revised by the Treaty of Nice (2000). No authorisation has yet been requested, but the establishment of enhanced cooperation has been envisaged on several occasions. In half of the cases, it contributed to breaking the deadlock.<sup>2</sup>

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<sup>1</sup> In that respect, the provisions on enhanced cooperation are enabling clauses. They define the conditions of authorisation for member states seeking closer cooperation to 'make use of the institutions, procedures and mechanisms' laid down by the TEU and the TEC. The wording of these provisions makes clear that closer cooperation as such is not the subject of authorisation under the treaty, but only the use of the EU framework.

<sup>2</sup> The most manifest case is that of the 2000 unlocking of the regulation concerning the European Company Statute introduced in 1970 (!) by the European Commission (EC Regulation n° 2157/2001, Council of 8 October 2001) and the directive 2001/86/CE completing this status with regard to workers' involvement. The final breakthrough happened after the presidency asked the legal services of the Council to inquire into the possibility of enhanced cooperation in this area. This unlocking is even more remarkable given that, at the time, the enhanced cooperation mechanism was under particularly drastic stipulations for authorisation. The possibility to implement a European arrest warrant under enhanced cooperation was one of the ingredients that contributed to a change of attitude on the part of the Berlusconi government in December 2001. The use of this mechanism was also brought up in areas such as energy taxation (European Commission and Swedish presidency in 2001) and the common code of company taxation (Commission suggestion of 23 October 2001), without this bringing about major concessions on the part of those unwilling to accept it.

## 2 Detailed evaluation of the current mechanism for enhanced cooperation<sup>3</sup>

### 2.1 The request – contents and conditions

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

In order to be taken into consideration for authorisation, a request *must satisfy no less than 15 substantive and three procedural conditions*. Except for the last resort condition, the treaties do not specify who is responsible for verifying whether those requirements are met. Logically speaking, this duty should fall on the institution responsible for the authorisation proposal.

The *substantive conditions* specify what enhanced cooperation should aim at, what it should not entail and what is out of its scope of action. To be admissible, *enhanced cooperation must aim at* furthering the objectives of the Union, protecting and serving EU interests, and reinforcing the process of European integration. It is *a priori* only logical to restrict the use of the Union's framework to endeavours that pursue the objectives endorsed by all. After all, that framework 'belongs' to and is financed by all member states. What seems less logical is the requirement made to enhanced cooperation in the field of CFSP to serve the Union's interests by 'asserting' the Union's 'identity'. Indeed this suggests that the group of member states engaged in enhanced cooperation act as an agent of the Union, while it is said elsewhere that enhanced cooperation's measures do not commit the Union. That reference should therefore be suppressed.

The list of *what enhanced cooperation may not entail* is rather long. A first set of conditions aims at preserving the Union's cohesion, the coherence of its policies and the readability of its institutions. It provides that enhanced cooperation must respect the treaties, the single institutional framework of the Union, the *acquis* of the Union as well as the consistency between the whole of the Union's policies and its external action. A second set aims at protecting non-participating countries. Some of these dispositions also answer operational (internal market) and systemic concerns (social and economic coherence). It stipulates that enhanced cooperation may not undermine the internal market nor the social and economic cohesion (a point introduced at Nice in order to quiet certain concerns about enhanced cooperation becoming a club of the 'selfish rich'). It may not constitute a discrimination, nor an obstacle to trade, nor distort competition. All these conditions merely repeat the general obligations set up in other articles of the treaties; thus they could be dropped.

The remaining substantive requirements list the *areas in which enhanced cooperation is forbidden* (negative list). This list is relatively short: enhanced cooperation is prohibited where the Union has no competence, in fields under the exclusive competence of the Union or with military and defence implications. The first prohibition is based on a basic democratic principle – transfer of powers requires the formal consent of the authority that relinquishes its right. The mechanism for enhanced cooperation cannot be used to bypass national and/or regional parliaments. As some have rightly pointed out, that rule may prove quite restrictive in areas where the competence of the Union is minimal – say, promoting exchanges of information and evaluating experiences. What if a group of

