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Paper

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Flexible Integration in the Common Foreign and Security Policy

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# FLEXIBLE INTEGRATION IN THE COMMON FOREIGN AND SECURITY POLICY

_Kathrin Blanck_

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I. Introduction

A. Intergovernmental sphere

When looking at the envisaged procedure of norm-setting in the realm of the Common Foreign and Security Policy (CFSP) after the closure of the Intergovernmental Conference (IGC) and the finalisation in terms of substance of the Treaty establishing a Constitution for Europe (TCE)\(^1\) one has to observe, supposing that the TCE is going to enter into force, that this traditional field of intergovernmental cooperation faces fewer changes in this respect than one might have expected. Decision-making in the Council remains dominated by the principle of unanimity. The weak position of the Commission and the European Parliament is preserved, thus reinforcing instead of mitigating key aspects that are often cited in the continuous lamentations on the EU’s democratic deficit. The complete exclusion of judicial review by the European Court of Justice (ECJ) in the field of CFSP\(^2\) illustrates the weight of national interests wanting to preserve as much sovereignty and autonomy as possible with regard to decision-making in external and security affairs.\(^3\)

In sharp contrast to the detected lack of innovative approaches concerning the norm-setting process, one may identify significant modifications when it comes to the legal effects which may originate from the future Constitution in the field of CFSP. They stem, above all, from the proposed merger of the pillars which will lead to a likely ‘watering down’ of the established principle of supremacy of Community law over Union law.\(^4\) A similar effect derives from the principles contained in Article III-308 TCE. These revisions lay the ground for a considerable extension of legal competences in the realm of the CFSP. However, for reasons of brevity this author will refrain from elaborating on this point any further.

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1. The Treaty establishing a Constitution for Europe (TCE) was adopted by the 25 Heads of State and Government in Brussels on 17 and 18 June 2004. It is based on an initial draft prepared by the European Convention and presented to the Thessaloniki European Council on 20 June 2003 (D-TCE). Having been adopted by the Heads of State and Government, the Constitution will be signed and then ratified by each Member State in line with its own constitutional arrangements (i.e. by parliamentary procedure and/or by referendum). The Constitution will not take effect until it has been ratified by the 25 Member States.


3. Views exist which claim that the competences of the ECJ in the sphere of CFSP have been partially extended in the framework of the Constitution. Following Article III-376 TCE “the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.” However it is important to note, that these competences existed already in the realm of Community law, so that one may only speak of a shift of legal grounds for ECJ competence from the former first pillar to the sphere of CFSP, which in effect does not entail an extension of rights with regard to the ECJ.

Despite the projected abolition of the pillar structure and the more coherent pooling of existing policy fields with regard to external action, the Constitution does not abandon the intergovernmental characteristic of CFSP, since procedural requirements such as the unanimity principle remain applicable. On the contrary, the intergovernmental aspect will even gain momentum due to the new institutional quality of the European Council together with its additional decision-making competences and the introduction of specific rights to take initiatives allocated to the Union Minister for Foreign Affairs. From a legal perspective, the danger of abusive intergovernmentalism is limited by the principle of the single institutional framework and the principle of coherence as enacted in Article 3 TEU. The former aims at establishing a balanced coordination between the supranational sphere and intergovernmental policy fields, while the latter implies the obligation for compatibility or absence of contradiction and synergy. In other words, in the context of EU law “coherence” signifies intensified efforts of coordination among the Member States and the institutions “towards creating the objective of an integrated whole, that is, to ensure that the EU acts in unisono.” According to the Treaty of Nice, the Commission and the Council must both together ensure compliance with the principle of coherence. In the Constitution this is the responsibility of the Commission and the European Minister for Foreign Affairs (Article III-292 para 3 TCE). This means that the institutions mentioned above must always examine the admissibility of measures of flexibility in reference to the respective article on coherence. Any further check against more specific conditions of flexibility may only be envisaged provided that concerns related to the principle of coherence can be excluded.

B. The obstacle of unanimity

The objective of giving the Union a more effective and rapid profile in external action is to a great extent hampered by the general condition of unanimous decision-making in this field. Exceptions from this condition are granted on the basis of Article 23 para 2 TEU, in cases where the Council on the basis of a common strategy is going to decide upon a common action, a common position or another decision or if it takes a decision to implement these instruments or to nominate a special representative following Article 18 para 5 TEU. However, decisions having military or defence implications are entirely excluded from qualified majority voting. The principle of unanimity is going to remain after the entry into force of the Constitution. The IGC failed again to overcome the impasse of restricted qualified majority voting in the realm of CFSP and ESDP

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7 It has to be noted that the principle of coherence is repeated in the catalogue of specific conditions governing flexibility; see Article 27a para 1 (3) TEU.
(Article III-201 para 4 TCE). Against this background, the additional option for qualified majority voting, namely “on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council, made on its own initiative or that of the Minister” does not substantially improve the situation (Article III-300 para 2b TCE).

C. Alliances and national preferences in terms of security and defence

As well as having been left beyond the remit of the Community’s legal order until the Treaty of Maastricht, Security and Defence Policy are also shaped by various defence traditions, membership of various alliances and by concern to maintain a status of neutrality or non-alignment. Due to the closeness and centrality of Security and Defence Policy to the closely guarded area of national security, these issues are the subject of much debate in day-to-day foreign policy making and practice at various levels.\(^8\) Eleven out of the former EU-15 are full members of NATO and two are not integrated militarily into the alliance (Spain and France). The other four EU-members (Austria, Sweden, Ireland, Finland) are neutral or non-aligned States. Following the last enlargement eight (out of ten) new Member States have joined the Union as NATO members (Poland, Hungary, Czech Republic, Slovenia, Slovakia, and the Baltic States). This gives additional weight to the “Atlanticists” in the Council, nourishing fears of squeezing out the formerly influential group of the so-called “Continentalists”. This refers above all to France, which has traditionally pursued a policy aimed at emancipation from the NATO. Furthermore, the continuous political adherence to the (presumed) status of neutrality is increasingly coming to be exposed as somewhat contradictory given the changing nature of threats to international security and the full commitment to the implementation of the CFSP to which all Member States are subject.\(^9\) A comprehensive solidarity clause contained in the Constitution (Article I-15 TCE), similar to that enacted in Article 11 para 2 TEU, figures as the only legal remedy on the EU level seeking to balance the panoply of national foreign policy programs.

The question however arises then of how this self-binding provision can be effectively put into practice in day-to-day business. This problem is aggravated by the manifest lack of any mechanisms providing for control or sanction in order to respond to potential or evident breaches. This is illustrated by the fact that numerous infringements of the principle of solidarity have occurred in the past without ever incurring any legal protest. The potential risks for the Union’s external profile resulting from too much internal division on how to react to external events may be disastrous.

\(^9\) The only exception is Denmark; see Protocol nr. 5 on the position of Denmark.
D. Unity or efficiency?

Against the picture drawn above one may deduce that the Union will have to assert its external role by striking a balance between intergovernmental cooperation, the principle of unanimity and national adherence to either alliances or to the status of neutrality. Taking all these factors into consideration would respect the unity of the EU’s external action, but in the majority of cases it would also mean reducing the result to the lowest common denominator.

Cooperation outside the Treaty framework may constitute an alternative. Another would be to use mechanisms of flexibility which enable interested Member States to advance the CFSP within the institutional setting of the Union without having to involve all Member States. Thus it should be possible to unite the most progressive members under a legal umbrella in order to boost the external profile of the Union and, at the same time, to prevent the creation of exclusive clubs.

However, the scope of enhanced cooperation in the field of CFSP is constrained considerably by a detailed catalogue of conditions set out in Article 43 TEU and the legal restriction to exclusively implement joint actions or joint positions. The explicit exclusion of measures having military or defence implications cuts off the possibility of building coalitions within the European legal order in times of crisis. Against this background, there are prominent voices pointing at the potential benefits stemming from enhanced cooperation in the realm of the ESDP, particularly with regard to the implementation of the Petersberg tasks. Opponents of a flexible Europe refer to the risk of enhancing the Union’s operability “at the costs of splitting it”, arguing that introducing flexibility into the realm of CFSP equates to a self-made “disempowerment of the Union in external relations”. To rebut this argument it is enough to acknowledge that any form of flexibility within the CFSP always has to represent the Union in its entirety. Nonetheless a dilemma emerges, since any measure of flexibility is only applicable if a unified reaction has not been reached in the Council. It is more than questionable as to whether it will ever be possible to disguise a lack of internal concordance with a seemingly unified appearance in external action. However, the risks of paralysing the external profile of the Union are much more ominous if decision making within CFSP remained exclusively based on unanimity.

The above-mentioned limitations to enhanced cooperation prompted the Working Group on “Defence” of the European Convention to address the issue of flexibility, despite the fact that it was

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10 See CONF 4760/00, 4.
11 Quoted in Bender (2001) p. 753 [translation by the author].
12 This argument however, raises the question whether due to the principle of collective representation, the European Union as a whole also assumes international responsibility for breaches of international law as well as contractual and non-contractual liability for damages caused by the group of Member States participating in enhanced cooperation. This problem, which is closely linked to the issue of international responsibility of international organisations, cannot be elaborated on any further within the framework of this paper, however the author pleads that at least a subsidiary responsibility with regard to the European Union be considered.
not granted particular attention in neither the Laeken mandate nor in the framework of a specific Working Group within the structure of the Convention. In their final report a number of explicit recommendations reflect the particular importance finally attributed to flexibility, namely:

“ensuring flexibility in decision-making and in action, both through more extensive use of constructive abstention and through the setting-up of a specific form of closer cooperation between those Member States wishing to carry out the most demanding Petersberg tasks and having the capabilities needed for that commitment to be credible”\(^{13}\).

The essential impetus leading to this document was expressed by the Franco-German contribution to the ESDP, in which it was explicitly demanded: “Notre objectif est d’atteindre une plus grande flexibilité, notamment dans le domaine des processus décisionnels”\(^{14}\). In addition, the contribution requested the transformation of the ESDP into a “European Security and Defence Union” through, amongst other things, the extension of enhanced cooperation to the second pillar and its establishment by qualified majority voting, as well as to reduce the quantitative threshold for participation. By contrast, the final report of the Working Group on defence put the focus on alternative measures of flexibility such as “closer cooperation”. Yet it was only after Europe’s political division about the war on Iraq and the signal set by the four-nations proposal of 29 April 2003 involving Germany, France, Belgium and Luxembourg, that the European discussion on enhanced cooperation was eventually re-animated. The underpinning objective, however, was to avoid the formation of any avant garde on European security issues operating outside the Treaties. To this end, the presidency of the Convention issued a comprehensive document proposing a range of legal revisions and additional normative options with regard to flexible integration in the CFSP/ESDP.\(^{15}\) Finally a breakthrough was reached in the Draft Constitution by overcoming the existing constraints of enhanced cooperation. Furthermore, specific instruments governing closer, structured and armament cooperation found their way into the Constitution. These newly created mechanisms significantly increase the range of possibilities to act, as well as the degree of complexity.

