

COVER NOTE

from :	Praesidium
to :	Convention
Subject :	Enhanced cooperation - Article 32b, Title V, Part One, and Articles I to P, Part Two of the Convention

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I. MAIN ELEMENTS

The mechanism for enhanced cooperation was introduced by the Treaty of Amsterdam and amended by the Treaty of Nice. It is governed by general provisions applying to all areas (Articles 43 to 45 TEU) and by specific clauses for the areas covered by the TEC (Articles 11 and 11a TEC), cooperation in criminal matters (Articles 40 to 40b TEU) and the CFSP (Articles 27a to 27e TEU). There are other forms of "enhanced cooperation" organised directly in the Treaty which are not examined in this document. These include, for example, the development of the Schengen *acquis*, the single currency and, in the future, defence matters.

Enhanced cooperation is in principle a "last resort" mechanism, where an action cannot be carried through with all the Member States participating. The Council may in that case, acting by a qualified majority, authorise a minimum of eight Member States to go ahead, making use of the "institutions, procedures and mechanisms" laid down by the Treaties. However, only those States participating would vote in the Council on adoption of decisions which would apply only to them and any costs other than administrative expenditure would in principle be borne by them alone. Enhanced cooperation may be allowed in principle in all areas covered by the Treaty, with the exception of matters having military or defence implications ¹.

The object of this document is to give a broad outline of this instrument of flexibility and to put forward draft articles of the Constitution dealing with it. The aim of these draft articles is principally to simplify the wording and structure of the current provisions on enhanced cooperation. The comments indicate where in the present treaties these provisions come from. The proposed new structure is based more on thematic criteria than on the present grouping by pillar, which will no longer be present in the Constitution (without prejudice to possible special procedural provisions). Some provisions deemed redundant have been deleted.

¹ Under the Amsterdam Treaty arrangements, the CFSP was also excluded, on the grounds that the system of constructive abstention satisfied the need for flexibility in this area (see Article 23(1) TEU).

Part I of the Constitution would contain **Article 32b**, which presents the essential features of the mechanism of enhanced cooperation in the Union framework. This would in principle be the last Article of Title V of the draft Constitution (Exercise of competences).

Articles I to P, meanwhile, would appear in the part of the Constitution devoted to institutional provisions not covered in the first part (at present Section D of Part II). These Articles concern the limits and arrangements for implementing enhanced cooperation, as well as the authorisation procedure and the procedure for later participation by other Member States.

Besides the above, a number of amendments of substance have been suggested. These are concerned for instance with simplifying and standardising the initial authorisation and later participation procedures and with strengthening the roles of the Commission and the European Parliament at the point when enhanced cooperation is activated (assent). The purpose of these procedural changes is to facilitate the activation of enhanced cooperation and to clarify the conditions governing later participation, while better ensuring the coherence of enhanced cooperation actions with respect to each other and to the objectives of the Union in general. The Commission is also well placed to arbitrate between the interests of participants in an enhanced cooperation action and those of non-participants. Special procedures for enhanced cooperation in the CFSP area are retained.

One novelty is that of expressly providing that in certain cases the authorisation decision can stipulate conditions for participation in enhanced cooperation. The mechanism is therefore no longer seen solely as a substitute for unanimity, but also as a tool that makes it possible to take account of objective differences, even if they are only temporary. In addition, the reference to possible objective conditions governing participation is designed to circumscribe the discretionary power of the Commission or the Council with respect to requests addressed to them by Member States to participate in an enhanced cooperation action after its creation, in that the conditions for participation will be the same for those Member States that participate in the enhanced cooperation initially and for those which join later.

The last resort condition has been somewhat clarified by stating that it is by means of the authorisation decision that the Council formally confirms its fulfilment, without any prior procedures having necessarily been completed. This condition therefore cannot have the effect of restricting the scope of enhanced cooperation to specific acts.

As regards the minimum threshold for participation, it is proposed to set it at one third of the Member States, in the spirit of the Nice Treaty which had set it at eight Member States.

Finally, in the CFSP context, enhanced cooperation is no longer restricted to mere implementation of a joint action or a common position.

II. DESCRIPTION OF THE CURRENT MECHANISM

I. Prior conditions for initiating enhanced cooperation: last resort and minimum threshold

(a) The "**last resort**" condition as reformulated by the Treaty of Nice is open to a variety of interpretations.

The Treaty of Amsterdam provided that "closer" cooperation could only be established "*where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein*". The Treaty of Nice now provides that "*Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties*" (Article 43a TEU).

The question arises as to when and how the Council may establish that the situation is deadlocked. The Amsterdam wording could be read as meaning that procedures must be conducted through to the end, if necessary as far as the voting stage, in order to fulfil the condition of last resort. The Nice wording appears more flexible, if somewhat unclear, insofar as it would be for the Council to establish that the situation is deadlocked without necessarily waiting for a vote, or even the effective start of normal procedures.