<sup>3</sup> This section is the follow-up of a more detailed study on 'enhanced cooperation' commissioned by Jacques Delors for the Paris-based think tank, Notre Europe. Philippart, Eric (2003), *A new mechanism of Enhanced Cooperation for the enlarged European Union*, Notre Europe (Research and European Issues), N° 22, March (<http://www.notre-europe.asso.fr/fichiers/Etud22-en.pdf>).

member states wants to harmonise their laws and regulations while the treaty excludes that possibility explicitly (cf. social policy, education, culture or public health – Arts. 136, 150-152 TEC). In order to overcome such a limitation, the mechanism for enhanced cooperation could allow participating member states to go beyond treaty restrictions provided that their decision is taken in accordance with their respective constitutional requirements.<sup>4</sup>

Forbidding enhanced cooperation in areas under exclusive competence of the Union, i.e. in areas in which a member state may no longer act since its powers have been transferred completely to the Union, is tautological. In matters of international trade, the Union is indeed either speaking with one voice at the WTO or is not. Likewise, it is impossible to have two monetary policies for the same currency. What applies to member states individually also applies to a group of member states. The reference to exclusive competence is totally redundant and should be abandoned.

As for the third restriction, it prevents any use of enhanced cooperation for peacekeeping operations (the Petersberg tasks) or for progressing on multinational forces, armament, human resources management, training and common doctrines' development as envisaged by the Franco-German proposition of 22 November 2002.<sup>5</sup> The new mechanism could be designed to offer a 'lean' alternative to the proliferation of ad hoc flexibility which characterised the Praesidium's draft articles on external action (Arts. 19-21). It should, at least, allow willing and able member states to develop 'enhanced cooperation' concerning foreign, security and defense policy.

The current system lays down *procedural conditions* regarding the participation's threshold, the situation of last resort and the degree of openness of enhanced cooperation. The Treaty of Amsterdam stipulated that enhanced cooperation has to involve a majority of member states. At Nice, it was decided to fix the *minimum participation threshold* at eight member states. There are five reasons for fixing a minimum participation threshold: 1) ensuring that enhanced cooperation is large enough to produce the desired outcome (critical mass); 2) limiting the costs for the Union; 3) preventing the development of parallel or competing policies in the Union's framework and creating a centripetal effect in favour of enhanced cooperation instances; 4) establishing enhanced cooperation's legitimacy; and 5) minimising the risk of institutional tension. After analysis of the main reasons for fixing a minimum participation threshold and of the relevance of the current threshold's level,<sup>6</sup> we draw three main conclusions. First of all, there is no universally valid participation threshold (the choice is necessarily arbitrary and thus potentially problematic from a functional point of view). Secondly, there are better ways for controlling costs and, if need be, preventing the development of parallel enhanced cooperations. Thirdly, the current threshold (eight member states) is of no use as far as the risk of institutional tensions is concerned. Raising the participation threshold (at least up to the majority of the population of the Union) would dramatically reduce that risk, but to the detriment of the system's

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<sup>4</sup> Procedures for simplified revision of the treaty provisions already exist for extending the scope of action of the Union or for changing the decision-making procedure. For instance, Art. 17 TEU provides that "the progressive framing of a common defence policy ... might lead to a common defence, should the European Council so decide. It shall in that case recommend to the member states the adoption of such a decision in accordance with their respective constitutional requirements," Art. 67(2) TEC (title IV on visas, asylum, immigration and other policies related to the free movement of persons) reads as follows: "the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Art. 251 and adapting the provisions relating to the powers of the Court of Justice".

<sup>5</sup> *Contribution by Mr Dominique de Villepin et Mr Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy*, The European Convention, The Secretariat, Brussels, CONV 422/02, CONTRIB 150, 22 November 2002. The contribution also mentions some areas covered by the Letter of Intent and the OCCAR (security of supplies, organisation of exportations, dealing with sensitive information and reciprocal market opening).

<sup>6</sup> See Philippart, Eric, op. cit., pp. 14-17.