Against the background of a selective analysis of existing forms of flexibility, this contribution intends to elaborate on the instrument of enhanced cooperation and the newly shaped specific mechanisms of flexible integration. On the basis of both the Treaty of Nice and the Treaty establishing a Constitution for Europe of 18 July 2004 (CIG 87/04), these instruments will be analysed from a legal perspective. In order to complete the picture, scenarios of factual and

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\(^{13}\) See CONV 461/02, 2.

\(^{14}\) See CONV 422/02, nr. 2.

\(^{15}\) See CONV 723/03.
potential cooperation outside the Treaty framework will be taken into equal consideration. It will be shown in the end that the range of options, from (ad-hoc) mechanisms in the framework of enhanced cooperation to new forms of pre-defined and even permanent flexibility, are promising to boost the profile of CFSP and ESDP. However, whether they will effectively contribute to and urge the extension go integration process can only be judged based on future practice.

In the following sections, two examples of existing forms of Treaty-based flexibility will be assessed in more detail.

II. Examples of flexible integration in the CFSP

A. Constructive abstention (Article 23 para. 1 TEU)

The instrument of constructive abstention allows single Member States to abstain from voting in the framework of the CFSP without hampering the unanimous decision-making process. Thus it is designed to provide a flexible alternative to fully blocking decisions requiring unanimity. With reference to Article 23 para 1 TEU, a Member State is authorised to make a formal declaration, which means that it will not have to apply the decision, while accepting that the Union as such is bound by it. The respective Member State is also obliged, in a spirit of mutual solidarity to “refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position.” If several Member States that amount to more than one third of the weighted votes, take recourse to constructive abstention, a decision does ipso iure not materialise.

When it appeared in the Treaty of Maastricht for the first time, this measure was welcomed as an adequate remedy to the rigid principle of unanimity in the CFSP. Nonetheless, its existence encapsulates a general dilemma. Any application of constructive abstention by one or more Member States reveals the ostensible lack of approval with regard to specific matters in this field. In turn, a majority of at least two thirds of the weighted votes is required for successful decision-making. Constructive abstention is not so much a potential measure of flexibility, as a more organisational element of decision-making. Moreover, it is not designed as a general escape clause for cases of conflict between Union law and national politics. To illustrate this concern, one may evoke the scenario of a neutral country which tries to regularly avoid participation in the field of ESDP by taking recourse to constructive abstention. Such an approach would not only run counter the comprehensive acceptance of the acquis as signed at the moment of accession to the Union, but it would also infringe on both the solidarity clause enacted in Article 11 para 2 TEU and the principle of good faith as a fundamental principle of international public law. However, it must be emphasised that any Member State which cannot or does not want to agree with a decision requiring
unanimity is not obliged to make use of constructive abstention. It never foregoes its right to prevent such a decision by using a veto.\textsuperscript{16}

The Treaty establishing a Constitution for Europe has also adopted the option of constructive abstention. However, the wording changed slightly, clearly illustrating the general endeavour to link voting majorities with quantitative thresholds. Thus, in other words, a decision will not be adopted if “the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union” (Article III-300 para 1 TCE).

\subsection*{B. Opt-out by Denmark}

In the course of the negotiations following the signing of the Treaty of Maastricht and the rejection of the Treaty by the population of Denmark in a popular referendum, Denmark was granted a specific opt-out clause enacted in Protocol nr. 5 on the position of Denmark. Based on the so-called “Edinburgh-compromise” Denmark also received exceptional abstention rights in the field of ESDP and JHA. Since the content of the Treaty of Maastricht partially touched upon the issue of national sensibilities, this derogation arrangement constituted the last chance at that moment and paved the way for the Treaty’s entrance into force. In the following, the protocol was incorporated into primary law by means of the Treaty of Amsterdam. In part two it is stated:

\begin{quote}
\textit{With regard to measures adopted by the Council in the field of Articles 13(1) and 17 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between Member States in this area. Therefore Denmark shall not participate in their adoption. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures.}"
\end{quote}

Thus Denmark, which has met any attempt of creating integrated EU military structures with open scepticism, is not obliged to participate either politically or financially to this kind of operations. In return, it retains the liberty to inform the other Member States at any time that it does not want to avail itself of all or of parts of the protocol and that it intends to fully apply the relevant measures within the framework of the European Union.

The Protocol on the specific position of Denmark has been entirely introduced into the Constitution.

In the light of the examples explored above, one may note that mechanisms of flexible integration have already been an integral part and stabilising element of the emerging Common Foreign and Defence Policy. In the longer run, however, it seems risky to build the concept of a more integrated and more operative CFSP and ESDP exclusively on the principle of constructive abstention and specific derogation regimes or on regular recourse to coordination outside the Treaty framework. The introduction of enhanced cooperation in the Treaty of Amsterdam initiated a process to meet these considerations and has further developed through the Treaty of Nice. The proposals contained in the future Constitution finally mark the turning point in primary law, ranging from temporary constructions of flexibility towards the even establishment of permanent institutionalised systems based on extended mandates.

III. Enhanced cooperation in the CFSP

A. Enhanced cooperation in general (Article 43-45 TEU)

The Treaty of Nice enshrined for the first time general provisions on enhanced cooperation applicable across all pillars. Before Nice, the Treaty of Amsterdam already provided legal grounds for enhanced cooperation. These were, however, restricted to the Community pillar (Article 11 TEC) and to the third pillar (Article 40 TEU). The field of CFSP affairs was reduced to alternative mechanisms such as constructive abstention according to Article 23 para. 1(2) TEU or closer cooperation in the realm of security (but outside the Treaties) according to Article 17 para. 4 TEU. Against this background, Articles 43 to 45 TEU in the Nice version, contain the first horizontal clause of primary law which entirely encompasses both the supranational and the intergovernmental legal sphere of the European Union. However, the Treaty of Nice did not fundamentally reform the context of enhanced cooperation, although new provisions were introduced in order to render future use of the mechanism more attractive. Article 43 TEU limits the required threshold of participating countries to start such a cooperation to eight Member States, which constitutes less than one third in the enlarged Union. The existing veto rights, which were created by the Treaty of Amsterdam, are lifted in the first and third pillar. By contrast, as will be shown in the following section, the scope of effective implementation within the CFSP (Articles 27 a-e TEU) became subject to significant limitations.

The relationship between the general provisions of Articles 43 to 45 TEU and the specific rules governing enhanced cooperation in the CFSP might be qualified as a “specific order of cross-references”\(^\text{17}\). This is impressively illustrated by Article 27a para 2 TEU that states: “Articles 11 to

\(^{17}\) See Kaufmann-Bühler in Grabitz/Hilf (2003), Das Recht der Europäischen Union, 22. Ergänzungslieferung, August 2003, Vorbemerkungen zu Art. 27a – 27e TEU, para 4.
27 and Articles 27b to 28 shall apply to the enhanced cooperation provided for in this article, save as otherwise provided in Article 27c and Articles 43 to 45c. This means that in the field of CFSP the general norms, which are applicable to enhanced cooperation in all pillars subsequent to Title VII TEU, are subordinate to the more specific ones. By contrast, following Article 27a para. 1 TEU, enhanced cooperation in the CFSP will safeguard the values and serve the interest of the EU as a whole by asserting its identity as a coherent force on the international scene. Furthermore, it has to respect the principles, objectives, general guidelines and consistency of the CFSP, as well as the decisions taken within this policy, the powers of the European Community and consistency between all the Union’s policies and external activities. In turn, the application of the general rules contained in Articles 43-45 TEU are confined by the prevailing *acquis communautaire* and the principles of unity and consistency.

B. Enhanced cooperation in the CFSP (Article 27 a – c TEU)

At the beginning of the IGC 2000 leading to the Treaty of Nice, extending enhanced cooperation to the realm of the second pillar was a non-issue. It took the Member States until the European Council summit in Feira in June 2000 to officially add it to the common agenda. However, the provisions introducing enhanced cooperation into the CFSP constitute nothing more than a thin compromise. A number of constraints, which have been added at the request of the UK, Ireland and Sweden, added to its complexity and reduced the potential to effectively exploit the opportunities offered by the mechanism of enhanced cooperation.

Firstly, the veto “for important and stated reasons of national policy” which had been lifted in the first and in the third pillar has been inserted into second pillar matters (Article 27c; Article 23 para 2 (2) TEU); secondly, enhanced cooperation in the CFSP will only relate to the implementation of a joint action or a common position (Article 27b TEU) and thirdly, all matters having military or defence implications are excluded from its application (Article 27b TEU). The later limitation does not, in the light of Article 17 para 1 (3) TEU, extend to (enhanced) cooperation between Member States in the field of armaments. Based on a strict terminological interpretation, procurement and coordination in the field of armaments are obviously related to defence. However, armaments are relevant with reference to commercial, social and further EC-related policies, including issues such

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18 The so-called Amsterdam *left-overs* are summarised in the “Protocol on the institutions with the prospect of enlargement of the European Union” appended to the Treaty of Amsterdam. They refer to the size and composition of the Commission, the weighting of votes in the Council, the possible extension of qualified majority voting in the Council, as well as other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam.
as competition, merger-control or subsidies in the industrial sector. Against this background one may argue, that enhanced cooperation in the field of armaments cooperation does not infringe on Article 27b TEU.

C. Enhanced cooperation in the Draft Constitution (Article I-44 TCE; Article III-416 – III-423 TCE)

Even though enhanced cooperation has never been practically applied to date, it has been further developed within the framework of the European Convention leading to an extension of its scope as laid down in the Draft Constitution. The legal bases governing enhanced cooperation do not follow any systematic design but are deliberately spread between the first and the third part of the Draft Constitution. Moreover they are subdivided into general and specific norms, whereby the principle of lex specialis derogat legi generali has to be applied. However, in cases of legal conflict or lack of normative clarity one has to have recourse to the general norms of enhanced cooperation or even to those governing CFSP as such.

Similarly to the current Treaty version, the instrument of enhanced cooperation, which is unconditionally open to all Member States, “shall aim to further the objectives of the Union, to protect its interests and reinforce its integration process” (Article I-44 TCE). Its establishment will only be authorised by the Council “as a last resort” after proving that the pursued objectives cannot be realised “within a reasonable period” by the Union as a whole. In addition, the Union’s Minister for Foreign Affairs and the Commission are entitled to issue opinions on the proposed enhanced cooperation’s consistency with the CFSP and other Union policies. The European Parliament must be informed. In order to initiate the procedure of enhanced cooperation, at least one third of the Member States must agree to work together.

Compared to the current Treaty regime, the proposed procedure is less cumbersome and restrictive. Above all, enhanced cooperation might be established in all policy areas, except the field of exclusive competences. In the realm of the CFSP, the limitation to solely implementing joint actions or common positions has been abolished, together with the explicit exclusion of matters having military or defence implications. In other words, the general rules governing enhanced cooperation unconditionally apply to the CFSP as well. Slight procedural differences persist when it comes to initiating the procedure or with regard to the admission of Member States wishing to join the mechanism at a later stage.

