



CENTRE FOR EUROPEAN REFORM

*working paper*

# *How flexible should Europe be?*

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How flexible should Europe be?

A European Union (EU) of 26 or more member-states will certainly be far more diverse – in economic, social, cultural and political terms – than the current one. Few people would argue that a monolithic, homogenous Union is what Europe needs. In order to accommodate different aspirations, it makes sense to allow groups of member-states to integrate at different speeds and in different policy areas. The question is thus no longer whether the EU needs flexibility at all, but rather, what sort of flexibility and with what aims?

Denmark's rejection of the euro on 28th September has made a "two-speed" Europe a reality. Denmark will remain outside the single currency – the EU's principal economic and political project – probably for a decade, perhaps forever. The British and Swedish governments are still weighing up the risks of putting the question of euro membership to their electorates. Meanwhile, the euro-zone countries continue to intensify their co-operation on economic policy.

By the end of the decade the EU could have 25 members. This prospect has always worried political leaders on the continent, particularly in France and Germany, far more than their colleagues in Britain. With so many governments it will be more difficult to take decisions. A large and lumbering Union will not have the capacity and agility to respond to global challenges. And many suspect that enlargement will increase the "centrifugal forces" at work inside the EU and weaken the shared commitment to deeper integration.

One response to these challenges was sketched out by Joschka Fischer, the German foreign minister, in May 2000. He suggested an avant-garde group of the willing and able member-states should press ahead with integration within the EU. Eventually, this group would move on to form a European federation, in the form of an executive responsible to a parliament. The other EU member-states would be able to join at a later stage.

The idea of differentiation in European integration is not new. In 1974 Willy Brandt, the West German Chancellor, suggested that the varying economic strengths of then nine European Community members would require different levels of integration. Twenty years later, frustrated at the obstructiveness of the British government, two leading German Christian Democrats, Wolfgang Schäuble and Karl Lamers, argued, in an influential paper, that the EU needed a hard core of countries committed to much closer integration. The French prime minister, Edouard Balladur, envisaged a Union of "concentric circles". John Major also saw flexibility as the way forward, albeit for different reasons: Britain would be able to opt-out of future integration in an à la carte Europe (he also insisted that Britain should have the right to veto the others going forward). But flexibility has come to mean different things to different people, hence the confusing array of terms, models and mechanisms.<sup>1</sup>

There are, of course, already several examples of flexibility in the EU. Indeed, some differentiation is defined in the EU's governing treaties. Denmark has exercised its opt-out from economic and monetary union (EMU). Britain also has an opt-out of the single

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<sup>1</sup> For a comprehensive explanation, see Alexander Stubb, *A categorisation of differentiated integration*, in *Journal of Common Market Studies*, June 1996.

currency and, together with Ireland, is not bound by the provisions on border controls, asylum and immigration. There are numerous protocols attached to the treaties providing different countries exemptions from specific common rules. New member-states have also traditionally enjoyed lengthy transitional periods before they are obliged to comply with all the EU's rules. And groups of EU countries have sometimes chosen to co-operate outside, but alongside the EU treaties: in the Western European Union, or under the old Schengen agreement on border controls.

In spite of these examples, the EU has remained a remarkably coherent organisation, with all member-states generally taking part in all aspects of integration. This is now set to change. The Danes have shown that there will be marked "variable geometry", with the EU remaining divided into euro members and non-members for some years to come. Furthermore, the 1997 Amsterdam treaty introduced a new mechanism that could make flexible integration more widespread. Known as "closer co-operation", it allows a group of member-states to press ahead with integration in numerous policy areas, without those who are either unwilling or incapable of joining in. This mechanism has not, as yet, been used.

A more flexible Europe may be the only way of building a truly continental Union. According to Hubert Védrine, the French foreign minister, closer co-operation is "the best way of reviving the Union...without exacerbating the various European contradictions or transforming institutional unease into crisis".<sup>2</sup> And at a time of growing popular discontent with the homogenising effects of globalisation, perpetrated by seemingly unaccountable supranational institutions, greater respect for national traditions and conditions may seem attractive. Greater flexibility thus has a seductive charm for eurosceptics as well, including the British Conservatives.

But greater differentiation also carries risks. The EU has been built on certain principles: social and political solidarity; commonality of interest; equality of sovereign governments; and the rule of law. These could all be undermined by flexibility. The challenge for the EU is to strike a balance, making closer co-operation a viable decision-making tool, while ensuring that it is not abused.

One of the most difficult arguments at the inter-governmental conference (IGC) that is due to end in Nice, and no doubt beyond, is whether the conditions and rules for the closer co-operation procedure should be loosened, and their scope broadened. France, Germany, Italy and the Benelux three – the EU's six founding members – plus Finland claim the rules are too tight. The other member-states are more cautious. Britain has been the most sceptical about loosening them. It is not opposed to greater flexibility per se, but London is anxious to avoid any rules that might consign Britain, perhaps permanently, to Europe's second tier.

The purpose of this paper is to assess the pros and cons of making the closer co-operation mechanism easier to use. It will speculate on which policies, and for what reasons, closer co-operation is likely to be employed. Lastly, it will examine the longer-term implications for the EU. Would extensive enhanced co-operation be an effective way of managing diversity in a Union of 27 countries? And would it lead, over the longer-term, to a "hard-core" EU, with two or more classes or membership?

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<sup>2</sup> Hubert Védrine, *Le Monde*, 11 June 2000

## Flexibility at Amsterdam

Flexibility forced its way onto the agenda of the 1996-97 IGC for a number of reasons. In 1996 it seemed as if only a handful of countries would join the single currency at its launch, and that they might therefore need flexibility in order to pursue closer co-ordination of economic policy. Some member-states were unhappy with the way that the Schengen arrangements on border controls and immigration – which stood outside the EU's treaties – were working.

