

European Policy Brief

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Flexible integration and the European Constitution

Introduction

In the Treaty of Amsterdam (which came into force in 1999) the members of the European Union for the first time decided to introduce into the treaties a formal and general mechanism allowing for further integration to take place within a sub-group of EU member states, rather than the whole Union. This 'reinforced co-operation' was subject to restrictive conditions, such as the requirement for a majority of member states to take part and a veto for every member state, even for those that did not intend to participate. These arrangements were later loosened in the Treaty of Nice, which reduced the number of member states necessary for enhanced co-operation and removed the veto for policy areas other than foreign policy and 'Justice and Home Affairs'. The proposed European Constitution develops the mechanism of what is now called 'enhanced co-operation' further by amending its procedures and widening its scope to defence (confusingly called 'structured co-operation'). Until now, the provisions of the Amsterdam and Nice Treaties for 'enhanced co-operation' have not been used. This Policy Brief will consider whether a ratified European Constitution will make more likely the emergence of a flexibly integrated Europe, and what shape this new political phenomenon might take. The Brief will consider in particular the implications for the European institutions of European integration upon more flexible lines than hitherto.

Flexibility in the EU Constitution

What the Constitution says

The EU Constitution states that 'enhanced co-operation' is only to be used as a 'last resort', when the Council has established 'that the objectives of such co-operation cannot be attained within a reasonable period by the Union as a whole'. It should 'aim to further the objectives of the Union, protect its interests and reinforce its integration process' and is not to disturb the functioning of the common market, for example by setting up barriers or discriminating in trade or distorting competition. The Constitutional Treaty clearly puts the emphasis on the need for groups of 'enhanced co-operation' to remain open to all member states: participating member states, as well as the Commission, are also to promote the eventual membership in these groups of as many member states as possible. However, the Constitution envisages the possibility that this membership may be subject to compliance with any 'conditions of participation' set out in the Council decision originally establishing the 'enhanced co-operation' group.

An 'enhanced co-operation' group can be set up in any policy area of non-exclusive Union competence, although there are special provisions for the common foreign and security policy and the common security and defence policy (see below). If at least one third of member states wish to establish 'enhanced co-operation' they need to address their request to the Commission, which then decides whether to transmit the proposal to set up a sub-group to the Council. When the Commission refuses to pass the proposal to the Council, it must inform those member states that made the request of its reasons for doing so. If the Commission submits

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EDITOR'S NOTE

This is the twelfth in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union. Other Policy Briefs are available on the Federal Trust's website www.fedtrust.co.uk/policybriefs

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Brendan Donnelly (Director, Federal Trust)

the proposal to the Council, the decision to set up 'enhanced co-operation' is then to be taken by the Council, after receiving the consent of the European Parliament. This decision is to be taken by a qualified majority.

After an 'enhanced co-operation' group has been established, the non-participating member states still take part in the deliberations of the group, but decisions are only to be taken by those members states which are party to the group. The internal decision-making of the sub-group is adapted following the general rules for decision-making laid down in the EU Constitution. In a policy area where the Constitution prescribes unanimous decision-making the 'enhanced co-operation' group can decide unanimously between themselves to move to qualified majority voting. This latter procedure is known as a 'passerelle'.

If a non-participating member state wishes to join an already established 'enhanced co-operation' group at a later stage the Constitution lays down that it should apply to the Council and the Commission. The Commission reviews the application and, if it is content, the application is accepted without reference to the Council. If the Commission concludes that the conditions for membership have not been met it informs the member state of the measures it needs to undertake, within a set time limit, in order to meet the conditions. After expiry of the deadline the Commission then re-examines the request. Only if its conclusion is then that the conditions are still not met may the member state concerned refer its request to the Council, where the 'enhanced co-operation' members may then decide on the request.

Special cases

The EU Constitution contains special provisions for flexible integration in the areas of common foreign and security policy (CFSP) and the common security and defence policy. To set up 'enhanced co-operation' in CFSP a unanimous Council decision is required, not a qualified majority vote. A further significant difference in procedure is that the request to establish 'enhanced co-operation' is to be made to the Council (not to the Commission). The Union's Foreign Minister is to give an opinion on whether the proposal would be consistent with the Union's foreign policy and the Commission on whether it complies with the Union's other policies. The European Parliament is informed but

has no role in the decision-making process. The decision on later entry of another member state into an 'enhanced co-operation' group in foreign policy is equally taken by the Council, after consulting the Union's Foreign Minister, again in a unanimous vote. The Commission receives the request by the member state concerned, but has no role in the decision-making process.