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22 Exclusive competences are competition policy, monetary policy, common commercial policy, customs union and the conservation of marine biological resources under the common fisheries policy; Article I-12 para 1 TCE.
23 See Article III-325 para 1 and 2 TCE.
When looking more closely at the correlation between the trans-pillar regime of enhanced cooperation anchored in Article I-44 TCE and the specific mechanisms of flexibility in the field of ESDP, one has to differentiate between both concepts. The only legal basis effectively referring to enhanced cooperation is to be found in Article III-213 paragraph 5 of the original Draft Constitution dealing with “structured cooperation”, thus establishing there again a hierarchical order based on cross-references. However, this provision has been dropped in the later version.²⁴ Similarly, the other mechanisms of flexibility, such as that of closer cooperation, the execution of civil or military operations by groups of Member States or active participation within the European defence agency do not relate to enhanced cooperation at all. They fall within the legal ambit of the general norms of CFSP and particularly ESDP, laid down in Articles I-40 and I-41 TCE. However, the opportunities offered by these mechanisms do not preclude the application of enhanced cooperation as such in the realm of foreign and security policy. Nonetheless, it is apparent that due to the specific mechanisms, potential issues for enhanced cooperation in the field of CFSP are limited in number. Related initiatives may be considered with regard to civil measures or aspects of human rights protection.

IV. Normative and institutional conditions for enhanced cooperation

A. Conditions for establishing enhanced cooperation in the CFSP

Basic conditions in the CFSP

Contrary to the detailed catalogue of general criteria contained in Articles 43-45 TEU, specific conditions for enhanced cooperation in the field of CFSP are practically almost totally lacking. In order to close this gap, a complex system of cross-references has been introduced into the Treaty. According to Article 27a TEU, the most important article in this respect, a number of fundamental objectives with regard to external relations must be observed, namely the safeguard of European values and the commitment to assert the Union’s identity as a coherent force on the international scene. By reference in paragraph 2 to the general objectives of CFSP contained in Articles 11 et seq. TEU, the obligation to support and maintain a unified European profile in international affairs, gains additional substance. In turn, the Council’s competence to assess whether the above-mentioned obligations are successfully honoured confers significant discretionary powers to this body. With regard to internal policies, enhanced cooperation in the CFSP has to preserve the common acquis and to respect the principle of consistency within the second pillar and within the sphere of Union policies as a whole. To this end the CFSP has to be understood in its entirety as

²⁴ See CIG 60/03 ADD 1, Annex 22, according to which the structured cooperation shall be established as a permanent mechanism, whereby the reference to enhanced cooperation has been dropped.
shaped by the (European) Council, thus equally encompassing respective guidelines, strategic principles or specific decisions. In other words, action in the framework of enhanced cooperation does not only have to consider respective Treaty obligations but also has to respect results originating from political developments as, for example, laid down in the regular Presidency Conclusions. However, one has to observe that the specific conditions governing enhanced cooperation in the CFSP basically aim at limiting its application and are obviously designed to complicate the whole mechanism.

*General conditions as laid down in Articles 43-45 TEU*

A further reference contained in Article 27a TEU refers to Article 27c and the provisions laid down in Articles 43-45 TEU. In other words, given the clear lack of a specific catalogue of conditions governing the establishment of enhanced cooperation in the CFSP (except those mentioned above) one has to resort to the general set of premises which are applicable across all pillars. It is arguable as to whether to draw a line between objective and subjective criteria.²⁵ Among the objective criteria are the requirement of a minimum quota amounting to eight Member States participating in the mechanism and the principle of openness for all other Member States. The condition of being the last resort and the obligation to respect the “competences, rights and obligations” of those Member States which do not participate in the enhanced cooperation belong to the sphere of subjective criteria. In a similar way to the conditions mentioned above, Article 43 TEU also enacts the obligation to further the objectives of the Union as a whole, to protect and serve their interests and to reinforce the process of integration, as well as to respect the single institutional framework and the acquis communautaire. Moreover, according to the Treaty of Nice the instrument of enhanced cooperation has to remain within the limits of the powers attributed to the Union or to the Community. As soon as the general and specific conditions are met, interested Member States are entitled to submit an application for enhanced cooperation to the Council (Article 27c TEU).

*Conditions laid down in the Constitution*

The grouping of general and specific conditions for enhanced cooperation in Article I-44 and Articles III-416, 417 and 418 para 1 TCE constitutes a net gain in terms of simplification and coherence. As a result, following the bundling of the previously spread provisions and the formal overcoming of the pillar-structure, legal requirements for enhanced cooperation are now equally applicable for both supranational and intergovernmental policy fields. However, this engenders

almost no or just slight editorial changes in terms of content and formulation. As an example, one might refer to the former requirement to respect the Treaties and the single institutional framework, which has been revised accordingly stating that enhanced cooperation will “comply with the Union’s Constitution and law”. Furthermore, the original threshold of eight Member States was transformed into a minimum share of one-third of all Member States, which, however, will not imply substantial changes given the future composition of the EU encompassing 27 Member States.

**B. The process of application and authorisation**

**General Conditions**

When the respective requirements are met, Member States participating in enhanced cooperation are authorised to make use of the institutions, procedures and mechanisms of the European Union in order to pursue the objectives set. The process of application and authorisation, however, is subject to specific provisions which vary among the policy areas.

Accordingly, each application for enhanced cooperation in the field of the European Community has to follow the procedure as laid down in Article 11 para 1 TEC, whereas Article 40a para 1 TEU governs the respective endeavours in the realm of judicial cooperation in criminal matters. Respective requests have to be presented to the Commission, which may in turn submit a proposal to the Council. In the event that the Commission refuses to issue a positive proposal, it has to forward its reasons to the Member States concerned. Finally, it is up to the Council to formally grant authorisation of enhanced cooperation after consulting the European Parliament.

**The process in the CFSP**

In the field of CFSP any request aimed at establishing enhanced cooperation has to be directly submitted to the Council, which has to forward it to the Commission for its opinion and to the European Parliament for its information (Article 27c TEU). Finally, the Council has to decide by qualified majority acting in accordance with Article 23 para 2 (2 and 3) TEU. However, the apparent exception to the unanimity principle in CFSP matters relates to the simple fact that enhanced cooperation is limited to the implementation of a joint action or a common position that is already subject to qualified majority.

**Scope of discretion of the Council**

In this context, the issue of the Council’s scope for exercising discretion when deciding upon the admissibility of enhanced cooperation must be considered. It must also be asked whether fulfilling the underlying conditions leads to an automatic legal entitlement for enhanced cooperation. According to this approach, the authorisation by the Council would constitute a pure
formal act. On the one hand it is arguable as to whether this approach is the most appropriate, given the comprehensive catalogue of difficult premises and complex procedural arrangements, which would be undermined by an additional discretion attributed to the Council. On the other hand, the Council retains the competence to determine whether the subjective criteria are effectively met. To put it more concretely, the act of assessing the degree of deepening and enhancing the integration process escapes from any viable verification and objective control, thus conferring significant discretion to the Council.

**Role of the ECJ**

Another problem is indicated by the deliberate lack of competence of the ECJ in the sphere of the CFSP. In any event, the existing case law may be applied analogously or at least be consulted in order to provide for a homogenous implementation of enhanced cooperation across all pillars. However, there is neither a binding obligation towards this end nor a mechanism of supervising it. The sole option allowing for ECJ review in the realm of foreign and security policy arises when the Court is confronted with possible overlaps of the first and the second or third pillar. In the future it seems most likely that the ECJ will get more involved in such delimitation problems that directly result from an increasing number of such “hybrid acts” covering both matters.

**The veto option**

According to Article 27c TEU referring to Article 23 para 2 (2 and 3) TEU, any Member State is entitled to declare its refusal to adopt a given decision by qualified majority voting for “important and stated reasons of national policy”. In order to rescue the contentious matter the Council may decide to refer the issue to the European Council for decision taking by unanimity. It is interesting to observe that despite the formal abolition of this veto clause in all other pillars, it had been introduced in the field of enhanced cooperation in the CFSP by the Treaty of Nice.

**The binding effect of the Council’s authorisation**

The authorisation issued by the (European) Council allowing for enhanced cooperation in the field of CFSP assumes a binding character on the participating Member States. Moreover, all future decisions and acts adopted in the framework of enhanced cooperation are exclusively binding

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26 This competence was for the first time confirmed by the Aiport Transit Visa case on the basis of Article 47 TEU; Case C-170/96, Commission v. Council, [1998], ECR I-2763.
28 It is worthwhile to note that a similar mechanism is still effective with regard to the first and the third pillar. However the referral to the European Council is just of suspensive effect leaving substantial decisions making to the Council (by qualified majority voting).
on these states. It is important to note that the initial authorisation also constitutes the relevant legal basis with regard to forthcoming accessions of other Member States. Therefore, it is not allowed to (excessively) deviate from the original scope of action. Member States which do not participate in enhanced cooperation are exempted from its binding effects, but they are obliged by the Treaty not to impede its implementation (Article 44 para 2 TEU).

**Procedure according to the Treaty establishing a Constitution for Europe**

The legal procedure governing the act of application and authorisation of enhanced cooperation, as currently enshrined in the consolidated Treaty of Nice, is also included in the Treaty establishing a Constitution for Europe. The relevant provisions are enacted in Article III-325 TCE. Additional weight is added to the process by the introduction of an extra right to be heard conferred upon the Union Minister for Foreign Affairs, with regard to the question of consistency. The obligation to consult the European Parliament has been retained unaltered. From a legal perspective, one might criticise the insignificant position of the European Parliament, even more since the European Parliament has been granted the right of approval in all other policy fields.

Decision-making is carried out by European Decisions. These are adopted by unanimity as a result of the extension of enhanced cooperation in the CFSP beyond common actions and common positions. However, following the provision ("passerelle") stipulated in Article III-422 TCE the Council is entitled to decide by unanimity to later on decide by qualified majority. In a given case, this option, which may be used from the start of enhanced cooperation, is then equally applicable to the process of authorisation. Different from the original Draft Treaty establishing a Constitution for Europe according to which the "passerelle" encompasses all policy fields, decisions having military or defence implications are excluded from its application in the current consolidated version (Article III-422 para 3 TCE). Nonetheless, in all other fields of external action it is possible to enable an *avant garde* in the framework of enhanced cooperation to proceed by using qualified majority voting. In other words, the participating countries would not only advance with regard to substantial questions, but would also enjoy extended decision making rights. It goes without saying that enhanced cooperation based on qualified majority voting has a rich potential of action at its command.

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29 Article 44 para 2 TEU states: "Such acts and decisions shall be binding only on those Member States which participate in such cooperation and, as appropriate, shall be directly applicable only in those States".

30 Article III-325 para 1 TCE.
C. The procedure of joining enhanced cooperation at a later stage

The principle of openness

The legally anchored principle of openness, providing for participation in enhanced cooperation either at the initial or at a later stage, applies unconditionally to all the policy fields of the European Union.\(^{31}\) In other words, openness has to be guaranteed at any phase of enhanced cooperation. However, the requirement to pass a specific process of application and authorisation, which is necessary due to a deliberate lack of automatic adherence, challenges the principle of openness. Respective modalities on later accession are enacted in Article 27e TEU.