France and Germany saw flexibility as a means of pursuing deeper integration by bypassing intransigent states, especially Britain, whose empty-chair tactics during the “Beef War” infuriated its partners. Meanwhile Britain's Conservative government saw flexibility as a way of opting out of future integration. The prospect of enlargement also raised the question of whether the current member-states would be allowed to press ahead with deeper integration or higher standards, while the accession countries underwent lengthy transition periods before having to accept EU norms. In the end, the 15 member-states agreed to a new mechanism for “closer co-operation”, otherwise known as “enhanced co-operation” or *coopération renforcée*. This allows a group of member-states, in certain policy areas and under tight conditions (see table 1), to use the EU institutions and procedures to integrate more closely. A different form of flexibility, “constructive abstention” (see below), can now be used in foreign policy.

Although some member-states were clearly more reticent than others about adopting a new form of flexibility, all of them felt that its use should be tightly regulated. This reflected a widespread concern that closer co-operation should not lead to a fragmentation of the EU, nor become the normal way of making policy. Instead, it would be a tool to be used in exceptional circumstances, and would act as a “test-bed” for integration initiatives. It was agreed that such experiments would be open to all member-states who were willing and able to take part. Most governments presumed that non-participating member-states would usually choose to opt in at a later stage when they saw the benefits of closer co-operation.

Most governments were also aware of the potential disadvantages. Widespread use of closer co-operation would only add to the complexity of the EU, making it even more difficult for the citizen to understand. It would also make it harder for legislators in national parliaments and in Strasbourg to keep track of new developments, and to exert democratic control over the executive. Since the EU's institutions (except for the Council) cannot be re-assembled according to which countries take part, closer co-operation would also give rise to a European “West Lothian” question.

**TABLE 1: CONDITIONS GOVERNING USE OF CLOSER CO-OPERATION**

**Article 43 (Treaty establishing the European Union)**

Member-states which intend to establish closer co-operation between themselves may make use of the institutions, procedures and mechanisms laid down by this treaty and the treaty establishing the European Community provided that the co-operation:

- is aimed at furthering the objectives of the Union and at protecting and serving its interests;
- respects the principles of the said treaties and the single institutional framework of the Union;
- is only used as a last resort, where the objectives of the said treaties could not be attained by applying the relevant procedures laid down therein;
- concerns at least a majority of member-states;
- does not affect the *acquis communautaire* and the measures adopted under the other provisions of the said treaties;
- does not affect the competences, rights, obligations and interests of those member-states which do not participate therein;
- is open to all member-states and allows them to become parties to the co-operation at any time provided that they comply with the basic decision and with the decisions taken within that framework;
- complies with the specific additional criteria laid down in article 11 of the treaty establishing the European Community and Article 40 of this treaty, depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.

**Article 11 (covering the first pillar, i.e. normal Community business)**

Closer co-operation may be used as long as it:

- does not concern areas which fall within the exclusive competence of the treaty;
- does not affect Community policies, actions or programmes;
- does not concern the citizenship of the Union or discriminate between nationals of member-states;
- remains within the limits of the powers conferred upon the Community by this treaty;
- does not constitute a discrimination of trade between member-states and does not distort the conditions of competition between the latter.

Thus Britain's MEPs are able to vote on EU immigration laws even though these do not apply in the UK.<sup>3</sup> If closer co-operation was used to introduce a lot of legislation, it could lead to severe disruption of the Community's legal system, with different EU laws applying in different countries. If flexibility of this sort became the norm, there

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<sup>3</sup> Scottish members of the Westminster parliament are allowed to vote on many aspects of English domestic policy while their English colleagues do not enjoy the same right now that power has been devolved to the Scottish parliament and executive.

would be a danger of political fragmentation, with member-states no longer feeling bound by common values and objectives. These risks are to some extent reduced by the long list of conditions agreed at Amsterdam. A closer co-operation initiative must remain within the scope of the EU treaties; must remain open to all states; must not constitute a distortion of trade and so on.

The disadvantages are also mitigated by the fact that the Commission is given a key role in regulating the use of closer co-operation. Not only does the Commission decide whether a group's request for closer co-operation is appropriate and viable, but it must also propose the very form that it should take. If it rejects an initiative, its opinion is final. The Commission will also adjudicate on a member-state's application to join a closer co-operation initiative at a later stage.<sup>4</sup>

Some argue that the Commission will always opt for closer co-operation, since it furthers the cause of integration – whatever the cost. But the Commission is obliged to ensure that the treaty's conditions are respected. It will be keen to make sure that closer co-operation does not undermine the Community's legal order and the integrity of the EU's institutions. The Commission is also fully aware of the need to make sure that closer co-operation does not divert member-states from the EU's common strategic objectives.

France, Germany, Italy, the Benelux three and Finland claim that these conditions are so restrictive that closer co-operation is unworkable. This is despite the fact that no attempt has yet been made to use it since the Amsterdam treaty came into effect in May 1999. These countries have succeeded in putting four issues on the agenda of the current IGC:<sup>5</sup>

- Should the ability of one country to veto the use of closer co-operation be removed?
- Should the quorum of member-states required for closer co-operation be reduced, for example from a majority (the current rule) to one-third (as recommended by the Commission)?
- Should there be an enabling clause allowing closer co-operation in common foreign and security policy and defence? (see page 13 below)
- Should the other general conditions governing the use of closer co-operation be reviewed? Indeed, are they so restrictive as to encourage member-states to co-operate together outside the treaties?

The most sensitive issue to be resolved is the voting procedure that is used to trigger closer co-operation. At Amsterdam those member-states which were the most sceptical about closer co-operation – Britain, Sweden, Denmark, Portugal, Spain and Greece<sup>6</sup> – argued that any decision should be taken by unanimity while the other

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<sup>4</sup> In police and judicial co-operation, the Commission has less power. It is only required to give an opinion on a closer co-operation proposal by a group of member-states, and it is the Council that ultimately decides whether a member-state can join in at a later stage.