In the policy area of the common security and defence policy deeper integration can be pursued under the specific mechanism of 'structured co-operation' by those member states 'fulfilling higher military capabilities who wish to make more binding commitments to one another' in this area. The conditions for fulfilling these capabilities are set out in detail in a Protocol to the Constitutional Treaty and refer to member states undertaking to develop their defence capacities and achieving, within a specified time limit, a certain level of capacity. Somewhat surprisingly, the decision to set up a 'structured co-operation' group is taken by the Council with a qualified majority vote. The decision on a further member state's joining the group at a later stage is taken with qualified majority only by those members who are participating in 'structured co-operation'. There is no role for the European Commission or the European Parliament foreseen in the setting-up of 'structured co-operation'. Although all membership decisions are subject to majority voting the internal decision-making procedure of the 'structured co-operation' group is unanimity.

An assessment

In one important respect, the European Constitution makes easier the setting up of an 'enhanced co-operation' group than the system prescribed by the Treaty of Nice. The rapidly developing policy area known as JHA (Justice and Home Affairs, covering a wide range of civil, criminal and domestic security issues) has been largely (although not entirely) 'mainstreamed' into the general provisions for 'enhanced co-operation'. The veto given by the Nice Treaty to each member state on the creation of a sub-group has been removed, with potentially dramatic administrative and political consequences. Under the EU Constitution it is only in foreign policy that there remains the requirement for a unanimous vote when deciding on the setting up of 'enhanced co-operation'.

The requirement for a minimum of a third of member states to participate in 'enhanced co-operation,' however, makes the establishment of a sub-group slightly more difficult than under the Nice Treaty. At current Union membership of 25, and even after the accession of Bulgaria and Romania, nine member states are required by the Constitution to build the founding bloc of 'enhanced co-operation' – one more than the eight required under the Nice Treaty. It is worth recalling that the rules for qualified majority voting under the Constitution require a minimum of 15 member states to agree (representing at least 65 per cent of the Union's population) to accept the institution of a sub-group. This means that if less than 15 member states wish to set up an 'enhanced co-operation' group they depend on the consent and support of at least some non-participating member states in the Council.

This consent may not always be easy to achieve. The Constitution envisages that the decision setting up 'enhanced co-operation' in any particular area may also set out 'conditions for membership'. These conditions may well become an issue of dispute, as they potentially give the 'enhanced co-operation' group the power to make it more difficult for others to join them later. Member states not wishing to join an 'enhanced co-operation' group from the beginning may therefore look very closely at any conditions attached to an 'enhanced co-operation' group and may be reluctant to give their consent to the setting up of the group if they believe these conditions could at a later stage be used to their disadvantage.

Once a sub-group has been set up, however, its potential workings have indeed been simplified by the Constitution. The ability to move to qualified majority voting offers the opportunity of an easier and more efficient decision-making process which may in turn lead to the 'enhanced co-operation' group's rapidly adopting a number of acts deepening integration in a specific policy area. The 'passerelle' rule for sub-groups of 'enhanced co-operation' was hotly debated in the Convention and the IGC, and it is not difficult to see why. Any sub-group could easily become more and more exclusive of others through the successive steps it takes towards further integration. Faced with the need to implement an already substantial new *acquis* in the relevant policy area, non-participating member states could find it more and more difficult to join later. There are understandable fears (not just in the United Kingdom) that flexible integration

might well lead to non-participating countries being 'left behind' if 'enhanced co-operation' proves to work successfully.

Possible outcomes

Policy areas

It is undeniable that within the European Union there exists a wide spectrum of views on the appropriate pace and extent of European political and economic integration. This variety of views is the ultimate source of all the sometimes contorted debate on 'flexible integration' over the past fifteen years. Those at the more integrationist end of the spectrum often express the hope that an adopted European Constitution will usher in an era of accelerating integration, facilitated by 'enhanced co-operation,' which will circumvent vetoes and allow the formation of 'vanguard' groups. Even if the Constitution is adopted, however, substantial obstacles will remain for the realisation of that aspiration. It is far from clear that a range of identifiable policy areas exist upon which any significant and coherent body of the Union's member states could be expected to wish to enhance their co-operation within the framework of the European Union. Moreover, if any such body did emerge, pursuing among themselves a closely-knit pattern of 'enhanced co-operation', then that of itself would create substantial problems for the working of the existing European Union, particularly for its central institutions. Ironically, the high degree of economic and social integration which the European Union has already achieved for its present members makes it practically extremely difficult for any integrative sub-groups to form themselves on other than an occasional or sporadic basis. Two particular policy areas which are often mentioned as candidates for 'enhanced co-operation,' namely fiscal co-ordination and foreign policy, illustrate, each in their own way, the difficulties.