The procedure according to Article 27e TEU

According to this article, any interested Member State wishing to participate in enhanced cooperation has to notify the Council of its intention. It should also inform the Commission which is entitled to formulate an opinion to the Council within three months. As for the Council, it has to decide on the request within four months of the date of receipt of that notification. Moreover, the Council has the discretion, where necessary, to decide upon “specific arrangements” in cases where it may deem it necessary. To put it more concretely, despite the principle of openness, participation may not be initiated by a unilateral declaration but requires a formal procedure.

The Council, in its totality, decides on the request of adherence by qualified majority but approval is ideally expressed by concealment.\(^{32}\) Any refusal of accession to enhanced cooperation has to be qualified as being of temporary nature, since any permanent exclusion from an existing enhanced cooperation would be in direct conflict with the Treaty.

The option of “specific arrangements”

In a further step, the Council has at its disposal the right to decide on “specific arrangements” where necessary, for example, in order to facilitate the participation of interested Member States. This construction may be compared to the well-known transitional arrangements frequently used during the process of accession to the European Union. In turn, the fact that specific arrangements of this sort are used in such a way to create more severe criteria, thus rendering participation more difficult, is not explicitly excluded. Although the objectives set out in the initial decision authorising enhanced cooperation must not be altered or its implementation complicated, one may always define conditions which risk undermining the general right of participation. An

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\(^{31}\) The guarantee of participation is stated in Article 43b TEU together with Article 27e (second pillar), Article 40b TEU (third pillar) and Article 11a TEC (first pillar).

\(^{32}\) With regard to enhanced cooperation in the first pillar it is the Commission to decide upon any participation at a later stage (Article 11a TEC) and in the third pillar it is the Council in the composition of the Council members concerned (Article 40b TEU).
example might be a group of Member States forming an enhanced cooperation (on the basis of a common position or common action) which pursue the purpose of dealing with the question of the status of Kosovo, in order to represent the EU position on the international stage. If participation at a later moment was conditional on significant financial contributions or the deployment of civil servants, the basic objectives as set out in the initial decision of the cooperation would not be substantially altered.

*The Procedure according to the Treaty establishing a Constitution for Europe*

Similar to the Treaty of Nice, the Treaty establishing a Constitution for Europe provides for accession at a later stage, which is explicitly enshrined in Article III-420 para 2 TCE. Compared to the current legal system, slight but important differences appear, although they do not contribute to the acceleration of the formal procedure. Firstly, the obligation to notify the intention to participate in enhanced cooperation has been extended beyond the traditional organs, namely the Council and the Commission, to the Union Minister for Foreign Affairs. In turn, the Commission’s obligation to issue a stated opinion has been dropped (but the Commission is free to formulate one). With regard to the Council, one may observe an increased number of restrictions compared to its former position. In the composition of the Member States concerned, it holds no discretionary decision making powers anymore, but has to formally “confirm” the participation of the interested Member State, after consulting the Union Minister for Foreign Affairs, and after “noting” that the pre-set conditions have been successfully met. This means, that later participation also requires full and explicit approval by the Council, leaving aside the possibility to accept new members by pure concealment. Another innovation refers to the option to introduce specific conditions for participation in the relevant European Decision founding enhanced cooperation. Against this background, Emmanouilidis has noticed a process of “challenging the principle of openness” within the framework of the Constitution.33 The author, however, disagrees with this observation, pointing at the institutionalised option of “specific arrangements” in the Treaty of Nice, which already allows for far-reaching limitations to the principle. In turn, the obligation to define relevant conditions at the initial stage of enhanced cooperation and to incorporate them into the founding Decision, significantly strengthens predictability and moves further away from the vague style and formulation of the current regime in this respect. If the Council comes to the conclusion that the required conditions are not met, it has to indicate the arrangements to be adopted and has to set a deadline for re-examining the given request. All in all, the procedure under the Constitution reveals a much more pro-participatory orientation which is illustrated by the wording of Article III-422 para

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33 In the original German version Emmanouilidis speaks of „Konditionalisierung der Offenheit“; *Emmanouilidis* in *Giering* (2003) p. 68.
2 TCE: “The Council, on a proposal from the Union Minister for Foreign Affairs, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation”. This provision flows from the general obligation entrusted to the Commission and the Member States to promote participation by as many Member States as possible, and it also ascertains the admissibility of temporary measures in order to support acceding Member States.

D. Treaty-based limits

Limitation to common positions and common actions

Article 27b TEU stipulates that enhanced cooperation in the field of CFSP is strictly limited to the implementation of common positions and common action and generally excludes relevant cooperation in respect of matters having military or defence implications. Against this background, it is hardly comprehensible why common strategies have not been included, above all because they are designed to cover areas “where the Member States have important interests in common” (Article 13 para 2 TEU). Equally excluded are “decisions”, which constitute the fourth legal instrument in the realm of CSDP and have to be taken unanimously by the Council. Arguably one may speak of a kind of unwritten principle stating that only legal acts that are based on qualified decision-making allow for further implementation in the form of enhanced cooperation. In return, one may maintain that the given restrictions express no more than the political intention to confine the mechanism of enhanced cooperation in the second pillar. During the process of consultation in the European Convention, the extension of the scope applicable to enhanced cooperation was one of the most controversial questions in the relevant Working Group.\(^{34}\) In the end, one concern of the Franco-German proposal was pushed through according to which enhanced cooperation should be introduced in the field of CSDP without reservation.\(^{35}\)

Legal effects

The Treaty of Nice explicitly states that acts and decisions taken under enhanced cooperation do not form part of the Union acquis (Article 44 para 1 TEU). As a consequence, these acts and decisions exclusively bind those Member States which participate in such cooperation and are directly applicable in those States (Article 44 para 2 TEU). This provision is based on the intention to communicate to future Member States that their obligation to take over the whole European Union acquis does not encompass measures taken under enhanced cooperation. As a

\(^{34}\) See CONV 791/03, Annex, 2.

\(^{35}\) See CONV 422/02, nr. 2.
result, the question of the legal nature of enhanced cooperation arises. On the one hand, it is arguable whether to consider enhanced cooperation to be fully part of the EU acquis. To support this argument one may point to the legal basis of enhanced cooperation rooted in primary law and to the general entitlement to make use of the Union’s institutions, procedures and mechanisms while respecting the institutional framework. This view gains even more momentum by taking into consideration that acts of secondary law issued by one of the numerous Association Councils in the framework of Association programmes with third States also form part of the EU acquis. The sole exceptions refer to the mode of decision making in the Council and to the fact that operative costs are to be carried individually by the participating Member States. It follows that enhanced cooperation in the realm of CFSP has to be qualified as agreement under public international law, which constitutes a kind of partial acquis existing among the general or aggregate acquis of the Union. The legal obligation to respect the acquis communautaire and to further the objectives of the Union indicates that in the event of conflict, the general Union acquis overrides the partial acquis created by enhanced cooperation.

Similarly, the Treaty establishing a Constitution for Europe implies that all acts or decisions taken in the framework of enhanced cooperation exclusively bind those Member States participating in the mechanism. Furthermore, no candidate country aspiring to accede to the European Union has to take over the partial acquis stemming from enhanced cooperation (Article I-44 para 4 TCE).

**Parallelism between multiple initiatives of enhanced cooperation or enhanced cooperation and specific mechanisms**

A further problem arises with regard to the permissibility of parallel mechanisms of enhanced cooperation being identical in terms of objectives and content, or with regard to similar initiatives of flexibility based on both, enhanced cooperation and specific mechanisms such as structured cooperation. Strikingly, neither the Treaty of Nice nor the Treaty establishing a Constitution for Europe contains relevant provisions tackling this delicate issue. However, it is not simply theoretical fiction to consider the possibility that several Member States, which do not (or do not want to) fulfil the criteria allowing for participation in the mechanism of permanent structured cooperation could decide to create a parallel mechanism based on enhanced cooperation, but promoting more or less the same objectives.

This problem may only be solved by recourse to the general criteria of enhanced cooperation. A first idea is indicated by the obligation to further the objectives of the Union and the Community, to serve their interests and to reinforce the integration process. The fragmentation of

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36 It is interesting to note, that even in the framework of Union policies in the second and third pillar, operative expenditure is charged to the budget of the European Communities, except of measures having military or defence implications or if the Council acting unanimously decides otherwise; Article 28 para 3 TEU and Article 41 para 3 TEU.
sensitive matters into a set of separate initiatives can be hardly conceived as enhancing the process of integration. A similar result can be reached by drawing on the obligation to respect the Treaties and the single institutional framework (uniformity clause). Particular consideration has to be paid to the principle of consistency with regard to inter-pillar activities within the framework of the CSDP, as well as concerning both trans-pillar and external relations of the Union and its institutions. More concretely, the principle under consideration stipulates the obligation to work towards highly consistent action in terms of internal policy making and in terms of substance. The assumption that both objectives are only reachable through conceptual and targeted coordination by the respective actors, clearly reveals the disruptive and thus non-consistent potential contained in a situation of parallel mechanisms pursuing identical objectives. However, one has to refrain from generalisation. The effective danger of undermining consistency by a multitude of flexibility mechanisms always has to be assessed and to be proven on a case-by-case basis. Moreover, in the end one should not forget the principle of unanimity, which is generally applicable in the second pillar and thus offer a last resort to circumvent undesirable parallelism. By contrast it is important to note, that a general prohibition of parallel flexibility would confer some kind of exclusive rights to the fastest Member States with regard to issues potentially open to enhanced cooperation. Such a situation would be prone to provoke uncontrolled competition, which in a worst-case scenario may even favour fragmentation within the EU.

V. Specific mechanisms of flexible integration in the CFSP/ESDP

For the first time in the history of the European Union, the Treaty establishing a Constitution for Europe has introduced a separate section on the European Security and Defence Policy (Article I-41 together with Articles III-309 to 312 TCE). To a large extent the provisions contained in this section meet the demands already phrased in the final report of the Convention Working Group on “Defence”. The substantial extension of the concept of security beyond the classical Petersberg tasks, figures among the most essential innovations in this context. All these tasks are now equally designed to contribute to the common objective of fighting against terrorism, which includes the readiness to support third countries in combating terrorism within their territories. The unconditional acceptance of enhanced cooperation in the field of CFSP and the introduction of new forms of flexibility on a legal basis constitute another important leap towards more efficiency and operability for the ESDP, as foreseen in numerous Presidency conclusions since Cologne (June

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37 See CONV 461/02. Furthermore see the Franco-German contribution to ESDP, CONV 422/02.
38 According to Article III-309 para 1 TCE these tasks encompass (by using civilian and military means) joint disarmament operation, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces undertaken for crisis management, including peace-making and post-conflict stabilisation.
However, these measures are of an inherent alternative nature, resulting from the unresolved antagonism between the demand for efficiency and the principle of unanimity within the framework of CFSP/CSDP. As long as the Member States prevent substantial transfer of sovereign rights in the field of external and security policy to the European level, any successful implementation of activities in this field will inevitably rely upon progressive groups of a few. Their effective ability to tackle sensitive issues on the European level but in an asymmetric structure solely depends, on the one hand, on the political will and on the other hand, on the financial and operational capacity.