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

The formulation of the *last resort* stipulation adopted in Nice seems to indicate a switch to logic based on the political recognition of a foreseeable impasse. It would no longer be needed to establish that a measure, detailed in a formal proposal and debated by all, has been formally rejected. This would be a matter for a group of member states, concerned by the stagnation of a sector, to envisage resorting to enhanced cooperation, to define its objectives (with a reference to the treaty articles concerned but stopping short of detailing future measures), and to ask the Council to acknowledge the impossibility of reaching these objectives in a reasonable time limit.<sup>7</sup> The formulation used in the treaty is, however, quite ambiguous. In order to state clearly that it is no longer necessary to wait for the end of very long legal procedures, the new mechanism should, as suggested above, state that interested member states must indicate the scope of action and the objectives they intend to pursue through enhanced cooperation. In addition, it should not say that enhanced cooperation may only be undertaken when these objectives cannot be attained ‘by applying the relevant provisions of the treaties’. As somebody else suggested, the solution would be to authorise enhanced cooperation if these objectives cannot be attained ‘by the Union as a whole’. Those two amendments would make clear that enhanced cooperation offers a real alternative to extra-EU cooperation *à la Schengen*.

## 2.2 The authorisation

The procedure for setting up enhanced cooperation consists of three stages: authorisation of the proposal, consultation and deliberation, and adoption or rejection of the proposal.

At the moment, the proposal procedure varies from case to case. Depending on the pillar, the Commission, the interested member states, or a combination of these have the authority to submit a proposal. Maintaining such a structure is hardly compatible with the ambition of transcending the pillar structure and simplifying the functioning of the Union. The simplest, most efficient and coherent solution would be to entrust the power of proposal to the Commission. This responsibility already lies with the Commission for the development of most of the Union’s policies (guaranteeing compatibility and coherence between the policies developed by the Union and those developed by enhanced cooperation). Besides, the Commission is better placed to carry out this task because it is more inclined to think in terms of what serves the Union’s interests best and not just the interests of the member states concerned (minimising tensions within the Union). Thanks to its long, multi-sector experience, it is also better able to assess the appropriateness of proposing the establishment of parallel or competing enhanced cooperation projects. The argument here is not theological (defending the Commission’s ‘sacred’ monopoly of initiative) but mainly functional. Sidelining the Commission and giving the proposal power to member states would reintroduce one of the most dysfunctional features of (rudimentary) intergovernmentalism.<sup>8</sup>

Considering the special nature of foreign policy, security and defence matters, one exception should be made: in these domains, the power of proposal should be in the hands of the European Foreign Affairs Minister.

The Nice Treaty stipulates that the Commission may include any particular provision(s) it deems necessary in its proposal. It seems necessary to specify the areas the particular provisions may cover.

<sup>7</sup> See Bribosia, Hervé (2001), ‘Les coopérations renforcées au lendemain du traité de Nice’, *Revue du Droit de l’Union Européenne*, N° 1, pp. 111-171, especially p. 135.

<sup>8</sup> Member states tend to draft proposals on the basis of their national traditions and preferences. Being partially motivated by national prestige, they tend to stick to their positions much longer. Besides problems linked to the proliferation of idiosyncratic proposals, such a procedure is also vulnerable to the proposals’ carousel. Disgruntled member states tend to put defeated proposals back on the agenda indefinitely.

We suggest that, among other things, these provisions concern objective prerequisites for participating in enhanced cooperation; the minimum number of participants (see above on minimum participation threshold); the assistance given to member states wishing to participate but not having sufficient resources to do so; the apportionment of operational expenditures among member states taking part in the enhanced cooperation; and/or the operational expenditures that should be charged to the budget of the Union.

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

The mechanism of enhanced cooperation would benefit if consultation and deliberation procedures were rationalised and put in line with current institutional developments at EU level. To start with, if the High Representative for CFSP also becomes Vice-President of the Commission in charge of external relations and he/she is responsible for proposing the authorisation, there would be no need to ask for the Commission's opinion. The definition of the European Parliament's prerogatives is a difficult matter. The Parliament should always be at least consulted (there is no justification in today's Union for total exclusion of the European Parliament from any EU common policy). Should the procedure go beyond consultation? The last decades show that the Parliament and the Council are progressively on an equal footing in various matters. Extending the scope of the Parliament's assent would indeed be in line with this institutional evolution. The assent would most certainly be required every time enhanced cooperation relates to an area covered by the co-decision procedure or every time its operational expenditures are to be borne by the Union. *A priori*, such extension should not complicate the launch of enhanced cooperation. Indeed, it does not seem inconceivable to find a majority of Parliament for a request that the Commission sees as admissible and opportune, and that the Council is willing to approve. Another option, more supranational, would be to require the assent of the European Parliament for any authorisation.