<sup>5</sup> Alexander Stubb, *Dealing with flexibility in the IGC*, in Edward Best, Mark Gray, Alexander Stubb (eds.), *Rethinking the European Union: IGC 2000 and Beyond*, European Institute of Public Administration, 2000

<sup>6</sup> For an account of the negotiations over flexibility during the 1996-7 IGC, see Alexander Stubb, *Negotiating flexible integration in the Amsterdam Treaty*, in Karlheinz Neunreither and Antje Wiener (eds.), *European Integration After Amsterdam*, 1998

member-states argued for qualified majority voting (QMV). In the end, a compromise was reached. The initial decision would be taken in the Council of Ministers by QMV. But, if “for important and stated reasons of national policy”, a member-state objected, it could apply an “emergency brake” to block the initiative. The Council could then decide (by QMV) whether to refer the issue to a meeting of EU leaders, to be resolved by unanimity. Such a veto would, in other words, not come cheap. If one country wanted to block closer co-operation, its prime minister would have to wield a veto in full view of the media at a European summit.

Nevertheless, some insist that the ability of one member-state to stymie the efforts of the others to press ahead with deeper integration defeats the whole object of flexibility. A vetoing country could easily declare some spurious national interest as the justification for its actions. So pressure is growing in the current IGC for the power of veto to be removed.

The British government maintains that the veto is less a means of blocking the progress of others than of making sure that its interests (as a non-participant) are respected. Indeed, Britain would probably be an enthusiastic advocate of closer co-operation, were it not hamstrung by its self-exclusion from the single currency. But here lies Tony Blair’s predicament. Since he was elected prime minister in 1997, the thrust of his European policy has been to maximise British influence in Europe, and to convince a sceptical public that the rules can be shaped in Britain’s interest. Only in this way, he believes, will the British agree to adopt the euro.

The government’s fear is that, with Britain on the outside, closer co-operation, especially in economic policy co-ordination, could actually increase the price of British membership of the single currency. If that meant it would be even more difficult to persuade people to sign up to the euro, then Britain could be stuck permanently in Europe’s second tier.

However, Britain will not preserve its status and influence in the European Union by blocking closer co-operation. In the longer run, that would only encourage member-states to go it alone outside the treaties – along the lines that Jacques Chirac suggested in his Berlin speech in June. The treaties already set down stringent conditions for the use of closer co-operation, with the Commission playing a vital arbitration role. And Britain is not alone in having concerns. It should be prepared to make a concession on the “emergency brake”, perhaps by suggesting that it can be pulled only if two or more countries decide that their interests are adversely affected.

Alternatively, the emergency brake could be replaced with a delaying mechanism. This would allow one government to invoke a 12-month delay if it felt that its vital national interests were being threatened. During that period it would have to submit to the Commission a reasoned argument for its position. The Commission would then be obliged to judge whether that country’s vital interests would indeed be adversely affected by closer co-operation.

The second issue to be addressed by the current IGC is the number of member-states required for closer co-operation to proceed. The quorum is currently a majority of all member-states – now eight, but the figure will increase with each enlargement. Proponents of closer co-operation either want the number fixed at eight or at one-third of the EU membership. It makes sense to reduce the quorum. In an EU of 28 countries

it would be very difficult to pursue closer co-operation with a minimum of 15 member-states. With a reduced quorum, closer co-operation would still require the agreement of a qualified majority of all member-states. That condition should ensure that the EU did not become overburdened with closer co-operation initiatives that benefited only one-third of its members; the EU's institutions, especially the Commission, are already over-stretched, without having to supervise a plethora of closer co-operation projects.

Some member-states are also keen to revise other conditions governing the use of closer co-operation.<sup>7</sup> France and Germany are in favour of deleting the condition saying that closer co-operation should only be used as a last resort, once all existing procedures have been exhausted. This would be very damaging, for it would allow a group of member-states to invoke closer co-operation as soon as another government raised an objection to their wishes during the normal policy-making process. In other words, it would remove any incentive for the group to reach compromises with other EU members. In the past, this pressure on members to make concessions has been the glue that has kept the Union together. Any reform that would reduce the incentive to compromise should be resisted. Fortunately, most member-states would see such a change as an attack on the Community system and would oppose it.

It is also essential that the deliberations of a closer co-operation group remain open to non-participating member-states. Some member-states may argue that openness in a ministerial meeting of such a group should be restricted for the sake of greater confidentiality and efficiency, as in the meetings of the Euro Group of finance ministers. Such arguments should be resisted: openness will help to ensure that closer-co-operation does not become exclusive.

Meanwhile, some of those countries that are most nervous about closer co-operation would like to add extra conditions. A member-state that is able and willing to participate in closer co-operation is allowed to do so, subject to Commission approval. However, the treaties do not say much about those member-states that might be keen to take part but are unable to do. Should the East European countries, for example, receive assistance from the other member so that they can join in higher environmental standards in the future? One solution would be to include in the treaties a "solidarity condition", a general commitment on the part of those engaging in closer co-operation to assist those who are willing but unable. This would not provide a guarantee of cash assistance, but might prevent other member-states from racing ahead on their own without considering the ability of the others to catch up.

There also needs to be a rule that prevents participation in a closer co-operation measure from becoming a pre-condition for taking part in other, separate initiatives. Member-states must not be allowed to blackmail others. This may be particularly important for those countries not yet members of the euro such as Britain. For example, euro-zone countries may wish to use flexibility mechanisms to achieve closer co-ordination of tax and social security systems. But additional integration in these areas should not become another criterion for joining the single currency, in addition to those laid down in the Maastricht treaty.

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<sup>7</sup> For an analysis of possible changes, see Eric Philippart and Monika Sie Dhian Ho, *The pros and cons of 'closer co-operation' within the EU*, Netherlands Scientific Council for Government Policy working paper 104, March 2000



## **Where will flexibility be needed?**

Analysing where closer co-operation could and should be used is, admittedly, a speculative exercise. Some proponents argue that closer co-operation is a contingency plan, to be deployed to overcome a blockage. The nature of that obstruction would, in large part, determine the degree and type of flexibility that needed to be put into place.

