

The beginning of the end or the end of the beginning? Enhanced co-operation in the Constitutional Treaty

1) Introduction

At the heart of any discussion on 'enhanced co-operation' lies a political divide over how differentiated integration can best be achieved within the EU. In a sometimes confused and imprecise debate, three main approaches can be discerned, a multi-speed Europe, an 'à la carte Europe' and a Europe based on 'variable geometry'. The first two approaches can be regarded as opposite extremes of the argument, with the more ambiguous 'variable geometry' as a middle ground between. Unsurprisingly, the Constitutional Treaty contains elements of all three approaches.

The multi-speed approach generally contends that European integration should be driven forward by a 'core' group of member states, allowing those who are unable or unwilling to participate to remain outside the development of an existing or the adoption of a new policy area for the time being. The hope and indeed expectation is that they will join at a later date. This approach would seek at least in theory to preserve the unity of the European project: differentiated integration is allowed to exist temporarily, with the long-term aim that all member states will eventually participate in all European policy areas. By contrast, the model of 'variable geometry' explicitly recognises that there may be substantial differences between the levels of integration desired by individual member states. This in its turn may lead to long-term or potentially permanent separation between the 'core group' and other member states. Finally, the 'à la carte' approach would allow each member state considerable latitude to pick and choose the policy areas in which it wants to participate. All member states would be part of a core common trading zone and then be allowed to choose the subject areas (such as social policy, monetary policy or defence policy) in which they wished to be represented.

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EDITOR'S NOTE

This is the seventh 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.

We would welcome comments on and reactions to this policy brief. Other Policy Briefs are available on the Federal Trust's website www.fedtrust.co.uk/policybriefs

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Ironically, there are in all three camps (particularly 'multi-speed' and 'variable geometry') both eurosceptics and those favouring deeper European integration. There are, for instance, integrationists who are in favour of a multi-speed Europe and want to use enhanced co-operation to accelerate the process of unification, bypassing states that are unwilling or unable to go forward. For them the phrase 'two-speed Europe' implies a common destination which all states will achieve, with some leading the way and others following later. By contrast, other supporters of a multi-speed Europe see it as an opportunity to slow or halt the 'federal' momentum. They are willing to allow other states to move ahead, so long as they do not have to participate in the relevant policy area, at least in the short and probably in the long-term. 'Variable geometry' evokes similarly contradictory reactions. Some integrationists fear that it will become a justification for creating a 'hard core' inner circle, from which non-participants will be permanently excluded. Others regard 'variable geometry' as an inevitability which now needs to be accepted. Finally there are at least some eurosceptics who regard any form of differentiated integration as only a temporary pause in the dangerous process of creating a European superstate.

It is against the background of these varying assessments that this Briefing will evaluate the changes made in the field of 'enhanced co-operation' by the Constitutional Treaty. The Briefing will conclude by considering whether and to what extent the political will exists in Europe to take advantage of the new possibilities created by the Treaty.

II) History: from 'opt-outs' to 'closer co-operation' to 'enhanced co-operation'

The concept of 'enhanced co-operation', that is the opportunity for a group of member states to use the institutions of the European Union to integrate further among themselves in certain policy areas, is not a new mechanism created by the European Constitution. A procedure for closer co-operation within the EU framework was introduced in 1997 by the Treaty

of Amsterdam and reformed in 2000 by the Treaty of Nice, although the procedure has not yet been used in practice. Even before 1997 the EU had already experimented with varying models of differentiated integration, both through the creation of the Schengen Area in 1990 and through the Treaty of Maastricht, which allowed Britain to opt out of the Treaty's Social Chapter and to postpone its decision on joining Economic and Monetary Union (EMU.)

The Schengen Accord was originally created outside the framework of the European Communities in an international agreement between France, Germany, Belgium, Luxembourg and the Netherlands. It was only incorporated into the EU system by the Treaty of Amsterdam in 1997. Two of the fifteen member states at the time chose to stay outside the Schengen framework, the UK and Ireland. Denmark, although it applies the Schengen agreement, treats it as an international and not an EU arrangement. The UK and Ireland (the latter because of its passport union with the former) remain outside the Schengen area although they can join if they wish at a later date. They can decide to opt in to individual elements of the Schengen system on a piecemeal basis.

The Maastricht Treaty followed a different route from that set out by the Schengen agreement. All the (then) twelve member states signed the Treaty, but the United Kingdom received an opt-out from two of the Treaty's central provisions (the Social Chapter and the single currency) and Denmark from one of them (the single currency.) The UK has since abandoned its opt-out on the Social Chapter, but its opt-out from the euro remains, as does that of Denmark and that of a later member state, Sweden. If at any time any of the three countries wishes to adopt the euro, the Maastricht Treaty stipulates that 'the Council shall decide by qualified majority whether a derogating member state fulfils the necessary conditions' to join the single currency. These conditions will no doubt be political as well as economic. At least in theory, this could act as a further barrier to eventual British

membership of the euro and lay the foundations for a European Union of 'variable geometry'.