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

The authorisation procedure could and should be more flexible. Maintaining the possibility of an individual veto seems not only incapacitating but also unjustified, as it is not a matter of taking measures that bind all member states. Authorisation to establish enhanced cooperation should be granted by a majority of member states, representing the majority of the Union's population (or three-fifths of the Union's population, which the Praesidium proposes for qualified majority voting). Such a threshold offers a satisfactory balance between the imperatives of efficiency and legitimacy. Besides, the possibility to suspend the authorisation vote in the Council and consult the European Council gives a last chance to stop the procedure and start developing a common policy instead. Considering that enhanced cooperation is likely to be a second-best choice in many cases, that opportunity should probably be maintained. Others propose to suppress it altogether. This optimised authorisation procedure should apply to all fields open to enhanced cooperation.

### 2.3 The membership

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

Conditional openness combines inclusiveness and efficiency. Capacity criteria already exist for member states wishing to join an existing enhanced cooperation. Why not consider this possibility from the start? By analogy with systems set up for the Economic and Monetary Union and for the Schengen *acquis*, any member state willing to join would be formally accepted ('pre-in') but would only fully participate in enhanced cooperation once it had met the capacity criteria ('in').<sup>9</sup> This would preserve the principle of openness while considerably increasing the attractiveness of enhanced cooperation. It is of utmost importance that the willing and able states are able to move reasonably fast and far. As long as enhanced cooperation does not provide for that, they will be tempted to conduct their cooperation on an extra-EU basis. Objective conditions are therefore a key variable in terms of attractiveness. These conditions should be laid down from the start and include the decision to authorise enhanced cooperation. They should also be kept to a minimum. For reasons explained above, it should be up to the Commission to make a proposal at this point.

The current treaties stipulate that enhanced cooperation is open to all member states at all times (*subsequent participation*) provided that the candidates accept any decisions made under this framework and they are able to implement them. Beyond the general principle of openness and respect of the *acquis*, there are noticeable differences from one pillar to another. These variations are present at different levels: the notification of the request for participation, the institutions to be consulted and the scope of that consultation, as well as the institution entitled to decide upon the request. To sum up, management of accession to enhanced cooperation for the first pillar is largely in the hands of the Commission (TEC Art. 11A). As regards to the second pillar, the Council asks for the Commission's opinion, then decides upon the request and on possible prerequisites for accession. The decision is considered approved on this basis, except if a qualified majority of states taking part in enhanced cooperation decide to suspend the decision (TEU Art. 27E). Accession procedure for the third pillar is identical to that of the second pillar, except for two points: firstly, the Commission's opinion may include recommendations on the conditions that the applicant should meet before joining; secondly, the qualified majority required to suspend the decision is different (TEU Art. 40B).

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

### 2.4 The operating mode of enhanced cooperation

Enhanced cooperation is supposed to operate in the same way as the Union – with the same institutional framework and same procedures. This isomorphic principle has one important exception:

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<sup>9</sup> An alternative would be to turn the burden of proof around and say that a 'pre-in' should enjoy all rights of the enhanced cooperation except those that are demonstrably related to certain capacities (suggestion of the anonymous referee).



if all members of the Council take part in the deliberations, only the member states participating in enhanced cooperation take part in the adoption of decisions. As for the rest, the institutions play the role they would normally play in the development of EU policies.

The current system has *several major advantages*: simplicity and readability; a high level of involvement of non-participants that are facilitating their accession (cf. acclimatisation strategy pursued in EU asylum and immigration policies); preservation of the coherency and supranational characteristics of the Union. Maintaining the institutional unity of the Parliament, the Commission and the Court of Justice is particularly important. Should it be otherwise (i.e. distinguishing between MEPs, Commissioners or Judges on the basis of the list of states participating in enhanced cooperation), it would indicate that the members of these institutions are first and foremost national actors operating at European level. In other words, what is at stake is the choice between further Europeanisation and creeping renationalisation.