The last resort condition could also carry an implication that the possible scope of the enhanced cooperation is determined. The condition could be interpreted, at least in the Treaty of Amsterdam version, as limiting an authorisation to undertake enhanced cooperation to an act, or a question covered by that act, which had previously been the subject of a failed decision-taking procedure by the Fifteen. The Nice wording appears to allow room for a broader interpretation here, as it refers to the objectives of such enhanced cooperation and to the Council establishing that they cannot be attained by the Fifteen within a reasonable period (without even necessarily having put it to a procedural test). Those objectives, which might have a wider scope than a single act, could then determine the area in which the enhanced cooperation would operate.

At any event, the wording of the Treaty of Nice is worth clarifying, particularly as regards the way in which the Council is supposed to establish that the condition has indeed been met.

(b) A further prior condition for initiating enhanced cooperation relates to the minimum number of States participating. The Treaty of Amsterdam laid down a **minimum threshold** of half the Member States, partly to avoid the creation of sub-groups in the same area, but also to justify the use of common institutions. The Treaty of Nice sets that threshold at eight Member States, which corresponds to the majority of the current Member States. There is no doubt that the future Member States would probably be less involved in enhanced cooperation as they would already have the task of incorporating the entire *acquis communautaire*.

In order to guard against any fragmentation, the Treaty of Nice introduced a new provision aimed at ensuring that activities undertaken on the basis of enhanced cooperation are consistent with each other and with the activities of the Union as a whole ¹.

¹ Article 45 TEU.

II. Procedure for authorising enhanced cooperation and participation at a later stage by other Member States

(a) Enhanced cooperation is **authorised** by the Council acting by a qualified majority. The Treaty of Nice abolished the possible right of veto "for important reasons of national policy", except for the second pillar. The Council acts on a proposal from the Commission, following a request from the Member States concerned. The Commission must justify any refusal to act on the request from the Member States. Under the third pillar, in the event of a refusal by the Commission, eight Member States may then submit a proposal directly to the Council. Under the second pillar, the Member States themselves make the request directly to the Council. According to the area, the European Parliament is informed or consulted or must assent to the authorisation.

(b) Any intended **participation** in enhanced cooperation at a later stage must be notified by the State concerned to the Council and to the Commission. Under the first pillar, the Commission takes a decision on the participation of another Member State, whereas under the third pillar, the request is deemed to be approved by the Council in its restricted configuration (of enhanced cooperation), unless it decides to hold its decision in abeyance for reasons which it must state. Here, the Treaty of Nice has not amended the Treaty of Amsterdam: in contrast to the authorisation procedure, there has been no change in the role of the Commission (under the third pillar) or the European Parliament (under the first pillar). As regards participation at a later stage under the second pillar, it is the Council in its plenary configuration which may hold its decision in abeyance.

III. Principle of openness

The Treaty of Nice places greater emphasis on the principle of the open nature of enhanced cooperation, both at the time it is being established and subsequently (Article 43b TEU). Thus participation in enhanced cooperation may not in principle be subject to prior conditions. The decision as to whether or not to take part in enhanced cooperation is for the Member States alone, on the basis of their own wishes. The authorisation decision cannot, therefore, exclude any Member State *a priori*. It is also provided that the Commission and the participants in enhanced cooperation should encourage as many Member States as possible to take part.

However, as regards the participation of other Member States at a later stage, the open nature of enhanced cooperation seems relative, given that it is not automatic but subject to a decision procedure. In addition, participation in enhanced cooperation at a later stage is subject to compliance with "the basic decision and with the decisions taken within that framework". Similarly, "specific arrangements deemed necessary" may be adopted during the procedure for the participation of a Member State at a later stage ¹.

While the exact meaning of these provisions is not very clear, they would suggest that in the current system participation at a later stage may be subject to certain conditions. Moreover it is quite likely that the subject-matter of enhanced cooperation would in itself impose or be based on objective premises.

IV. Functioning of enhanced cooperation: competence and institutional framework

The internal functioning of enhanced cooperation is governed by the same institutional provisions and the same legal bases as for the Community or the Union as a whole. In other words, the framework of competence, the instruments for action and the decision-taking procedures laid down in the Treaties apply in principle in the same way to the Member States taking part in enhanced cooperation.

(a) As regards **competence**, there is therefore no question of undertaking enhanced cooperation to adopt an act or conduct an action that the Member States could not adopt or conduct within the framework of the Treaties. The transfer of competence is uniform, only the exercise of it differs.

The Treaty places limits on the competence which may be exercised by means of enhanced cooperation. It may not be exclusive competence. Its exercise may not undermine the internal market or economic and social cohesion. It may not affect trade between Member States or distort competition. In general, enhanced cooperation must respect the *acquis communautaire* and be aimed at furthering the objectives of the Union and the process of integration ².