It was therefore possible for the EU to achieve different levels of integration prior to the introduction of 'closer co-operation' in the Treaty of Amsterdam. It was not lost, however, on Britain's partners that in an enlarged European Union the United Kingdom might well find allies in its general desire to slow down the pace of European integration. The majority of member states decided that, before enlargement took place, the Union needed to equip itself with a mechanism to allow those states who wanted to press ahead with further integration to do so, using the Union's structures. In general terms, the British government recognised the legitimacy of the desire from other member states to proceed further and faster in their integration. It was, however, concerned that it might find itself entirely marginalised if recourse to 'closer co-operation' was made too easy.

A compromise was reached in the Treaty of Amsterdam of 1997. Under Article 5a(2) of the Treaty authorisation for closer co-operation would be granted by the Council, 'acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament!' However, under the same Article, an individual member state could veto any move towards closer co-operation, even if it did not intend to take part in it. The Treaty also provided for strict procedural and substantive conditions which needed to be met before closer co-operation could be instituted. Closer co-operation must be 'aimed at furthering the objectives of the Union and at protecting and serving its interest' and it was only allowed 'where the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein'. It had to concern 'at least a majority of member states' and remain 'open to all member states and allow them to become parties to the co-operation at any time, provided that they comply with the basic decision and with the decisions taken within that framework'.

These high thresholds set by the Amsterdam Treaty were never met, and they were revised in the Nice Treaty of 2000. Particularly influential in leading to these changes was the famous 'Humboldt speech' by Joschka Fischer in 2000, which argued that 'the consistent use of enhanced co-operation by several member states could form a centre of gravity out of which a European federation could evolve.' The Treaty of Nice went some way to meeting these aspirations. It abolished the national veto on what was now called 'enhanced co-operation' in all areas except CFSP and reduced the minimum threshold for the creation of such a co-operation group to eight member states. Despite this loosening, the Nice framework was still considered too rigid by some states and it was decided that the question would be reconsidered during the Convention set up under Giscard d'Estaing's chairmanship in 2002.

III) What the Constitutional Treaty proposes to change

The new European Constitution does not essentially change the criteria and procedures for instituting 'enhanced co-operation,' beyond the small change for the minimum number of participating states from eight to 'one third of the member states.' In particular, the national veto remains for any attempt by groups of member states to set up 'enhanced co-operation' in the sphere of the common foreign and security policy (CFSP). But in the negotiations, and in particular with a view to defending its 'red-line' areas such as taxation and foreign policy, the UK government had to accept a change in the functioning of such co-operation once established. The new Treaty makes it considerably easier than before for sub-groups within the Union to adopt the decision-making procedures they think most appropriate for their goal of deeper integration.

There are now two parts to the enhanced co-operation procedure, other than for CFSP or defence policy. (For the latter an entirely separate procedure known as 'structured co-operation' has been instituted, a

procedure which demands no minimum number of participating member states, but does demand a stipulated level of 'military capabilities.'). Under Article III-419(1), enhanced co-operation can be established through a European decision adopted by a qualified majority vote (QMV) of all member states and with the consent of the European Parliament. Once this has been done, and a sub-group established, its members have the right to decide among themselves the basis on which they will take decisions.

Article III-422(1) of the Constitution specifically states that once enhanced co-operation has been established in an area where the Constitution stipulates that decisions are normally to be taken by unanimity, the member states participating in this area of enhanced co-operation can unanimously decide to apply qualified majority voting between themselves. Some members of the Convention were critical of the provision as they argued that national parliaments would have no say over the decision to move from unanimity to QMV. This was the position of the 41st Report of the House of Lords Select Committee on EU affairs. It argued that 'it could have the effect of allowing the Council to abolish unanimity in certain areas without any substantive involvement of national parliaments.' Other members of the Convention and participants in the Intergovernmental Conference saw the new procedure as an opportunity for member states co-operating together to render their decision-making more flexible and efficient.

IV) Institutional implications

Although simple in its underlying concept, enhanced co-operation poses a severe institutional test for the European Union. It is true that the Constitution maintains the same general institutional and procedural framework for enhanced co-operation as for the overall working of the Union. By not superimposing an additional layer of institutions, it promotes the simplicity and transparency of enhanced co-operation. Furthermore, the fact that non-participating member states can take part in deliberations of

any sub-group (without voting) ensures their continuing involvement and facilitates any potential future accession. There will be no formal division of the member states into first class and second class members, dependent upon their participation or not in enhanced co-operation.

But in practice, the situation is likely to be less straightforward. Enhanced co-operation will inevitably differentiate between those member states in the Council that can vote and those that can only take part in deliberations. The longer any state or group of states remain outside an area or areas of enhanced co-operation, the more significant this will become. Nor is it only in the Council that unity and coherence may be jeopardised. The collegiality of the Commission may also be threatened by the division between the Commissioners from member states which participate in all important policy areas and those who do not. Such an attitude was already evident in the light of the criteria used to choose the new President of the Commission earlier this year, when some member states posed a condition that he or she should come from a member state that participates in all the central policy fields of the Union.