Denmark's decision not to join the euro means that the EU will need two sets of arrangements for economic co-operation for decades to come. But if Britain elected a eurosceptic Conservative government opposed to any further integration, closer co-operation might have to be used in many areas other than economics. Another argument for closer co-operation would be to facilitate the early admission of the 12 applicant countries: they would receive lengthy transition periods or multiple opt-outs from some rules, such as the arrangements on borders. Rather than waiting to the end of these transition periods, the current member-states might want to use closer co-operation in order to press on with integration.

On the other hand, 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. 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.

Member-states should agree at the Nice summit in December 2000 to amend the triggering procedure and reduce the quorum. But even if the decision-making rules were relaxed in that manner, the way the EU works would impose natural limits on closer co-operation, making it the exception and not the rule.

First, the space in which closer co-operation can be used is narrow. It can be deployed only for policy objectives covered by the treaties. But large swathes of the treaties are excluded from closer co-operation, either in principle, because they relate to the single market, or in practice, because they are already subject to qualified majority voting (in which case there would probably be little point in using closer co-operation). Second, in those areas where closer co-operation might be used, the countries going ahead will always have to consider whether it really is in their interests. For they may give those countries that do not take part a competitive advantage, for example if a closer co-operation group decides to adopt stricter standards on carbon dioxide emissions.

## **Flexibility in the first pillar**

Closer co-operation in normal Community business is subject to extensive restrictions (see Article 11 in table 1). It is not allowed in those areas that are deemed to be "exclusive" to the Community. What these are is the subject of some legal debate. But the Commission itself considers them to be: free movement of goods, persons, services and capital, the common visa policy, common commercial policy, common transport policy, agriculture, fisheries (although an enlarged EU will have at least four countries

with no interest in the common fisheries policy), rules on competition, and monetary policy.

That still leaves a large number of areas where closer co-operation can be used: border controls, asylum and immigration (see below), tax, economic policy, employment and social policy, customs co-operation, education, vocational training, youth, culture, public health, consumer protection, environment, industry, research and development, trans-European networks, economic and social cohesion and overseas development co-operation.<sup>8</sup>

Yet even here closer co-operation is likely to be used infrequently, since many of these policies are already decided by a qualified majority vote. This is a more efficient way of making policy, for it forces member-states to compromise rather than use the veto, and then binds them to the eventual decision. No EU government wants to undo these policy-making arrangements.

Closer co-operation may be more logical in taxation, and many fields of social policy. These are still subject to unanimity and will probably remain so beyond the 2000 IGC. More importantly, there is, at least in rhetorical terms, considerable divergence between the member-states on how far the EU's member-states should converge towards uniformity. But flexibility would prove highly contentious in areas such as tax, social policy, the environment and consumer protection, since they have a direct impact on the single market.

The extent of closer co-operation in these areas will depend on the degree of distortion of trade that member-states are willing to endure, and on whether the Commission and European Court of Justice are prepared to sanction it. For instance, a group of states might wish to use closer co-operation to introduce a minimum EU-wide level of energy tax, agreement on which is being held up by Spain. They could argue that it would be preferable for the single market to have two regimes – one covering 14 countries, the other applying in one – than 15 differing rules. Spain would enjoy a competitive advantage. But the others could judge that there would not be a significant distortion of trade and investment flows if only one country were exempt from EU rules. They would thus be prepared to bear the distortion, for the sake of the environment.

The Commission would need to agree to such a measure. But the process would not end there. Ultimately the Court would need to sanction such an arrangement. For it would, no doubt, be challenged by a company that felt that a Spanish competitor enjoyed a commercial advantage. The 14 might also be tempted to discriminate against the products from the country that does not comply with the higher environmental standards. This example shows just how contentious (and litigious) closer co-operation in the first pillar would be, especially if it involved the application of different laws across the Union.

Closer co-operation will probably be used more extensively for “soft” integration – where member-states work towards common objectives via benchmarking and peer pressure, rather than via centrally-issued legislation. Soft integration has become

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<sup>8</sup> Francesco Milner and Alkuin Kölliker, *How to make use of closer co-operation*, European Commission Forward Studies Unit working paper, 2000

widespread in many areas of EU business, especially where Community competence is limited. Groups of member-states may wish to work in this way on culture, education, training, health or social policy, attaching an EU label to their initiatives and making use of the EU's institutions. They could also use closer co-operation to set up regional bodies (a network of Mediterranean coastguards) and non-statutory agencies (a European film institute).

Flexibility will also be highly contentious when it relates to economic and monetary union. Until the Danish referendum in September 2000 it had been assumed that Britain, Sweden and Denmark, the countries that chose not to join the single currency at its launch, were in fact "pre-ins". They were supposed to be biding their time, waiting to take the plunge. The Danish rejection of membership has confirmed that the "variable geometry" of EMU will be long-term, and possibly permanent.

Nobody can now deny that the EU will need flexible arrangements to accommodate these two tiers in the EU. But the nature of these arrangements, and their purpose, is likely to be one of the most disputed questions over the next decade.

The first battle was fought in 1997, when the finance ministers of the euro-zone formed their own committee to discuss those parts of economic policy that were related to the management of the single currency. The committee – now known as the Euro Group – was established as an informal caucus, precisely to exclude non-members of the euro from confidential discussions. The Euro Group has no treaty base and thus no legal powers. Legislative decisions are still taken by the council of all 15 economic and finance ministers (Ecofin). But few observers doubt that it is the Euro Group that has become the EU's pre-eminent economic policy-making body.

The Euro Group was set up as an informal body. For the time being there is little support for turning it into a formal institution. In any case, its influence continues to grow. It now holds longer and more regular meetings, and the country in the chair has the power to act as the Group's spokesman, which is an attempt to enhance its coherence and credibility with the markets. Plans for the Euro Group to be supported by its own secretariat appear to have been dropped. France and Belgium – the chief proponents of an "economic government" – still favour an informal body, where decisions are taken by consensus, and political pressure has primacy over legalistic rules.