The disadvantages are that this operating mode is functionally suboptimal, posing various equity and legitimacy problems. *Procedural isomorphism could be a serious problem* if the new Constitutional Treaty does not improve EU rules in a number of areas. To be on the safe side, the new mechanism should provide that participating member states may decide (acting unanimously) that enhanced cooperation shall be governed by qualified majority instead of unanimity and/or by co-decision procedure. A more substantial inconvenience of the current arrangement is the relative vulnerability of enhanced cooperation to ill-intentioned member states. Should enhanced cooperation only involve a minority of member states, non-participating states could try to mobilise the European Parliament against measures proposed for the implementation of enhanced cooperation. This particular argument rests in part on fragile, even disputable postulates.<sup>10</sup> In case of pressures from their national government, it is likely that many MEPs will abstain, but few of them would go as far as voting against proposed measures.

The present mechanism also raises questions regarding equity and legitimacy. Those refusing to participate (the 'out') have as many rights as those wishing to take part in enhanced cooperation but are prevented from doing so due to material reasons (the 'pre-in'). The provision regarding the deliberations in the Council could be reviewed. The 'unwilling', for instance, could be kept informed of the development of enhanced cooperation, but have no right to attend the Council meetings.<sup>11</sup> This would not only be more equitable but also diminish the vulnerability of enhanced cooperation and increase centripetal dynamic (assuming that frustration rather than acclimatisation is the most effective means to change the mind of unwilling member states). Such a differentiation between 'pre-in' and 'out' could be defined in one of the specific provisions of the authorisation proposal.

Another possible point of friction rests with the right of MEPs from non-participating countries to approve or reject measures that will not apply to their states. Some see that as democratically questionable. From their point of view, MEPs represent their constituency and, beyond that, their country. Just as the ministers sitting on the Council, they must be considered as national representatives and should therefore be excluded from the deliberations and/or the adoption of enhanced cooperation's measures. This reasoning opposes the letter and the spirit of the treaties. TEC Art. 189 states that Parliament consists of "representatives of the peoples of the states brought together in the Community". Furthermore, TEC Art. 190 does not specify the number of representatives elected "by" each member state but "in" each member state. These are not legal niceties of little political relevance. It clearly establishes that the European Parliament is a supranational institution and that the

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<sup>10</sup> See Philippart, Eric, op. cit., p. 27.

<sup>11</sup> The right to attend meetings is indeed not universal. Countries that did not adopt the euro are excluded from the governing body of the European Central Bank. In April 2003, it has been decided that, from September, the UK, Sweden and Denmark should no longer take part in senior official meetings preparing the sessions of the 'Eurogroup'. For other options to differentiate between the rights of the unable and the unwilling, see Philippart, Eric, op. cit., pp. 28-29.

mandate of the MEPs is a European one. Both elements are of high systemic importance and cannot be disposed of without serious consequences for the dynamics of the Union. To those who consider it illegitimate for members of Parliament to vote on measures that will not apply to ‘their’ country, one could also object to the fact that it is already a common thing at the Union level. MEPs from Austria vote on the fishing quotas in the North Sea and MEPs from the Netherlands vote on Alpine agriculture programmes. No one ever suggested suspending their right to vote on these issues. As long as enhanced cooperation is used as a laboratory or an implicit *avant-garde*, variable geometry should not be introduced in the structures of the Parliament, the Commission nor the Court of Justice on account of such high systemic costs.

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

## 2.5 The status and funding of measures developed through enhanced cooperation

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

The fact that enhanced cooperation’s measures may no longer be considered part of the Union’s *acquis* with a limited territorial scope is, legally speaking, very puzzling.<sup>12</sup> One option is to accept the fundamental ambiguity of the present system from this viewpoint, and hope that member states involved in enhanced cooperation will quickly have the majority needed in the Council to impose the inclusion of these measures in the Union’s *acquis*. Another option, suggested somewhere else, is to return to the solution adopted for the development of the Schengen *acquis* through enhanced cooperation, specifying that for the purposes of the negotiations for the admission of new member states into the EU, enhanced cooperation’s *acquis* shall not be regarded as an *acquis* which must be accepted in full by all state candidates for admission. This elegant solution avoids theological traps, while being (legally speaking) more coherent and (politically speaking) more centripetal.

As far as *funding* is concerned, the current system provides that ‘expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating member states, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.’