The nature of the European Parliament may also be called into question if enhanced co-operation, among a limited number of member states, becomes a regular occurrence. The standing of the European Parliament as the institution representing the peoples of Europe could well be put at risk. Specifically, MEPs could find themselves regularly voting on issues which do not directly affect their electors, and the 'West Lothian question' could emigrate to Strasbourg. It is true that MEPs from landlocked countries such as Austria and Luxembourg have always voted on fishing issues in the EU without any embarrassment. Equally, the Constitution states that 'enhanced co-operation shall aim to further the objectives of the EU, protect its interests and reinforce its integration process,' and the latter are issues of legitimate interest to MEPs from all countries of the Union. But there are many in the European Parliament who

fear that extensive use of enhanced co-operation will act as a further element of confusion and misunderstanding in their dealings with the electorate.

V) Potential effects on the EU integration process

A number of commentators across the European political spectrum have made known their fears that enhanced co-operation could lead to a disintegration rather than closer integration of the Union. Danuta Hübner, former Polish Minister for European Affairs and now a European Commissioner, has warned that 'the economic foundations of the Union, the internal market, the common commercial policy and competition policy, must remain unaffected by enhanced co-operation. Yet in many areas enhanced co-operation may threaten this policy unity! The Polish Commissioner fears, for instance, that enhanced co-operation in the environmental area could lead to differential costs throughout the Union which in the long term could damage the functioning of the internal market. This fear is echoed by Jacques Delors who plausibly argues that if we 'have too many actions of reinforced co-operation, there will be enormous confusion about who is doing what and a lack of any guide or map showing us where we are going.' His clear preference is for an 'avant-garde' that will take responsibility for mapping out the overall path to further European integration and for driving the process forward in a coherent fashion.

But, even if there is a strong political desire for increasing integration among some member states, it remains to be seen whether enhanced co-operation will succeed in creating this 'avant-garde'. Areas of enhanced co-operation may turn out to be piecemeal and limited to ad hoc policy areas with no logical connection. Some states for instance may wish to push ahead with enhanced co-operation in the areas of taxation or judicial reciprocity, yet have no such similar desire in matters of defence. Equally, some member states well-disposed to the possibility of enhanced co-operation in a particular policy area may be deterred from participation by the fear of coming

under pressure within the newly constituted group to abandon their existing right of national vetos.

Something of this uncertainty has already been seen in the reaction to Commissioner Bolkenstein's proposals for creating a common tax base for corporate taxation. Within the group of states who appear to be in favour of that proposal, there are a number such as Estonia and Sweden that were firmly in favour of the UK's general determination to maintain unanimity in the area of taxation. These states regard it as being in their interest to harmonise the corporate tax base across the EU, as it would greatly simplify a foreign company's choice to invest in the EU. They would however definitely prefer that harmonisation take place by the unanimous decision of all twenty-five member states, rather than within an enhanced co-operation core. It would be a delicate decision for Estonia and Sweden whether they might wish to participate in any such core were it set up.

In the light of the above, there is a genuine risk that the fragmented use of enhanced co-operation, far from leading the EU to become two increasingly separate concentric circles, will create in the Union a number of overlapping circles, with different member states participating in different enhanced co-operation groups. It is highly unlikely that the United Kingdom would participate in all such co-operative groups. There are some areas, such as defence, in which the UK seems willing to enhance its co-operation with its European partners. However, the areas in which a number of other member states seem most willing to enhance their integration, such as taxation and welfare harmonisation, are those areas in which the UK refused to accept any move towards QMV at the Intergovernmental Conference. It is probable that the UK would refuse to participate in these new areas of increasing co-operation, with no intention of 'opting in' for any foreseeable future.

VI) Conclusion: regeneration or disintegration?

There is a fear among some EU actors that enhanced co-operation, rather than being the solution to the clearly differing desires between member states as to the appropriate level of European integration, may simply serve to exacerbate existing tensions, potentially leading to an irremediable divorce between groups of member states. Despite the numerous procedural safeguards in the Constitution, the institutional unity of the Union may be lessened if enhanced co-operation is extended to increasingly sensitive policy areas. Non-participant member states may well fear, despite being allowed to participate in deliberations, that their own national interests are not being sufficiently considered in the sub-groups. There are already fears in the UK that the development of the Eurogroup will further weaken British influence in the development of the single currency. Other member states could well develop similar concerns in other policy areas.

How and to what extent enhanced co-operation develops over the coming years will say much about the future coherence of the European Union. If a genuine attempt is made to negotiate decisions among all member states and to use enhanced co-operation as a last resort, then enhanced co-operation may develop into a dynamic tool, to be used only exceptionally as a transitional arrangement in which all member states eventually participate. If, however, enhanced co-operation becomes the Union's standard mode of operation in future, whether in the form of an 'avant-garde' or in the form of overlapping circles, then there is a real danger that increased flexibility may undermine the coherence and solidarity of the Union. Enhanced co-operation is primarily a tool in the hands of member states. It is their underlying attitudes and the use they make of this new tool that will determine the future of the European Union.

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