Of course, this view could change with a recession in the middle of the decade, or increased euro-dollar exchange-rate volatility. The euro-zone members might be persuaded that they needed more formal powers to establish an EU-wide fiscal stance (placing further constraints on national budgetary policy), or to set an exchange-rate policy (responsibility for which now lies ambiguously with Ecofin).<sup>9</sup>

The Euro Group members might then choose to establish their club as a formal decision-making institution in the EU, with legally-binding powers. However, in order to do so, they would have to persuade the "outs" to agree to change the treaties to that effect. In other words, the current rules prevent a group of member-states from re-writing the EU treaties and redesigning the Union's institutions without the consent of the others. It is essential that such rules be preserved in order to keep the EU in tact.

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<sup>9</sup> See Charles Grant, *EU 2010: an optimistic vision of the future*, CER, September 2000

Nevertheless, those member-states that remain outside the euro still fear that EMU will develop into a hard core. Their concern is that the euro-zone countries will fix many decisions in their own interests, rather than in the interest of the EU as a whole. The closer co-operation mechanism, allowing smaller groups to proceed with integration without the others, could make the Euro Group into a more powerful, if informal, caucus. Although Ireland, Spain and Finland do not share the same instinct for tax and social policy harmonisation as the French, the sense of common endeavour that binds the euro-zone countries together is often underestimated.

Britain, Sweden and especially Denmark can hardly take issue with this self-imposed loss of influence. But they do have a more legitimate concern: euro-zone members may wish to harmonise – or at least co-ordinate much more closely – further aspects of economic policy. They may do this for legitimate reasons, to improve the functioning of the single currency. Or they may pursue closer economic co-operation for political purposes, to create a “social union” to complement the monetary one.

Either way, the effect would be to push up the price of membership. A country that wished to join the euro might find that it had to comply not only with the formal Maastricht requirements, but also with a set of tax, budgetary and social policies. Faced with these additional conditions, electorates in Britain and Sweden would be even less likely to vote for euro membership.

Some in Britain have come to believe that the Euro Group might deliberately exclude other member-states from joining the euro. After all, Joschka Fischer and Jacques Chirac have advocated the development of a hard core of countries, perhaps consisting of the euro-zone members, to drive forward integration. One of the attractions of this model is that it would be easier to take decisions in this more compact and like-minded group of countries. The core would, in theory, be open to all those willing and able to join. But would the core be happy to dilute itself by admitting more members? Note how some key euro-zone players were quick to reassure the markets – when the euro fell to its lowest point against the dollar in September 2000 – that the weaker economies of central and eastern Europe would have to wait years to join the euro.

Ironically, had the Euro Group been formed as a new institution, using the provisions on closer co-operation (which were not in place at the time), Britain, Sweden and Denmark would be better off. For they would have had the right to attend the group’s deliberations, a right that Gordon Brown, the British Chancellor, pleaded for but was denied. And they would have more of a say in the future development of economic policy co-ordination. This example demonstrates the advantages of the new closer co-operation mechanism over informal co-operation. The former regulates flexible integration, and protects the interests of all EU member-states; the latter is the law of the jungle.

If Tony Blair wanted to test the willingness of France and Germany to abide by the very rules they are so keen to promote, he should demand that the Euro Group be reconstituted, using the formal closer co-operation mechanism. However, the only real guarantee against loss of influence is membership of the euro, and of its forums.

## Flexibility in Foreign and Security Policy

In the run-up to the 1997 inter-governmental conference, Italy and Germany argued that flexibility was the solution to the lack of progress towards a truly common foreign and security policy. The EU would, they believed, become a weightier actor on the international stage if it were able to present a common front – even if that front was not supported by all members. It would be better to have a coherent position from most members than total dissonance and paralysis. Since the EU's foreign policy is not yet decided by majority voting – which would force all member-states in line behind a common position – dissenting states should be allowed to opt-out.

But by the end of the negotiations, most member-states had decided that closer co-operation – allowing a group to move ahead without the others – was inappropriate in foreign and security policy. The idea was dropped in favour of an alternative form of flexibility known as “constructive abstention”. This allows a member-state to abstain and to declare that it will not apply a decision, while accepting that the decision commits the EU as a whole. That member-state “shall refrain from any action likely to conflict with or impede Union action based on that decision”. If those member-states who wish to abstain in this way represent more than one third of the votes (under the QMV system) – quite a high threshold – then the decision shall not be adopted. Constructive abstention does not apply to decisions that have military implications.

It is worth remembering that under the CFSP, the common strategies that lay down broad guidelines of EU policy towards a region, country or theme are decided by unanimity. Meanwhile, measures implementing the common strategy can be adopted by QMV. A member-state can, however, apply an “emergency brake” in order to block an implementing measure “for important and stated reasons of national policy”. Alternatively, a country could use constructive abstention.

One question for the 2000 IGC is whether there should be greater scope for flexibility in foreign and security policy, and particularly whether it should be extended to defence issues.

In July 2000, the Spanish delegation presented the IGC preparatory group with a paper proposing an enabling clause for closer co-operation in common foreign and security policy. It argued that “constructive abstention” undermines the credibility of common EU action, since it implies last-minute opposition from whoever exercises it. Closer co-operation, on the other hand, would allow a sub-set of like-minded member-states to work together in a more sustained, strategic manner towards common objectives. The greater coherence and determination of this group, the Spanish say, could outweigh the fact it would not encompass the whole Union.

There would be some merit in allowing some countries to commit more resources – diplomatic or financial – to certain projects. For example, the Mediterranean members could use the EU's institutions to work together more closely on political relations with the Maghreb. Closer co-operation could also be used for the mechanics of diplomacy, perhaps to set up joint embassies in third countries (although whether this would need to be done under the auspices of the Community's institutions is a moot point).

Most governments, however, agree that no form of flexibility should be used in the formulation of the most important elements of the EU's foreign policy. The EU is unlikely to launch a common strategy towards Russia that does not have the support of all member-states. This would be even less likely after enlargement. There may be greater differences of opinion on how to treat Russia in a Union that encompasses the former Soviet satellite states. But the EU cannot afford to have two foreign policies towards Russia, one for its western members and one for those from the east. This would kill off any hope of establishing a common EU foreign policy and create a dangerous fault line between old and new members. In any case, few countries would be sufficiently neutral to abstain publicly from a foreign policy and then sit back and watch the Union pursue it. They are much more likely to either support it or wield the veto.