At the Convention and Intergovernmental Conference, much time was devoted to debating the retention or modification of the present arrangement whereby all tax-related questions in the European Union are decided unanimously. The maintenance of its national veto on tax matters in the finally negotiated Constitution was hailed by the British government as one of its particular negotiating successes, all the more so in that its absolutist position on the issue was not widely shared. It is entirely possible that if the Constitution is

ratified a substantial sub-group will be constituted of those willing to share more of their fiscal sovereignty with each other. But there will be widely differing ideas among the participants about the way this shared sovereignty should be employed, a difference which will act as a substantial brake on the integrative force of any such sub-group.

Many member states of the Union would be prepared to pool more fiscal sovereignty in the interest of improving the workings of the single European market. Many fewer, however, would be prepared to endorse the use of majority voting in the context of measures designed to prevent 'fiscal dumping,' a problem the very existence of which is disputed by many member states. The coalition constructed for greater fiscal harmonisation as a trade-facilitating measure would rapidly fracture on any attempts to use shared fiscal policies as an instrument for constructing a particular kind of 'social Europe'. For reasons deriving from its continuing preoccupation with national sovereignty, no British government will give up its veto on European tax questions for the foreseeable future. There might well be countries less concerned with traditional notions of sovereignty equally reluctant to abandon their national veto for fear of suffering economic disadvantage by doing so. The resolution of this and similar questions is a particular challenge for the emerging 'economic governance' of the eurozone.

Another and different set of problems would arise from any serious attempt to promote 'enhanced co-operation' in the sphere of foreign policy (or indeed defence policy). The bitter disputes over the invasion of Iraq showed deep differences of geo-political analysis within the enlarged membership of the European Union. Moreover, the foreign (and defence) policy assets of the European Union are disproportionately concentrated in the hands of three big countries, the United Kingdom, France and Germany. Without any of these three countries, the scope for a credible European foreign policy is much reduced. If these three countries agree among themselves, little room for manoeuvre will normally be left for the other member states of the European Union, particularly on issues of the highest international import.

Two of these three leading member states, France and the United Kingdom, have favoured and clearly continue to favour a distinctly intergovernmentalist approach to European foreign-policy making. The

European Constitution bears their imprint in this regard, consistently minimising the role of the European institutions, a role traditionally but now less enthusiastically championed by Germany. The creation of a European Foreign Minister by the Constitution does not mark any more than a symbolic advance on the present position: the Minister takes instructions from the Council, deciding by unanimity. If over the coming years, the European Union moves nearer towards a coherent and distinctive foreign policy it will be structurally very different to the model of 'enhanced co-operation' which strives to reproduce on a numerically reduced scale the traditional workings of the 'Community method' in the European Union.

It is indeed true that over a sprinkling of policy areas, such as social policy, the environment, transport and consumer protection a number of individual measures can be identified which might command enough support among member states for those member states to find attractive the setting up of 'enhanced co-operation' sub-groups. But it very much remains to be demonstrated that there are enough such measures over a sufficiently wide range of policy areas to change significantly the current extent and pace of European integration through the widespread application of the 'enhanced co-operation' procedure.

The institutions

The European Commission

The Constitutional Treaty gives the European Commission two important roles in the procedure governing 'enhanced co-operation.' It can decide (although it has to be able to justify its decision publicly) not to pass on to the Council a request from a group of member states to set up an 'enhanced co-operation' sub-group; and it vets any later applications to join a sub-group which has already been formed. It is an open question whether the Commission would ever be inclined to use these potential powers of veto. Although the Commission may originally have been sceptical about the whole concept of 'flexible' integration, it now seems to believe 'vanguards' of one kind or another have a positive role to play in encouraging the overall process of European unification.

Despite this change of heart, the Commission is nevertheless uneasily aware that any deviation from the traditional 'Community method' contains dangers for itself. The Commission, with its specific

powers and responsibilities, is very much a creature of the legislative and political system created by the European Treaties. In theory, its role within the sub-groups of 'enhanced co-operation' is precisely comparable to that which it plays within the whole plenum of the Union's twenty-five member states. Its grounded fear is that the shifting coalitions of a European Union characterised by overlapping sub-groups will undermine its traditional role as the motor of European integration. Any conception of the Commission as simply the secretariat for sub-groups of differing composition is deeply repugnant to the traditional self-image of the Commission's officials, even if certain Commissioners may today be more willing to see their role in that light.