¹ See Article 11a TEC and Articles 27e and 40b TEU.

² See Article 43 TEU.

(b) As far as the **institutional framework** of enhanced cooperation is concerned, it is identical to that established by the Treaties for the whole of the Union. The decision-taking procedures are also those laid down by the legal bases on which the action of the Union as a whole would be based.

The composition and functioning of the Commission, the Court and the Parliament do not vary, therefore, when they exercise their powers within the framework of enhanced cooperation. Only the functioning of the Council varies: only those States participating in enhanced cooperation take part in the vote, while the others may take part in the Council's deliberations. Thus only the participants in enhanced cooperation are bound by the acts adopted and bear the non-administrative costs of their action.

The Treaty of Nice stipulates in this regard that acts and decisions adopted within the framework of enhanced cooperation "shall not form part of the Union *acquis*". Such a statement raises questions about the nature of enhanced cooperation. It would seem, however, that the main intention, given future enlargement, was to exclude that *acquis* from the *acquis* which the future Member States will be obliged to adopt. By way of comparison, the Treaty of Amsterdam itself laid down that the Schengen *acquis* incorporated into the Union framework was part of the *acquis* which the candidate States must accept in its entirety ¹.

In the restricted Council of enhanced cooperation the system of qualified majority voting is adjusted in such a way that the threshold corresponds to the same proportion of weighted votes as that set for the Fifteen, i.e. roughly 71% of the votes ². This is so that the threshold represents the majority of the Member States, or two thirds if the proposal does not emanate from the Commission (by analogy with the system adopted for the Fifteen, see Article 205 of the TEC). However, no particular adjustment is made to the weighting of votes.

¹ Article 8 of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

² Compare with qualified majority voting in a restricted EMU Council, where the threshold is two-thirds of the votes weighted in accordance with the usual formula (Article 122(5)).

V. Specific case of the CFSP

The Treaty of Nice extended the enhanced cooperation mechanism to the second pillar (Title V TEU). However, it may only be used to implement a joint action or a common position adopted beforehand by the Fifteen.

In general, the Treaty of Nice provides that enhanced cooperation in the CFSP field is aimed at "safeguarding the values and serving the interests of the Union as a whole" and that it is required to respect the principles, objectives and general guidelines of the CFSP and the decisions already taken within the framework of that policy. It therefore seems that a group of Member States engaging in enhanced cooperation acts on behalf of the Union as a whole, with the result that the Union's unity of representation at international level is not affected. The fact that there is a right of veto over any such enhanced cooperation at the authorisation stage supports this view ¹.

The general rules relating to financing still apply, which means that the participants alone bear all expenditure other than administrative costs (Article 44a TUE).

Enhanced cooperation may not relate to "matters having military or defence implications" ².

This considerably reduces its potential scope and rules out, for example, the implementation of "Petersberg" missions.

VI. Points to consider

The enhanced cooperation mechanism seems to have been conceived originally as a substitute for majority voting. The condition of last resort might suggest that enhanced cooperation can only be initiated to adopt specific acts, while the only institutional change which enhanced cooperation entails is to the configuration of the Council, which, in terms of voting rights, is confined to the representatives of the participating Member States.

¹ However, majority voting should always apply within enhanced cooperation since it will always be a matter of implementing a rule already existing.

² Article 27b TEU.

Seen in this light, the mechanism seems to some to be too complicated compared with other means of avoiding the stumbling block of unanimity (positive abstention, constructive abstention, postponing a majority vote by adducing "important national political reasons to be raised before the European Council", superqualified majority, opt-out, etc.). By contrast, certain features of the mechanism offer no response to differentiation needs of a more "structural" nature covering a policy area, based where appropriate on objective criteria, along the lines of the single currency or the Schengen system.

More fundamentally, the question arises as to whether an abstract and general mechanism of this kind is useful when "structural" differentiation needs are largely taken into account by the pre-established systems for flexibility provided for in the Treaty itself, such as the single currency or the Schengen system, and, shortly, in the area of defence (see draft Article 30 of the Constitution).

However, it is important to bear in mind the motives of the authors of the Treaty of Amsterdam and subsequently of Nice, namely the desire to establish a mechanism which could prove useful in the long term, particularly considering the growing heterogeneity of the Member States of the Union and their respective interests or specific needs. Enhanced cooperation is conceived as an instrument of progressive integration open to all Member States at any time. This instrument aims to enable and encourage a group of Member States to cooperate inside rather than outside the Union. Member States participating in enhanced cooperation can thus benefit from an existing infrastructure; their citizens enjoy parliamentary and judicial guarantees; and non-participants are assured that their interests and those of the Union as a whole are protected.