During the Intergovernmental Conference a number of provisions contained in the Draft Constitution underwent fundamental discussions and substantial amendments. In order to follow this process in a chronological order, particular attention has to be paid to the so-called “Naples-Document” dating 25 November 2003\(^{39}\) and the subsequent papers of 2 December, 5 December and 9 December 2003.\(^{40}\) Any additional document which referred to the legal framework of the CFSP did not alter the trade-offs consented to beforehand.\(^{41}\) These compromises reflected a high degree of mutual agreement among the Member States. As expected, they have been incorporated into the Treaty establishing a Constitution for Europe. The following analysis will be effected on the basis of the legal framework offered by the current version of the Constitution. Only in exceptional cases will references be made to the Draft Constitution or to respective documents issued during the IGC.

### A. Implementation of missions by a group of Member States

This form of flexibility refers to the situation in which the Council entrusts the implementation of a civilian or military task, as foreseen in the Constitution, to a group of Member States “which are willing and have the necessary capability for such a task” (Article III-310 para 1 TCE). To this end, the Council has to adopt a European decision by unanimity. According to Article III-310 para 2 TCE, the European decision has to contain detailed information on the objectives and scope and the general conditions for the implementation of the mission. The Member States involved, in association with the Union Minister for Foreign Affairs will agree collectively on the concrete management of the task. Despite the considerable extent of autonomy conferred on the participating Member States, they are obliged to regularly inform the Council of the progress achieved during the operation, either on their own initiative or at the request of a non-participating Member State. The mandatory liability towards the Council is most visible in the event that the

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\(^{39}\) See CIG 52/03 ADD 1 (Annex 17: CSDP).
\(^{40}\) See CIG 57/03 (Defence); CIG 57/1/03 (Defence), CIG 60/03, ADD 1 (Annex 22: ESDP).
completion of the task has major consequences or requires amendments of the objective, scope and conditions. In such cases, the Council is entitled to authorise necessary adaptations to the legal basis of the operation by means of a European decision.

One of the advantages attributable to this mechanism consists of the lack of any obligatory minimum number of participants for the benefit of rapid coalition building of the “able and the willing”. In other words, only two Member States would be sufficient to form such a group in order to implement a European mission. In return, all Member States which do not contribute to the group are bound to refrain from any opposing action.

All other necessary decisions for the day-to-day business of the operation are exclusively decided on by the participating countries. Given the lack of any specification, it is arguable whether it is best that these kinds of decisions have to be taken by unanimity. Moreover, the Constitution is not clear on the effective scope of group-specific decision-making rights. Do they encompass even the most important issues such as the Operation Plan (OPLAN) or the Rules of Engagement, generally taken in the framework of the Political and Security Committee (PSC) or are they taken by all EU Members. However, since the European Union is the contracting partner offering support by means of a crisis-management mission to a third country, it is most unlikely that it will forgo its decision-making rights with regard to the most sensitive rules governing a civil or military operation. Moreover, the Constitution remains silent on the question of participation rights for third countries willing to contribute to a European mission. The same is true for Member States that wish to join the group at a later stage. Given the apparent lack of explicit rules one may, in an analogous manner, draw conclusions from the law on enhanced cooperation, at least to a certain extent. In other words, it is disputable whether the principle of openness equally applies to the specific forms of flexible integration and that in practice it is sufficient to notify the intention to participate to the Council and the Union Minister of Foreign Affairs. In return, the final decision will be taken by the Council in its entirety. Different from the concept of enhanced cooperation, the type of flexible integration discussed is designed to implement a EU initiative (namely to conduct a crisis-management operation). Thus the decision-making rights with regard to the establishment and further development of such a group is a Union competence (whereas in the realm of enhanced cooperation this right is conferred solely upon the participating countries). It should be pointed out that the only criteria required for participation is to be “willing” and to possess “the necessary capability”. Accordingly, any interested Member State fulfilling these criteria will be entitled to join the group.

Another question points at the financial aspect. To put it more concretely, what kind of financial resources are foreseen to cover the costs entailed by the execution of operations implemented by only a group of Member States? In short, the general financial provisions applicable on external action become effective. This means any administrative costs are charged to
the Union budget (article III-313 para 1 TCE). The same is true for operational expenditure with regard to purely civilian missions. In a case of an operation having military or defence implications, the operational expenditure is charged to the Member States in accordance with the gross national product scale, unless the Council decides otherwise. The question arises as to whether these costs are to be incurred exclusively by the participating countries, or whether the financial burden will be borne by all Member States? In this respect the framework decision on the financing of operations having military or defence implications adopted by the European Council in June 2002 may shed some additional light.\textsuperscript{42} According to it, operational costs are subdivided into three categories: firstly, common costs that cannot be allotted to individual States taking part\textsuperscript{43}; secondly, costs for the transportation and the accommodation of the forces and the barracks which may be established collectively depending on the Council, which decides on a case-by-case basis; thirdly, all other costs which are considered individual costs. However it is explicitly stated that common financing of incremental costs for ESDP operations “does not entail financing of military assets and capabilities offered by participant States on a voluntary basis”\textsuperscript{44}. To the author it seems most likely that expenditure arising from the above-mentioned deployment, as well as from so-called “individual costs” that have to be financed on a “costs lie where they fall” basis, will be exclusively charged to the contributing countries. Despite the fact that all Member States have to decide unanimously on an EU-operation, they may not be likewise “able” or “willing” to effectively deploy troops and assets. In return, it would be justified if the so-called “common costs” were borne through a repartition by all Member States, since they all have approved its execution. However, the Constitution does not clarify this point, which most probably will be left to practice.

In addition one may enquire about any alternatives, namely whether for the implementation of (extended) Petersberg tasks one may also resort to enhanced cooperation? The Constitution itself does not indicate anything contrary to this assumption, since it does not establish a kind of hierarchical order between measures of enhanced cooperation and the specific modes of flexibility. However, bearing in mind the comprehensive catalogue of criteria which have to be met in order to launch enhanced cooperation, the attraction of enhanced cooperation in this field will be relatively reduced.

\textsuperscript{42} EU-Doc. 10155/02 of 18.06.2002.
\textsuperscript{43} These costs encompass incremental costs for the headquarters for EU-led operation (transport costs, administration, locally hired personnel, communications, transportation/travel within the operations area of headquarter, barracks and lodging/infrastructure, public information, representation and hospitality) as well as incremental costs incurred for providing support to the forces as a whole (infrastructure, additional equipment, identification marking, medical).
\textsuperscript{44} EU-Doc. 10155/02 of 18.06.2002, para. 2.2.
B. Permanent structured cooperation

The possibility to enter into a permanent structured cooperation as defined in Article I-41 para 6 TCE is open to those Member States “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions”. Both the criteria and the necessary operational commitments to be made are listed in a separate protocol added to the Constitution. This is a significant improvement compared to the Draft Treaty issued by the Convention, which had left the definition of the criteria and the specification of the commitments up to the Member States. As a result of logistic shortcomings and ambiguous terms, such as “higher criteria”, but even more because of the common demand by the Member States to establish structured cooperation as an inclusive and predictable institution, this led to revision of the relevant provisions during the IGC.

Among the most essential conditions figure the obligation to intensively develop the national defence capacities “through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes and in the activity of the Defence Agency”\(^{45}\). Moreover, the participating Member States should have the capacity to supply targeted combat units for the missions planned, structured at a tactical level as a battle group, and capable of carrying out the extended Petersberg-Missions within a period of 5 to 30 days, which can be sustained for an initial period of 30 days and be extended up to at least 120 days, by 2007 at the latest. These combat units are particularly - however not exclusively - designed to carry out operations in response to requests from the United Nations. Article 2 of the Protocol contains a list of detailed requirements, which the participating States have to meet in order to reach the common objectives. Among them figure measures to enhance the availability, inter-operability, flexibility and deployability of the forces and to bring the defence apparatus into line with each other as far as possible by harmonising, pooling and even specialising the Member State’s defence means and capabilities. To a certain extent, these measures meet the frequent demands to introduce military convergence criteria in order to close the operative gap.\(^{46}\) However, the catalogue on structured cooperation does not tackle the core concern, namely the determination of a financial threshold based on national GNP to be dedicated for defence matters.

The mechanism of structured cooperation is open to all Member States provided they do meet the relevant criteria set out in the protocol. It is sufficient to notify the intention to the Council and to the Union Minister for Foreign Affairs. Thereafter, the Council has to adopt, within a time span of three month, a European decision establishing permanent structured cooperation and


\(^{46}\) Missiroli (1999) 485.
determining the list of participating Member States. To this end, the Council acts by qualified majority voting after having consulted the Union Minister for Foreign Affairs (Article III-312 para 2 TCE). Any request to accede to permanent structured cooperation at a later stage has to follow the same procedure, except the fact that effective participation in the Council vote is limited to these members representing the participating States (Article III-312 para 3 TCE).

The rigorous conditionality between participation and the fulfilment of the pre-defined criteria consequently includes the option to suspend Member States which no longer fulfil the criteria or are no longer able to meet the commitments. The respective European decision taken by the Council composed of the participating countries (except of the Member State concerned) has to be based on consolidated findings by the defence agency. A qualified majority will be defined by at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

All other decisions taken in the framework of permanent structured cooperation are to be adopted by unanimity by the Council, composed of representatives of the participating countries only (Article III-312 para 6 TCE). In order to prevent the establishment of exclusive clubs, all Member States are entitled to participate in the consultation process.

The original intention as laid down in the Draft Constitution was to normatively link structured cooperation with the instrument of enhanced cooperation. According to the former Article III-213 para 5 D-TCE that “[n]otwithstanding the previous paragraphs, the appropriate provisions relating to enhanced cooperation [ex-Articles III-325 (2) and III-326 (2)] shall apply to the structured cooperation governed by this Article”. This provision was misleading since the Articles in question mainly refer to the process of establishing or joining enhanced cooperation, which has already been regulated in detail by Article III-213 D-TCE. Consequently, the reference to enhanced cooperation has been dropped during the IGC.

Moreover, in the framework of the IGC negotiation process the explicit reference was dropped according to which the members of structured cooperation are empowered to carry out crisis management operations. However, one may deduce the general permissibility of such activities from the fact that permanent structured cooperation will not affect the provisions of Article III-309 TCE. Furthermore, a closer look at the objectives as enacted in the Protocol on permanent structured cooperation may shed some additional light on the role of its members in international crisis management operations. Accordingly they will “have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article III-309, within a period of 5 to 30 days, in particular in response to requests from the United
Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.”