The European Parliament

The Constitution gives the European Parliament a stronger stake in 'enhanced co-operation' than it had under the Nice Treaty. Under the latter, its assent to 'enhanced co-operation' was necessary only for policy areas governed by co-decision, with consultation rights for the Parliament in other areas. The Constitution on the other hand gives the Parliament a veto over the establishment of 'enhanced co-operation' (with the unsurprising exceptions of foreign policy and defence). In theory at least, this could give rise to the anomalous situation whereby the Parliament blocked 'enhanced co-operation' with a majority arising from the votes of MEPs from member states which do not intend to participate in the project.

This latter possibility highlights the fundamental danger posed for the European Parliament by any consistent and serious move towards patterns of 'flexible integration' within the European Union over the coming years. The Constitution envisages that the Parliament will exercise its role as co-legislator in the decision-making procedure of the 'enhanced co-operation' sub-groups. The Parliament has been able to accept on a temporary and occasional basis a divergence between the voting rights of MEPs and the legal situation of the countries from which they came. British MEPs, for instance, were able to vote on European social legislation during the British opt-out from the Social Chapter. But the widespread use of 'enhanced co-operation' could create recurrent uncertainty about which MEPs possessed the political legitimacy to vote on what legislation. This could easily become a divisive factor in the workings

of the Parliament and undermine the credibility of a body not widely regarded in the way that it would wish to be regarded, namely as the authentic Parliamentary representation of the European electorate as a whole. The 'West Lothian question' might well end up finding itself transported from Scotland to Strasbourg.

The European Court of Justice

Like the European Parliament, the European Court of Justice is a potential victim of a substantially more flexible European institutional structure, both in its day to day work and its underlying legitimacy. Because most of the 'enhanced co-operation' sub-groups would be adopting legislation in areas where a corpus of EU legislation already existed binding on all member states, the interaction between the sub-group's adopted legislation and that valid for the Union as a whole would be an extremely complicated one. Presumably the Court would always attempt to reconcile the differing streams of legislation, deciding where necessary to uphold its interpretation of the whole Union's law against the legislation of any sub-group.

No doubt technically the Court will do a good job of solving the legal riddles arising from widespread application of the 'enhanced co-operation' procedure. But given the piecemeal and case by case nature of the Court's working methods, legal certainty would inevitably suffer as a result, with a corresponding diminution of the Court's prestige and authority. Until now, the Court has been able to treat the Union as a uniform legal order, with certain limited and clearly-defined exceptions. Arguably, the European Constitution destroys that framework, through its explicit acceptance of differing levels of European integration. The Court's position as mediator between those levels would not be a comfortable one.

The Council

Of all the European institutions, the Council is the least likely to be adversely affected by 'enhanced co-operation'. It is only at the moment of voting that non-participants in any sub-groups will be at a tangible disadvantage. Until that point they will have been able to express their views, views which may well be taken seriously if they come from countries which in the foreseeable future wish to become

members of the relevant sub-group. The weighting of votes within sub-groups will mirror the appropriate allocations for the European Union as a whole, a calculation which represents another level of complication in the anyway complicated weighted voting system proposed by the Constitution. (The Constitution's defenders point out that the system is a little less complicated than the Nice system which it replaces.) Since, contrary to popular belief, formal voting only rarely takes place in the Council anyway, the work of the Council meeting in its formation as an 'enhanced co-operation' sub-group, should not greatly suffer as a result.

Conclusion

The preceding analysis suggests that there are formidable practical obstacles to be overcome if 'enhanced co-operation' is to become anything other than a marginal feature of the European Union's development. Those who see the Constitution's proposals in this area as central to Europe's future integration may well be disappointed. But the 'flexibility' debate within the European Union is not by any means limited to the Constitution's conception of 'enhanced co-operation'. Although the Constitution has little new to say on the subject, the single European currency is a powerful potential vehicle of flexible integration. It is still small enough to benefit from Franco-German leadership, much of its institutional and political structure has yet to be determined and it will be many years before the United Kingdom is numbered among its members. All these factors make it a promising testing-ground for a model of flexible integration with real prospects of success. Much of the 'flexibility' debate within the European Union in the past decade has been, consciously or unconsciously, a response to the accelerating detachment of a large member state, the United Kingdom, of itself from the European institutional mainstream. The euro may be an opportunity for Britain's partners to ask themselves more coolly and collectively just what it is that they want from a more 'flexible' Europe.

Brendan Donnelly
Ulrike Rüb