There is, of course, already some flexibility in foreign policy. The EU's larger member-states often co-operate together outside the EU. France, Germany, Britain and, later on, Italy formed the Contact Group, alongside the US and Russia, to cope with the conflict in the former Yugoslavia. This is an example of flexibility without rules. It suits the large countries at the expense of their smaller partners. France and Britain enjoy being able to collude with other large powers. They do not want closer co-operation on the Amsterdam model, for flexibility with rules could make it more difficult to push around the smaller countries. Hence the Spanish proposal. As a medium-sized member with aspirations to become a larger power, Spain is irritated about being excluded from Europe's top table.

Greater flexibility could be a useful means of allowing further progress in defence co-operation, within the EU's institutional structure. There has always been considerable "variable geometry" in Europe's security arrangements. Sweden, Finland, Austria Ireland and Denmark are observer members of the Western European Union, while the other EU countries are full members of the WEU, as well as of NATO, and are thus bound by mutual defence commitments (Denmark, exceptionally, is in NATO but not the WEU). Several East European states are likely to join the EU before they join NATO, if they ever do. And there are a number of bilateral defence arrangements, such as Eurocorps, which comprises forces from Germany, France, Spain, Belgium and Luxembourg. Meanwhile Article 17 of the Amsterdam treaty makes it clear that the CFSP does not preclude "the development of closer co-operation between two or more member-states on a bilateral level, in the framework of the WEU and the Atlantic Alliance".

On "softer" security issues the 15 member-states appear to have similar aspirations. They agreed, under the Amsterdam treaty, to allow the EU to conduct so-called Petersburg tasks – humanitarian and rescue missions, peacekeeping and peacemaking. And they have since endowed the Union with new decision-making procedures and political and military bodies to conduct such operations. But the EU may not be able to meet its new defence ambitious unless there is greater scope for flexibility in these arrangements.

At the Helsinki summit in December 1999 EU leaders agreed to a set of principles governing the conduct of peacekeeping operations. A member-state can choose to opt out of a mission, while allowing it be carried out under the auspices of the EU.

Nevertheless, one country could still block a specific peacekeeping mission, or the more general development of the EU's defence organisation. Austria, Finland and Sweden all have good records in terms of participation in multilateral peacekeeping under the UN flag. But would they behave similarly in EU missions? During the Kosovo conflict, Austria refused to allow NATO planes to use its airspace, because the Alliance's intervention had not been sanctioned by the UN Security Council. Would Austria veto an EU mission under similar circumstances, or merely choose not to take part in it?

One way of circumventing such an obstruction would be to introduce a closer co-operation mechanism – without an “emergency brake” – in the field of defence. This is a change that is unlikely to win much support at the 2000 IGC. But it would be sensible to allow for greater flexibility on defence inside the EU. After all, the EU treaties talk of “the progressive framing of a common defence policy...which might lead to a common defence”. Some member-states may wish to press ahead with military integration beyond the realm of peacekeeping, perhaps by entering collective defence arrangements, or by framing their own strategic concept. It would be better if they pursued such co-operation inside the EU than in an ad-hoc way outside.

Lastly, closer co-operation would be a way of establishing an EU framework for defence industry collaboration or common procurement. Only Britain, France, Germany, Italy, Spain and Sweden have significant defence industries. In 1998 these countries signed a letter of intent to align their rules on export controls, security classification and procurement. While these countries are, in principle, keen to see rapid cross-border consolidation of Europe's defence industries, they have made slow progress.

The closer co-operation mechanism could be used to speed up progress towards uniform rules on exports and procurement, by allowing a sub-group of member-states to use the EU's institutions and decision-making procedures. Ultimately, this group of countries could establish a European Armaments Agency to police their own “mini-single market” in arms. But that would not work unless national ministries were prepared to surrender power to EU institutions and to subject national champions to legally enforceable single market disciplines. That is not going to happen any time soon.

### **Flexibility in Justice and Home Affairs**

Europe has most experience of flexibility in the field of justice and home affairs. Since 1984, under the Schengen agreement, a group of EU members have worked together to remove internal border controls, to strengthen their external frontier and to introduce common rules on immigration and police co-operation. The Schengen agreement was, however, an exercise in flexibility outside the EU's treaties and normal procedures. Britain, which wanted to preserve border controls, was opposed to giving the EU power in the domain of immigration. But the inter-governmental nature of Schengen also reflected the reticence of some of its members. France, in particular, was reluctant to cede too much power to EU institutions; it wanted to keep co-operation secret and out of reach of the European Court of Justice.

It was the inefficiency, legal uncertainty and lack of transparency of the Schengen arrangements that eventually persuaded most governments to bring them under the

auspices of the EU. Schengen also convinced many that the EU needed the capacity for closer co-operation, to allow groups of member-states to work together inside the EU. Thus under the 1997 Amsterdam treaty, the member-states agreed to bring the Schengen arrangements into the EU treaties, in return for a formal British (and Irish) opt-out. The Schengen rules were split, with the migration policies coming under the first pillar (albeit still subject to unanimity, and with limited powers for the Parliament and Court), and the law-enforcement elements placed under the inter-governmental third pillar.

Britain and Ireland have the right to opt into EU policies on borders, immigration and asylum. However, their participation in projects that are up and running, or in laws that are already on the statute book, is subject to the unanimous approval of the EU's 13 Schengen members. Britain contested this point, claiming that the Amsterdam IGC had concluded that the approval should depend on a decision by QMV. But the Spanish argued to the contrary and their version of events was eventually included in the new treaty. When Britain later decided to join the Schengen Information System, a police database, the Spanish government blocked its application for months, citing various disputes over Gibraltar. This illustrates how easily the rules can be set to exclude non-participants. It also helps explain the British government's determination to ensure that any closer co-operation remains genuinely open to all.