However, Article III-312 does not constitute a particular legal basis for the execution of military operations. By contrast, this quality is exclusively limited to Articles III-309 and III-310 TCE. In other words, Article III-312 constitutes the legal foundation for substantial cooperation in order to meet the agreed objectives, while it does not work as a basis for launching operations in a concrete crisis situation.

Thus, the Constitution actually encompasses two instead of three provisions as foreseen in the Draft Constitution, enabling either all Member States (Article III-309 para 2 TCE) or groups of them (Article III-310 para 1 TCE) to carry out civil or military crisis operations. It has to be noted that generally all Member States are invited to contribute military troops and civil personnel but it would be over-optimistic to expect collective action based on unanimous decision-making by 25 Member States. Most likely is a scenario according to which civil or low-risk operations will be executed by ad-hoc groups according to Article III-310 para 1 TCE, while high-risk operations will be carried out by members of permanent structured cooperation equally based on Article III-310 para 1 TCE.

C. Participation within the Agency in the fields of defence capabilities development, research, acquisition and armaments (European Defence Agency)

In addition to the obligation of the Member States ““to undertake to progressively improve their military capabilities” the Constitution foresees the establishment of an Agency in the fields of defence capabilities development, research acquisition and armaments

“to identify operational requirements, to promote measures to satisfy those requirements, to contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, to participate in defining a European capabilities and armaments policy, and to assist the Council in evaluating the improvement of military capabilities”.

A more detailed catalogue of its functions is contained in Article III-311 para 1 TCE. Effective participation in the agency remains facultative and does not affect membership in other forms of flexible integration in the field of armament cooperation. In this respect the final report of
the Convention working group on “Defence” suggested,⁴⁹ that the agency should “incorporate, with a European label, closer forms of cooperation which already exist in the armaments field between certain Member States (OCCAR, LoI). The Agency should also be tasked with strengthening the industrial and technological base of the defence sector. It should also incorporate the appropriate elements of the cooperation that most Member States undertake within the WEAG.”⁵⁰

The incorporation of existing initiatives in the field of armaments into the context of EU policies, accentuates the need for modalities allowing for the participation of third States and the willingness of the Member States to substitute national regulatory frameworks and preferential economic relations by a common approach in this field. This is particularly true given the fact that only a small number have significant industrial defence sectors. In other words, most Member States are consumers rather than producers of defence equipment. However, most details on the participation, the role of the Commission or on procedural aspects regarding the incorporation of OCCAR, WEAG/WEAO and LoI are not exhaustively dealt with in the Constitution.

By contrast, the objectives of the agency are well defined, encompassing the fields of procurement, research and the establishment of a common defence market. However, the exclusion in primary law of the application of competition rules in the defence sector is in direct opposition to the envisaged profile of the European Defence Agency.⁵¹ The unconditional transfer of Article 296 TCE into the framework of the Constitution (Article III-436 TCE) despite prominent voices opposing it, may raise concerns on the seriousness of the Agency project. In addition, due to the voluntary nature of participation in the Agency, any full application of the competition rules on the defence sector would not be acceptable. It would be more realistic to adapt the relevant provision accordingly or to agree on a general waiver with regard to the use of Article 296 TEC in order to boost the European defence market.⁵²

The establishment of a European Armament Agency was originally intended to become part of the new Constitution that will hopefully enter into force in 2007 or 2008. This schedule became confused when the European Council of Thessaloniki in June 2003 endorsed the idea of a Defence Agency and explicitly tasked the “appropriate bodies of the Council to undertake the necessary actions towards creating, in the course of 2004, an intergovernmental agency in the field of defence capabilities development, research, acquisition and armaments.”⁵³ In the following, the Council decided to appoint an ‘Agency Establishment Team’ (AET) in order to prepare the institutional

⁴⁹ See CONV 451/02, para 64.
⁵⁰ WEAG – group for armaments cooperation between 19 European countries (14 of which are members of the European Union and 16 members of NATO), the objective being harmonisation of operational programmes and standards, cooperation on research and technology and the opening up of contracts.
⁵¹ See Article 296 para 1 TEC.
setting. Subsequently this led to the establishment of the European Defence Agency under a Joint Action of the EU on 12 July 2004.

This raises two questions: the first regards a legal problem. Due to the preparation and setting up of the Defence Agency far ahead of the coming into force of the Treaty establishing a Constitution for Europe, it is likely to significantly pre-determine its substance. Secondly, the intended incorporation of the above-mentioned cooperation programmes into the Agency (to which participation is purely voluntary) and the option to set up exclusive industrial arrangements finds itself in direct opposition to the Nice Treaty provisions excluding enhanced cooperation from issues having military or defence implications. Nonetheless must be emphasised that the Agency is not based on enhanced cooperation but on a Joint Action, decided by all Member States.

The new Defence Agency absorbs the provisions contained in Article III-311 TCE as regards content and objectives, while respecting the national security and defence competences of participating Member States. The Agency, which has legal personality, will be subject to the Council’s authority. The Council is entitled to issue guidelines annually, determining the priorities of the Agency’s work programme. The Agency is headed by the SG/HR for the CFSP who equally chairs the Steering Board composed of one representative of each participating country. The steering board is likely to meet at least twice a year at the level of Defence Ministers. The actual conception of the Agency clearly builds on intergovernmental concerns. However, with regard to efficiency a more independent construction certainly would have been preferable.

The necessary revenue to cover expenditure will to a large extent come from contributions by the Member States participating in the Agency, based on the gross national income scale. In other words, except specifically ear-marked revenue granted on a case-by-case basis for specific purposes, the Agency will receive no financial contributions from the general budget of the European Union. However, in addition the Agency will also carry out ad-hoc projects or programmes which will be funded by associated budgets that may even be completed by Community contributions. Among them one may differentiate between projects/programmes in which all participating Member States are presumed to participate (Category A) and those which may implemented by a reduced group (Category B). Participating Member States involved in the latter category are solely bound to make financial contributions. Thus flexibility within flexibility was introduced into the realm of European Union law. Another meaningful aspect is the option to include third parties contributions to a particular ad-hoc project or programme on the approval of

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54 Council Decision of 17.11.2003 creating a team to prepare for the establishment of the agency in the field of defence capabilities, development, research, acquisition and armament, OJ L 318, 03.12.2003, 19.
56 Article 15 of the Joint Action.
the Steering Board. The question of third party contribution was raised for the first time in the framework of the Joint Action, thus shedding light on an important aspect of the future functioning of the Agency (Article 23 of the Joint Action).

Moreover the Agency is intended to “develop close working relations with the relevant elements of OCCAR, the LoI Framework Agreement, and WEAG/WEAO with a view to incorporate those elements or assimilate their principles and practices in due course, as appropriate and by mutual agreement” (Article 25 para 2 of the Joint Action). Particular concern is paid to the non-EU WEAG members which will enjoy the fullest possible transparency with regard to the Agency’s specific projects in order to attract their participation when appropriate. A specific consultative committee will be set up to guarantee regular exchange of views and information on relevant matters of mutual interest. It follows that in the initial phase the Agency will work as a sort of coordination forum while the effective employment of its full range of operational functions is to be expected only after the incorporation of the above-mentioned cooperation programmes.

However, with regard to the future entering into force of the Constitution two questions arise: firstly, does the now established agency fully correspond with the Defence Agency foreseen in the Constitution? Secondly, does the entering into force of the Constitution require another European decision according to Article III-311 para 2 TCE in order to (re-)establish the Agency under the Constitution? With regard to the first question, the similarity of both concepts may necessarily be assumed to a great extent. Examining the scope of functions attributed to both agencies reveals them to be identical, although the shape and key functions of the now existent agency are outlined in a more detailed manner. As to the second question, it is important to refer to the provisions on succession and legal continuity enacted in Article III-438 TCE. According to paragraph 3, all acts adopted on the basis of the former treaties, then repealed by the Constitution, will remain in force. Moreover, their legal effects will be preserved until those acts are repealed, annulled or amended in the implementation of the Constitution. In other words, the Joint Action establishing the European Defence Agency, which is clearly based on Article 14 of the TEU, will remain in force until it is altered in the way outlined above. Thus, the Council will be entitled to re-establish the Agency by a separate European Decision and even change its mandate as long as it respects the Constitution. The shift of the constitutional regime does not run counter the preservation of the original legal basis whose legal continuity is ensured by Constitutional law.
D. Excursus 1: Closer cooperation

Closer cooperation as originally anchored in Article I-40 para 7 together with Article III-214 of the Draft Treaty, referred to the field of “mutual defence”. This mechanism was not designed to substitute a collective defence clause but to constitute an interim option, as long as the Council has not (unanimously) decided on introducing common defence according to Article I-41 para 2 TCE. The terminological choice of “mutual defence” will simply indicate that it does not yet refer to a fully-fledged “collective defence”.

This mechanism did provide that any participating Member State which is the “victim of an armed aggression on its territory” may, after having informed the others, “request aid and assistance from them”. In such a situation the Member States were bound, in accordance with Article 51 of the United Nations Charter to “give it aid and assistance by all means in their power, military or other”. The text was nearly identical to the provision of Article V WEU-Treaty encompassing the collective defence clause to which the members of the Western European Union are subject. It may be understood as an attempt to establish at least a partial defence union since any initiative to introduce a common defence regime within the Union had failed so far. In practice, all participating Member States would have had to be listed in a declaration (not a protocol) annexed to the Constitution.

This legal construction, however, met considerable resistance during the IGC finally leading to its transformation into a common but substantially limited collective defence clause (Article I-41 para 7 TCE). In addition, the provisions stipulated in Article III-214 D-TCE have been deleted in their entirety. In addition, the scope of addressees has been extended to all Member States of the EU, which will be collectively obliged (arg. “shall have the obligation”) in accordance with Article 51 of the UN Charter, to give their aid and support to any Member State which had fallen victim to an armed attack against its territory. It is interesting to note that according to the previous version the Member States would not be “requested” any more. However, the Member States dropped the explicit requirement in the Constitution that the aid and assistance have to be “military or other”. This indicates that closer cooperation does not mean a purely military collective defence clause, whereas the reference to the legitimate right of individual and collective self-defence as provided by the UN Charter does indicate its permissibility. Moreover, from the perspective of EU law, two significant restrictions have to be taken into consideration:

57 Article III-214 para 2 D-TCE.
58 Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
59 Article I-41 para 7 TCE.
First of all, the stated clause does not affect the “specific character of the security and defence policy of certain Member States” (Article I-41 para 7 TCE). In other words, by introducing this somewhat awkward condition it was intended to take into consideration the status of the neutral and non-aligned Member States, namely Austria, Ireland, Sweden and Finland. The foreign ministers of these countries have signed a collective petition note addressed to the Council, openly opposing provisions containing formally binding security guarantees since they would be in conflict with their national security policy or with constitutional requirements.\(^6^0\) However, despite the fact that these concerns have been partly met, it does not mean that Austria is generally absolved from giving any aid and assistance. Austria is solely released from that charge as relevant action falls under remit of its neutrality. It has to be clarified that Austria’s obligations stemming from the Constitutional Act on Neutrality have been widely derogated from, not only following Austria’s active participation in sanctions governed by a mandate of the UN Security Council, but even more because of its constitutional commitment to actively and unconditionally contribute to the CFSP.\(^6^1\) The legally binding remains of the Austrian concept of permanent neutrality may be summarised as the prohibition to join military alliances or to accept deployment of foreign troops on the national territory, as well as the constitutionally anchored ban on direct or indirect support of belligerent parties (e.g. supply of goods, loans etc.) which are not members of the EU. In the light of the foreseen EU collective defence clause, Austria is not bound to actively contribute to measures of collective military self-defence. However, Austria may be (politically) obliged to give effective humanitarian assistance to EU-Members which have become victims of an armed aggression.