There is a logical contradiction in this. Enhanced cooperation can only be authorised if the Commission and the Council (as well as the European Parliament under certain circumstances) acknowledge that it serves the objectives and interests of the Union. How is it then that all operational costs should be borne (by default) by the participating states? It is true that, in many areas (legislative and regulatory in particular) the Union entrusts the implementation of its policies to the member states, without financial compensation. This being said, on most budgetary issues, unanimity is no longer required. There is no reason to make an exception here. It should be possible for the Council to decide by a qualified majority (or what will replace it) that the Union’s budget will support enhanced cooperation’s operational costs.

<sup>12</sup> On the post-Nice status of enhanced cooperation in the Union legal order, see Bribosia, Hervé, *op. cit.*, p. 153.

### 3 Recommendations – draft article on enhanced cooperation

The following provisions should be divided between “Part I: Constitutional Architecture - Title V: The Implementation of EU Actions (Art. 32)” and “Part II: Union Policies and their Implementation - D: Functioning of the Union” (institutional and procedural provisions; budgetary provisions) of the draft project of a constitutional treaty proposed by the Praesidium.

#### *Contents and admissibility of the request*

1. The member states which intend to establish enhanced cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty.

They shall address a request, which defines the scope of action and the objectives of the enhanced cooperation, to the Commission.

The Commission shall, within three months of the notification, verify whether the envisaged enhanced cooperation: furthers the objectives of the Union, protects and serves its interests and reinforces its process of integration; respects the Constitution and the *acquis* of the Union; and respects consistency between all of the Union’s policies and its external activities.

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

#### *Authorisation procedure*

2. Authorisation to establish enhanced cooperation shall be granted by the Council (acting by a majority of member states, that represent the majority of the Union’s population) on a proposal from the Commission and after consulting the European Parliament. If the request concerns foreign, security or defence policy, the proposal shall be made by the European Foreign Minister.

The proposal may include the specific provisions deemed necessary. These provisions may, in particular, concern objective requirements governing participation in the enhanced cooperation; minimum number of participants; assistance to member states wishing to participate but not able to do so; the apportionment of operational expenditures among member states taking part in enhanced cooperation; operational expenditures that should be charged to the budget of the Union; as well as (see Option 2 below under ‘Enhanced cooperation’s operating mode) the right of non-participants to attend the Council meetings. In the event that the Commission or, as appropriate, the European Foreign Minister proposes to refuse the authorisation, the reasons must be indicated.

[Option 1] When enhanced cooperation relates to an area covered by the co-decision procedure, or when the Commission’s proposal envisages that operational expenditures shall be charged to the budget of the Union, the assent of the European Parliament shall be required. [Option 2] The assent of the European Parliament shall be required.

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

#### *Enhanced cooperation’s membership*

3. When enhanced cooperation is being established, it shall be open to all member states in so far as they satisfy the conditions of participation. It shall also be open to them at any time, subject to compliance with the basic decision and with the decisions taken within that framework as well as possible capacity criteria.

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

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

*Enhanced cooperation's operating mode*

4. For the purposes of the adoption of the acts and decisions necessary for the implementation of enhanced cooperation, the relevant institutional provisions of this Treaty shall apply. By way of derogation from the provisions excluding any harmonisation of the laws and regulations of the member states, the member states participating in enhanced cooperation may decide, by unanimity and in accordance with their respective constitutional requirements, to do otherwise. By way of derogation from the decision-making procedures provided by this Treaty, they may also decide, acting unanimously, that enhanced cooperation shall be governed by qualified majority instead of unanimity and/or by co-decision procedure.

[Option 1] While all members of the Council shall be able to take part in the deliberations, only those who represent member states participating in enhanced cooperation shall take part in the adoption of decisions. [Option 2] Only member states participating in enhanced cooperation shall take part in the adoption of decisions.

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

The Council and the Commission shall ensure the consistency of activities undertaken on the basis of this Article and the consistency of such activities with the policies of the Union and the Community, and shall cooperate to that end.

The acts and decisions adopted for the implementation of the enhanced cooperation shall be binding only on those member states that participate in such cooperation.

[Option 1] For the purposes of the negotiations for the admission of new member states into the European Union, enhanced cooperation's *acquis* shall not be regarded as an *acquis* which must be accepted in full by all state candidates for admission. [Option 2] The acts and decisions adopted in the framework of enhanced cooperation are not part of the *acquis* of the Union.

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

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