So what scope is there for enhanced co-operation beyond the existing British and Irish opt-outs? Denmark is a member of the Schengen area and has signed up to its provisions. But it has an opt-out from rules that might be developed in this field in the future. So will we see closer co-operation by sub-sets of the Schengen group, perhaps with Britain taking part?

Closer co-operation in border controls, immigration and asylum is governed by the same rules as the rest of the first pillar. The thirteen criteria (listed in Table 1) are, in themselves, ample reason to expect that closer co-operation will be used rarely. But the very nature of EU migration policy does not lend itself to flexibility.

The whole point of the Schengen agreement was to replace internal border controls with an external frontier reinforced to common standards, and to achieve common rules on asylum and immigration. All 13 Schengen members have thus undertaken to introduce the same standards. This should ensure that there is no weak link, but also that one government does not try to outbid the others with ever tighter restrictions. Uniformity is thus the goal. Any differentiation of policy through closer co-operation would undermine this objective.

Most of the Schengen states would also be reluctant to do anything that would undermine the coherence of the group.<sup>10</sup> Thus closer co-operation is more likely to be used for operational purposes – to implement better common policies – than to change the nature of those policies. This might be especially appropriate for efforts to combat illegal immigration. For example, the western members, or the Mediterranean countries of the EU might wish to work together on co-operation between coast-guards to improve maritime surveillance. Or France, Spain, Italy and Belgium might

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<sup>10</sup> See Jörg Monar, *Flexibility and closer co-operation in an emerging European migration policy: opportunities and risks*, CeSPI, 1999



wish to set up joint visa issuing offices in a country from which they receive many applications, such as Morocco.

Overall, there will be less differentiation in migration policy issues over the medium term. The British government has been allowed to join the provisions of Schengen (now incorporated into the EU) that deal with law enforcement, namely the Schengen Information System that promotes co-operation between police forces and touches on matters such as surveillance and hot pursuit. The Irish government is likely to follow suit. Meanwhile the UK has also signalled its intention to take part in a future EU asylum policy and measures to combat illegal immigration, in effect ending parts of its opt-out from the free movement provisions of the treaties. In fact at the Tampere European summit in October 1999, all 15 EU member-states signed up to a common agenda of policies to tackle migration and fight against crime.

Meanwhile the applicant countries are expected to comply fully with the Schengen rules and any further migration policy that might be put in place from now on. There may well be a few exceptions, or at least transitional arrangements. In general, however, most applicant countries believe that belonging to an EU without internal borders would bring advantages. They will be able to concentrate their resources on enforcing their borders with non-EU countries.

Once the countries of central and eastern Europe join the EU, a group of member-states may wish to proceed more quickly without them. But this is unlikely. It would make little sense to have different rules and standards in a single zone of free movement. Most west European governments will be more concerned with making sure that the new members match their own immigration control standards.

We can, however, imagine a different scenario. With the exception of some aspects of visa policy, all decisions on border controls, asylum and immigration are subject to unanimity, and progress is slow. The member-states can move to qualified majority voting after 2004, but only if there is a unanimous vote (by the Schengen 13) to do so. If there is no unanimous support for such a change, it will remain easy for one of the Schengen member-states (perhaps Austria under a Freedom Party government, or a Berlusconi-Bossi administration in Italy) to block legislation. This would undoubtedly encourage the more ambitious member-states to try and forge ahead on their own, using closer co-operation “as a last resort”.

As stated above, differentiation of rules on visas and residence permits (where there is, in theory, a system of mutual recognition) would not be compatible with a common immigration policy. But a sub-group of Schengen member-states could argue that the use of closer co-operation to align rules on asylum, or the granting of national citizenship, would not undermine a common immigration policy. On the contrary, they would be creating more uniformity, not less. Of course, under current rules, a Haider or Berlusconi government could still block closer co-operation.

There are several reasons for believing there is more scope for closer co-operation in “third-pillar” police and judicial co-operation (and in those parts of the Community pillar that deal with judicial co-operation in civil matters). First, there has been no prior separation of the reluctant countries from those keen on integration, as there has been in migration policy. This might make blockages more likely. Second, unanimity

applies to all aspects of the third pillar. It is unlikely that any of these issues will be transferred to QMV in the near future.

Third, the EU's ambitions in this field are very broad. It is hard to envisage any co-operation in the law enforcement field that would work against the EU's objectives. And closer co-operation is unlikely to have significant adverse effects on those countries which do not participate. One country is unlikely to suffer an inflow of criminals as a result of the actions undertaken by a sub-set of EU member-states. If that were ever the case, it is hard to imagine a government not taking the decision to opt in.

Fourth, there is a tradition of bilateral co-operation between law enforcement authorities that does not preclude EU-wide action. Thus Britain could subscribe to EU-wide measures to penalise and combat drug smuggling, whilst forming closer partnerships with its immediate neighbours. Similarly, Germany would want different rules for how its police could operate in its neighbours' territory than it would want with Britain.

Finally, some member-states may still harbour ambitions for greater harmonisation of their criminal legal systems. This may not be a particularly practical response to the challenge of organised crime. Full-scale harmonisation would be an enormous technical and political challenge and would take decades. Yet some governments may wish to press on with this objective, not least as a signal of their desire for more political integration. Many governments would not want to take part in such initiatives, but neither could they object, since harmonisation by others would not affect their national interests. The closer co-operation group could claim that greater legal uniformity was in the broader interests of the EU.

But in many respects, harmonisation amongst some member-states would be an unnecessary diversion. It could undermine greater and more rapid coherence across the EU as a whole. One of the fundamental objectives of judicial co-operation, for example, is to overcome the fragmentation of judicial systems that creates loopholes for the cross-border criminal. Thus at the Tampere summit in October 1999 all EU member-states undertook to introduce a system of mutual recognition of court orders and judgements. This system would allow the EU to live with diversity by giving one country's legal system jurisdiction in another member-state. Implementing mutual recognition should remain a priority. One of the challenges of managing closer co-operation will be ensuring that the EU's shorter-term strategic objectives are not undermined by the pursuit of pipedreams.