The second restriction enacted in Article I-41 para 7 TCE states, that “[c]ommitments and cooperation in this area shall be consistent with commitments under NATO, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementations”. Therewith an answer was given to the question of primacy between the two organisations in case of an attack against a EU+NATO member, cementing the prior role of the Atlantic alliance towards its own members. Moreover, the solution found corresponds to the basic principle of the ESDP, according to which the Union will only become active when the Alliance as a whole is not engaged.

Another question that is still not resolved concerns the possibility of extending the scope of application of the bilateral Berlin-plus agreement to cases of armed aggression against the territory of EU Member States. Berlin-plus contains guarantees of “assured access” to NATO planning capabilities and of “presumed access” to other capabilities and assets. However, these guarantees

\(^6^0\) See CIG 62/03 (Letter from E. Tuomioja, Minister of Foreign Affairs of Finland; B. Cowen, Minister of Foreign Affairs of Ireland, B. Ferrero-Waldner, Minister of Foreign Affairs of Austria and L. Freivalds, Minister of Foreign Affairs of Sweden).

\(^6^1\) See Article 23f para 1 of the Austrian Constitution (B-VG).
have been reserved for EU-led operations carrying out Petersberg-tasks as laid down in Article 17 para 2 TEU, in which the Alliance as a whole is not engaged. The applicability of the agreement on measures of military self-defence is more than questionable, however, it will hardly gain practical relevance. Above all, because any attack against an EU-Member would most likely be against a NATO-Member too, it would thus automatically engender the principle of NATO-primacy. For the sake of completeness it has to be noted that in a specific declaration of the European Council it was agreed that EU-Member States which are neither Members of NATO nor of the NATO Partnership for Peace programme (PfP) would not take part in EU military operations conducted using NATO assets. In actual fact, this restriction exclusively applies to Cyprus and Malta.

Following the assumption that measures of flexibility may not only allow for making use of the institutional setting of the Union but equally authorises the drawing upon the Union *acquis*, including international agreements, one could be inclined to accept automatic rights of recourse to NATO assets in the field of closer cooperation. Inversely, if one applies the relevant legal provision within the framework of enhanced cooperation which states, that participating Member States “*may make use it Institutions and exercise those competences by applying the relevant provisions of the Constitution*” (Article I-44 para 1 TCE) it would be difficult to establish legitimate grounds allowing for automatic recourse to further more substantial rights. Moreover, the role of NATO as the foundation of collective defence to its members may not be undermined by extensive interpretation of its restrictively assured guarantees.

Compared to the original concept of closer cooperation according to which it should be established by unilateral declaration signed by the interested Member States (which are then compiled in a list annexed to the Constitution), the current conceptualisation is designed to have general effect from the beginning. To put it more concretely, all Member States are bound by it, except those that are exempted from collective defence due to their specific status of neutrality or non-alignment. Against this background, one has to note the transformation of the former concept of flexibility as stipulated by the Draft Treaty into a provision now generally applicable within the framework of the CFSP.

Due to the abolition of the construction of closer cooperation, the current clause, as stipulated in Article I-41 para 7 TCE, has to be qualified as a restricted collective defence clause which does apply to all Member States without specific implementation or accession. Compared to the instrument of structured cooperation, there are neither pre-defined criteria nor does the Council dispose of any discretionary authority regarding participation. It is sufficient to be an EU Member State in order to enjoy rights and obligation from it. It follows that for the time being third States may not join in.

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E. Excursus 2: Protocol nr. 24 on Article I-41 para 2 TCE

When looking more closely at the Protocol nr. 24, which is annexed to the Constitution, it reveals an interesting legal aspect with regard to flexibility. In the protocol it is stated that “the Union shall draw up, together with the Western European Union, arrangements for enhanced cooperation between them”. This inevitably leads to the question of whether the required sort of cooperation corresponds to the mechanism of enhanced cooperation in the sense of Article I-44 TCE or whether it hints at informal endeavours towards cementing relations between the two organisations.

Against this background it is worthwhile to consider two important features:

First of all, the purpose of the WEU is reduced to the collective defence clause enacted in Article V of the WEU-Treaty. The dynamic development of the St-Malo process and the related set-up of military structures within the framework of ESDP led to substantive erosion of the WEU’s initial functions. According to the Presidency conclusions issued at the conference of the European Council in Cologne in June 1999, it was plainly anticipated that the WEU would have “fulfilled its purpose” as an organisation by the end of 2000.\(^{63}\) This would not entail its total liquidation as an international organisation but at the same time however, the sole existence of the collective defence clause in Article V and of the WEU-Assembly according to Article IX WEU-Treaty\(^{64}\) simply reduced the WEU to a contractual carcass. After the transfer of the operational functions and capabilities from the WEU into the EU, all references to the WEU were dropped in the Treaty of Nice. By contrast, the partial dissolution of the WEU did not affect the status of membership and did not annul the existing acts of secondary law governing relations between both of them.\(^{65}\)

Secondly, one has to take note of an important Council decision dating 9 May 1999 concerning the arrangements for enhanced cooperation between the WEU and the EU with a view to fully integrating the WEU into the EU.\(^{66}\) The decision drew upon the Protocol on Article 17 Treaty of Amsterdam which had stipulated that “the EU shall draw up, together with the WEU, arrangement for enhanced cooperation between them within a year from the entry into force of the Treaty of Amsterdam”. The document encapsulates a comprehensive list of regulations governing the following aspects:

- Improvement of the coordination, consultation and decision-making notably in crisis situations;

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\(^{64}\) In the last declaration issued by the WEU Council on 17.11.2000 it is stated: “Ministers approved the WEU residual functions and structures which (...) will enable the Member States to fulfil the commitments of the modified Brussels Treaty, particularly those arising from Article V and IX, to which the Member States reaffirm their attachment”; Europe Documents, nr. 2219, 18.11.2000, pp. 1-4.

\(^{65}\) Hummer/Obwexer (2001) 43.

- Regular contacts between the staff of both organisations;
- Harmonisation, as far as possible, of the sequence of the WEU and EU Presidencies and their rules of administration;
- Regulation allowing for the relevant bodies of the EU, including its Policy Planning and Early Warning Unit, to draw on the resources of the WEU’s Military Staff, Satellite Centre and Institute of Security Studies;
- Cooperation in the field of armaments with a view to more effective cooperation, coordination and rationalisation and the establishment of a European Armaments Agency;
- Cooperation with the Commission;
- Regulations on secrecy.

These issues have been further elaborated on in a comprehensive compendium of six annexes. An annexed flowchart provides additional guidance on the decision-making process for cases where the EU avails itself of the WEU according to Article 17 para 2 and 3 Treaty of Amsterdam.

Thus, any legal assessment of the requirement to establish arrangements for enhanced cooperation as enacted in Protocol nr. 24 of the Constitution, has to be aligned with the objectives as set out in the Council decision in 1999. In other words, enhanced cooperation in the sense of the Protocol indicates institutionalised cooperation between the two organisations, but does not mean employing the technical instrument as stipulated in Article I-44 TCE. Another option could be that the ten full members of the WEU establish enhanced cooperation among them with a view to taking over the residual functions of the WEU, namely to anchor the collective defence clause in the framework of the Union. Certainly, non-WEU members, such as the new EU Member States which enjoyed the status of Associated Members to the WEU, would have the right to join in at a later stage. This argument however, is somewhat inconsistent when confronted with Article I-41 para 7 TCE according to which all Member States are obliged to give aid and assistance in case of a military attack against the territory of another Member. The exceptions granted to the neutrals and non-aligned countries exclusively regards States which have never been full members to the WEU.67

It is uncertain whether other forms of cooperation may be effectively installed between the WEU and the EU, taking into consideration that the WEU Council has not been convened since November 2000. Thus one may even presume that the incorporation of Protocol 24 into the Constitution was nothing more than an accidental act.

67 Austria, Sweden, Finland, Denmark and Ireland have a status as “Observers” at the WEU. Czech Republic, Norway, Poland, Hungary, Iceland and Turkey are “Associate Members” because of their NATO-membership. Bulgaria, Rumania, Slovakia, the Baltic States and Slovenia are “Associate Partners”.
VI. Flexible integration outside the Treaties

A. WEAG/WEAO, OCCAR, Letter of Intent (LoI)

Three fora tackling armament and procurement policy figure among the most important cooperation mechanisms in the realm of foreign and security policy, but outside the European Treaty framework. These are the WEAG/WEAO, OCCAR and the members of the framework agreement LoI.68

The WEAG followed the Independent European Program Group (IEPG) which was founded in 1976 by European NATO-members (with the exception of Ireland). In December 1992, the IEPG defence ministers decided to transfer the functions of IEPG to the WEU, where the WEAG is intended to coordinate programmes and cooperations in the field of armament among 19 equal European States. This includes the endeavour to harmonise programmes and operative standards, to strengthen technological and research cooperation and the liberalisation of relevant markets. Subsequent to the introduction of the CFSP into the Treaty of Maastricht, the WEAG tasked an ad hoc study group to review the possibilities of creating an European Armaments Agency. However, this attempt failed because of a lack of political, legal and economic support. Nevertheless, by drawing on the preliminary studies it was possible in 1997 to create the WEAO as a formal subsidiary body of WEU. WEAO and WEAG are still assigned to the organisational sphere of the WEU, despite the massive decomposition of the WEU. The WEAO mainly focuses on defence research and technology activities, but as the potential precursor for the proposed agency the relevant Article 7 of the WEAO Charter provides for a broad mandate of possible activities.69

OCCAR was created on 12 November 1996 by France, Germany, Italy and the United Kingdom.70 It aims at improving efficiency in the management of collaborative defence equipment programmes. Among the most important programmes are “Tiger” (combat helicopter), “Boxer” (armoured utility vehicles) and “A400” (aerial). The latter one is important since it includes third States for the first time namely Spain, Turkey, Belgium and Luxembourg.

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68 WEAG/WEAO (Western European Armament Group/Western European Armament Organisation), OCCAR (Organisation Conjointe de Coopération en matière d’Armement), LoI (Letter of Intent).
69 Article 7 of the WEAO-Charter states: “In order to carry out the aim defined in Article 6 above (...) the WEAO may undertake, in the name of the WEU and on behalf of one or more participants, the following functions: a) defence research and technology activities; b) procurement of defence equipment; c) studies; d) management of assets and facilities; e) other functions necessary to carry out the aim of the organisation”.
70 The OCCAR Convention was signed on 9 September 1998, ratification of the Convention was completed in December 2000 and OCCAR attained legal status on 28 January 2001.
According to Article 8 of the Convention, OCCAR’s mandate encompasses a comprehensive range of activities which makes it eligible to become a fully-fledged armaments agency.\footnote{Article 8 of the OCCAR Convention stipulates: “OCCAR shall fulfil the following tasks, and such other functions as the Member States may assign to it: a) management of current and future cooperative programmes, which may include configuration control and in-service support, as well as research activities; b) management of those national programmes of Member States that are assigned to it; c) preparation of common technical specifications for the development and procurement of jointly defined equipment; d) coordination and planning of joint research activities as well as, in cooperation with appropriate military staffs, studies of technical solutions to meet future operation requirements; e) coordination of national decisions concerning the common industrial base and common technologies; f) coordination of both capital investments and the use of test facilities”.}

LoI is based on a common initiative by the six leading European armament producing countries (UK, France, Germany, Italy, Spain and Sweden) signed on 6 July 1998 pursuing the objective to harmonise existing regulations in this field. They set up a number of working groups which mainly focused on issues of cross-border restructuring and aspects of security in the realm of armament supply and information. A comprehensive report was produced on the basis of their findings which will, after ratification by the national parliaments, become an international treaty.\footnote{For more comprehensive information see Schmitt (2000) particularly 59.}

The incorporation of these mechanisms must be given highest priority in order to fully exploit the potential synergies which eventually may lead to a common policy in this field.

B. Close bilateral cooperation between the Member States or in the framework of NATO or WEU

According to Article 17 para 4 TEU “[t]he provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO” provided such cooperation does not run counter to or impede the implementation of the CFSP. This kind of cooperation does not depend upon prior approval by the Council nor of the fulfilment of specific criteria as developed with regard to enhanced cooperation. The most important examples of such cooperation are the WEAG/WEAO, OCCAR and the LoI. It is important to note that this clause has not been inserted into the Constitution, which however, must not be interpreted as a contrarius actus.

In addition there exists a variety of multinational forces. Best known of them is, of course, the Eurokorps which was created in 1992 on the basis of a Franco-German initiative. Meanwhile it draws its components from five countries (Germany, France, Spain, Belgium and Luxembourg) and is frequently referred to as the nucleus of a future European army.\footnote{For detailed information on the Eurokorps see Wassenberg (1999).} Based on a similar conceptualisation are the land and sea forces EUROFOR and EUROMARFOR which were created in 1995 by France, Spain and Italy. Another concrete example stems from the German-Dutch
Corps, which in 2003 assumed leadership of ISAF in Afghanistan. Accordingly, the Constitution invites participating Member States to make these forces available to future EU-led operations.74

C. No mechanisms of flexible integration outside the Constitution foreseen

Strikingly, the Treaty establishing a Constitution for Europe does not provide a single legal basis on the admissibility or not of co-operations outside the Treaty framework.

The obvious lack of any clarifying provision may be interpreted as implicitly precluding cooperation outside the treaties. At the same time, one may assume general admissibility as long as it does not affect the fundamental principles of the Union and the established system of competences. Preference should settle on the second option since the imposition of a general ban of cooperation outside the Treaties would significantly limit the national sovereignty of the Member States going far beyond the scope covered by the principle of solidarity as enacted in Article 11 para 1 TEU. This principle aims at preventing harmful action by the Member States against the Union but it does not exclude activities per se outside the Treaty framework. It follows that cooperation remains admissible provided that it respects the primacy of Community law.75

A second question refers to the aspect of conditional admissibility. It has to be clarified whether the legitimacy of cooperation outside the Treaties builds on a multi-level process. Following this assumption, any objective of cooperation outside the Treaties would require previous attempts to implement the matter within the framework of Union law. In the case of failure, the interested Member States would have to try to pursue their aim by using the mechanism of enhanced cooperation. Only if both initiatives remain unsuccessful should it be possible to take recourse to cooperation outside the legal and institutional framework of the Union. The legal foundation to support this assumption in the field of CFSP is to be found in Article 11 para 2 TEU:

“The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

As noted above, Article 11 para 2 TEU exclusively bans harmful action against the Union set by the Member States but it does prohibit cooperation outside the treaties. As a result one may

74 Article I-41 para 3 TCE states: “Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy.”

not deduce any obligation to run the different levels spelt out before. If at all, this would only be possible by means of the stronger duty of faith in the realm of Community law (Article 10 TEC).  

VII. Conclusions

In conclusion, one may observe that the measures of flexible integration discussed above, contain promising elements for a more functional CFSP. However, a balance has to be struck between the objective of increased efficiency and strengthened unity, as well as between legal security and necessary ad-hocism.

The objective of enhancing efficiency has led to significant improvements. In other words, not only the restricted scope of implementation with regard to enhanced cooperation has been extended, thereby overcoming the sole option of constructive abstention, but it has also been seriously contemplated to additionally include institutionalised models of integration designed for the shorter or longer term. Apart from a more positive connotation, these types of cooperation offer the advantage to be directly adaptable to the respective needs and objectives.

The requirement to comply with the principle of unity confronts us with the dilemma that the underpinning reason for the creation of these flexibility instruments is the persisting reality that unity often could not be reached among the Member States. Likewise, the extent of flexibility remains a controversial issue as illustrated by the political resistance provoked by some of the mechanisms proposed by the Convention. As a consequence, massive redrafting and substantial restrictions to the relevant provisions occurred during the IGC.

The aspect of being institutionally anchored is decisive in view of the potential impact exercised by mechanisms of flexibility and the Member States concerned. Only where the inherent link to the European Union remains visible it is possible to attribute the relevant action to it. Moreover, in order to meet the principle of consistency, it is important to have a clear-cut delimitation of competences. This is even truer since legal grounds for external action are spread over the fields of Community law as well as of CFSP/ESDP.

However, mechanisms of flexibility in the realm of CFSP will also allow for spontaneous reactions on important global questions in case no consistent answer could be found in the Council. To this end, Member States may avail themselves of the instrument of enhanced cooperation. In addition, in the more operative-military sphere of ESDP particular mechanisms will allow for rapid reaction. To this end, the respective normative foundations have been left rather vague and do not even clarify the degree of delegation of decision making competences nor the interplay between the Member States concerned and several crucial functions currently attributed to sub-organs such as

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76 Article 10 TEC states: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”
the PSC or the Committee of Contributors. This is particularly striking with regard to future operations carried out by ad-hoc groups of willing and able Member States.

By extending the scope of applicability of enhanced cooperation to all policy areas, the CFSP thus has great potential to eventually unify loose co-operations and deliberate coalitions under a more solid and institutionalised umbrella within the framework of the European Union. This versatile tool will bundle synergies and optimise the external profile of the Union not only through the guarantee of assured recourse to the internationally accepted institutional framework. However, in the ideal case enhanced cooperation is not designed as a permanent instrument. On the contrary, measures of enhanced cooperation will provide a legitimate transitional frame for innovative and pro-integrationist initiatives, which after having successfully passed their proof of value may finally lead to full integration into the Union.

The already established defence agency forms part of the Union *acquis* from the beginning, although based on voluntary participation. Hence, this construction means a conversion of the classical concept of flexibility within the EU. So far there have been various attempts to bring together the existing variety of formats of armament and defence programs paving the way for a specific institution. In this respect, the exclusion of the relevant rules and obligations of the single market constitutes one of the most important challenges. The final success of the defence agency will considerably depend on the question of whether participating Member States may refrain from employing Article 296 TEC.

The instrument of permanent structured cooperation pursues the objective to create the desired *avant garde* by setting up a catalogue containing predefined criteria which will give participating Member States an orientation for military transformation and allow them to assume leadership in this field under an EU umbrella. Given the highly institutionalised concept, the clear-cut procedures and the option to suspend participating States hint at a more durable institution. Permanent structured cooperation is by far the most integrated and predetermined form of flexibility of all those discussed in this paper, and comes near to concepts such as Schengen or the EMU.

One of the most striking innovations within the framework of the CFSP refers to the (former) concept of closer cooperation in form of a limited collective defence clause, which stipulates the obligation to give aid and assistance in case of an armed aggression against a Member States however, without defining specific procedures, institutions or competences. It should be noted that only the form of closer cooperation as enacted in the Draft Constitution contains elements of flexible integration whereas the revised clause incorporated into the final version has
general effect. Only the obligations to take national particularities into consideration (above all the status of neutrality or non-alignment) and to respect the primacy of the NATO contain remnants of flexibility. All in all, these approaches point at the objective of establishing collective defence within the EU legal framework, however without effectively realising it.

The multi-faceted range of forms of flexibility bears the potential to meet new challenges without too much deviation from the path of Jean Monnet. The possible recourse to the mechanism of flexibility in the domain of security and defence neither replaces former instruments of flexibility nor does it preclude flexible integration outside the Treaty framework. The effective interplay of the new variants of flexible integration, namely enhanced, structured and armament cooperation could spark off an integrationist process which may allow the most progressive Member States to proceed. The profits could be exploited by all if it succeeds in making these forms effective on the basis of solidarity, bridging the gap between a policy of logjams and ambitions for directorates.
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## IX. Abbreviations

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AET</td>
<td>Agency Establishing Team</td>
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<tr>
<td>Bull.EU</td>
<td>Bulletin of the European Union</td>
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<tr>
<td>B-VG</td>
<td>Austrian Federal Constitution (Bundes-Verfassungsgesetz)</td>
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<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<tr>
<td>CIG</td>
<td>Documents issued by the IGC 2003/2004</td>
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<td>CONFER</td>
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<td>CONV</td>
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<tr>
<td>EC</td>
<td>European Communities</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECR</td>
<td>European Court Register</td>
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<td>ESDP</td>
<td>European Security and Defence Policy</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUROFOR</td>
<td>European land forces</td>
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<tr>
<td>EUROMARFOR</td>
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<td>D-TCE</td>
<td>Draft Treaty establishing a Constitution for Europe</td>
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<tr>
<td>IEPG</td>
<td>Independent European Program Group</td>
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<tr>
<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>ISAF</td>
<td>International Stabilisation and Assistance Force for Afghanistan</td>
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<td>JHA</td>
<td>Justice and Home Affairs</td>
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<tr>
<td>LoI</td>
<td>Letter of Intent</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>nr</td>
<td>number</td>
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<tr>
<td>OCCAR</td>
<td>Organisation de Coopération Conjointe en matière d’armement</td>
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<td>OJ</td>
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<tr>
<td>OPLAN</td>
<td>Operation Plan</td>
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<td>PSC</td>
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<td>SG/HR</td>
<td>Secretary General / High Representative for the CFSP</td>
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<td>TCE</td>
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<td>TEU</td>
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<td>WEAG/WEAO</td>
<td>Western European Armament Group / Organisation</td>
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<td>WEU</td>
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<th>Titel</th>
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