The member-states would also have to consider the effects of closer co-operation on the coherence of the JHA institutions, specifically Europol and its planned equivalent for judges, Eurojust. It is difficult to see how a sub-set of member-states could use closer co-operation to boost the independent, operational powers of Europol, or to turn Eurojust, the planned co-ordinating unit of national judges, into an EU body of public prosecutors. Neither would it make much sense for a group of countries to set up an EU public prosecutor to tackle fraud against the EU budget, if it had jurisdiction in only some countries: fraud rackets usually cover several jurisdictions.

## Closer co-operation: will it save or destroy the EU?

The EU needs to be more flexible if it is to accommodate the different aspirations of its members. It is likely to become so in several ways. Further differentiation could yet be written into the treaties so that, for example, some new member-states could opt out voluntarily of the EU's arrangements on borders. There may be very long, if time-limited, transition periods for new members. The euro-zone member-states will probably intensify informal co-operation amongst themselves on a range of issues, particularly those related to monetary union, such as the co-ordination of budgetary policy. The larger member-states may deliberately choose to work together on an ad-hoc basis outside the treaties, as they have done in the Contact Group. And some member-states might wish to proceed bilaterally, building their own private institutions outside the treaties.

Closer co-operation on the Amsterdam model is perhaps the least bad form of flexibility, for it should make the EU more supple without stretching it to breaking point. It is designed to contain integration within the EU. Any initiative will be supervised by the EU's institutions and will be subject to the rule of law. This will help to protect the interests of all EU member-states and to keep initiatives genuinely open to those that want to join at a later stage. This mechanism should become easier to use: the right of one country to veto it should be removed, and the quorum should be reduced; yet it should remain tightly regulated so that it cannot be abused.

Closer co-operation should therefore be a useful device for making policy, especially in police and judicial co-operation, in defence and in projects that do not entail legislation. Even so, integration through closer co-operation is likely to be the exception rather than the rule. It must never be used in the single market; it makes little sense when applied to border controls or immigration policy; and it is barely compatible with the idea of a common EU foreign policy. In many circumstances, the very prospect of a group of closer co-operation countries pressing ahead on their own is likely to deter a hesitant or obstructionist government from isolating itself. In other words, the potential application of closer co-operation will, like majority voting, encourage countries to compromise.<sup>11</sup>

However, just as some of the sceptical governments are becoming more comfortable with the idea of closer co-operation, the debate has raced forward. Some in France and Germany have begun to see closer co-operation not as a way of making the EU more flexible but as a way of bypassing it altogether. That is exactly the prospect raised by Joschka Fischer, in his now celebrated speech to Berlin's Humboldt University in May 2000. Fischer advocated a transition from a union of states to a true federation: a European parliament and government with real legislative and executive power, circumscribed by a constitution. This would happen in stages. First, a group of member-states (he declined to say which) would develop closer co-operation. Second, those countries engaged in closer co-operation would form a "centre of gravity" to conclude a new treaty within the EU treaty. This core group would develop its own institutions and would speak with one voice inside the EU. It would be the nucleus of the eventual federation. The last stage would be to extend the federation to the whole Union.

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<sup>11</sup> Françoise de la Serre, *La coopération renforcée: quel avenir?*, in Paul Magonette (ed.), *La Constitution de l'Europe*, 2000

Joschka Fischer clearly envisages use of the closer co-operation mechanism as a first step in the process of building a new federation. So it is not surprising that the governments which are reluctant to see an acceleration of the pace of integration are worried that closer co-operation is the thin end of the wedge. They fear that it will lead to a hard-core and the permanent relegation of those countries that do not share the ambitions of France and Germany. If this were to happen, it is hard to see how the EU could survive.

Comments made by President Jacques Chirac in a speech to the Bundestag in June 2000 have heightened this concern. The French President called for those member-states engaged in closer co-operation to form a “pioneer group”, working inside or outside the treaties, with its own private institution or secretariat. To the dismay of Chirac’s own government (the Europe minister, Pierre Moscovici, declared that it was not a statement of official policy), the idea provoked a hostile reaction from most member-states. It implied that the Community institutions – the Commission, European Parliament and Court of Justice – and the less powerful member-states would be sidelined in a club with no rules that would be dominated by France and Germany. To most governments this would be an example of bad flexibility.

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, the 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.

The Danish decision not to join the euro has confirmed the existence of a two-speed Europe. But this does not necessarily mean that an exclusive inner core will develop in the EU. It is difficult to discern the pole around which a core would coalesce, and which countries would be in it. Monetary union is the most obvious pole, as its members will probably wish to co-ordinate more intensely a wide range of economic policies. But with eleven countries in the euro-zone and others set to join over the coming years, this is hardly a compact, intimate core.

A tight core could, instead, be formed from the six founding members of the EU, which supposedly share similar ambitions. But there is little to distinguish members of this group from some of the enthusiastic newer members such as Finland (or perhaps Hungary). And some of the founding members have less to offer in certain fields than their newer partners, and can hardly claim to be at the EU’s vanguard. Belgium and

Luxembourg have little to offer in the way of military capabilities, unlike Britain and Poland, which should be at the centre of the EU's military core. Italy is hamstrung by its unstable political system. Belgium's judiciary is a shambles.

There should instead be a number of different "cores" in the EU, revolving around for example, environmental protection, social policy, taxation, defence, judicial co-operation and immigration. None of these, apart from EMU, is significant enough to divide the EU into two separate tiers, nor to form the basis of some new form of political union.

As Fischer made clear in his speech of May 2000, the development of closer co-operation would not automatically lead to political union. He said: "The steps towards a constituent treaty – and exactly that will be the precondition for full integration – require a deliberate political act to re-establish Europe." A new core will only develop if a number of countries decide to invent a new form of collective government, with different political institutions to the ones currently offered by the EU. This group would have to draw up, as Jacques Delors has suggested, a treaty within the treaty. It remains to be seen how many national governments would want to take such a quantum leap towards a federal government for Europe. But it is clear that this would signal the death of the European Union.

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*October 2000*