Moreover, while the mechanism of enhanced cooperation may be inappropriate for adopting specific acts or, conversely, covering major policy areas, it may nonetheless prove useful in an intermediate field of action, i.e. certain aspects of a policy, or in extending certain flexibility systems pre-established in the Treaty.

**III. TABLE: THE PROPOSED ARTICLES ON ENHANCED COOPERATION IN
RELATION TO THE EXISTING TREATIES**

	New Articles	Articles reproducing provisions found in the existing Treaties, but only partially or with substantial amendments	Articles reproduced from the existing Treaties, slightly adapted or unchanged
<u>Article 32b</u> (Part I of the Constitution): Enhanced cooperation		✓	
<u>Article I</u> (Part II of the Constitution): Special forms of cooperation in the ESDP	✓		
<u>Article J</u> (Part II of the Constitution): General conditions			✓
<u>Article K</u> (Part II of the Constitution): Relations with non-participants			✓
<u>Article L</u> (Part II of the Constitution): Principle of openness		✓	
<u>Article M</u> (Part II of the Constitution): Authorisation procedure		✓	
<u>Article N</u> (Part II of the Constitution): Procedure concerning the subsequent participation of other Member States		✓	
<u>Article O</u> (Part II of the Constitution): Financing			✓
<u>Article P</u> (Part II of the Constitution): Principle of cohesion			✓

IV. DRAFT ARTICLES: ENHANCED COOPERATION

PART ONE OF THE CONSTITUTION

Article 32b (Enhanced cooperation)

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Constitution, subject to the limits and in accordance with the procedures laid down in this article and in Articles I to P of the Constitution.

Enhanced cooperation is aimed at furthering the objectives of the Union, at protecting its interests and at reinforcing its process of integration. Such cooperation shall be open to all Member States when it is being established and at any time, in accordance with Article L of the Constitution.

2. Authorisation to proceed with enhanced cooperation shall be granted by the Council as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole and provided that it brings together at least one third of the Member States. The Council shall act in accordance with the procedure laid down in Article M of the Constitution.

3. Only representatives of the Member States participating in enhanced cooperation shall take part in the adoption of acts adopted within the Council. All the Member States may, however, take part in the deliberations of the Council.

Unanimity shall be constituted by the participating States only. A qualified majority shall be defined as a majority of the votes of the participating Member States, representing at least three fifths of the population of those States.

4. Acts adopted in the framework of enhanced cooperation shall only bind those Member States taking part in such cooperation. They shall not be regarded as an *acquis* which has to be accepted by candidates for accession to the Union.

PART TWO OF THE CONSTITUTION, SECTION D

Article I (Special forms of cooperation in the CFSP)

The provisions of Article 32b of Part One and Articles J to P of Part Two shall not apply to the forms of cooperation in the area of defence provided for by Article 30 of Part One and governed specifically by Articles 18 to 21 of Title I B of Part Two.

Article J (General conditions)

Any enhanced cooperation proposed shall comply with the Union's Constitution and *acquis*.

Such cooperation shall not undermine the internal market or economic and social cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Article K (Relations with non-participants)

Any enhanced cooperation proposed shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Article L (Principle of openness)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation which may be laid down in the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to any such conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they facilitate participation by as many Member States as possible.

2. The Commission and, where appropriate, the Minister for Foreign Affairs shall keep all Council members and the European Parliament regularly informed regarding developments in enhanced cooperation.

Article M (Authorising procedure)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Constitution, with the exception of the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council, acting by a qualified majority on a proposal from the Commission and after obtaining the assent of the European Parliament.

2. In the framework of the common foreign and security policy, the request of the Member States which wish to establish enhanced cooperation between themselves shall be addressed to the Council. It shall be forwarded to the Minister for Foreign Affairs, who shall give an opinion on whether the enhanced cooperation is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council, acting by a qualified majority.

Article N (Procedure for the participation of other Member States at a later stage)

1. Any Member State which wishes to participate in enhanced cooperation shall notify its intention to the Council, the Commission and, where necessary, the Minister for Foreign Affairs.

Within four months of the date of receipt of the notification the Commission shall confirm the participation of the Member State concerned. It shall note where necessary that any conditions of participation have been fulfilled and shall adopt any transitional arrangements deemed necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that any conditions of participation have not been fulfilled, it shall indicate the measures to be taken to fulfil those conditions and shall set a deadline for re-examining the request for participation. When it re-examines the request, it shall act in accordance with the preceding subparagraph. If the Commission considers that any conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall act by a qualified majority in accordance with Article 32b(3) of the Constitution. The Council may also adopt the abovementioned transitional arrangements acting on a proposal from the Commission.

2. In the framework of the common foreign and security policy, the Council shall confirm the participation of the Member State concerned, after consulting the Minister for Foreign Affairs. It shall note where necessary that any conditions of participation have been fulfilled. The Council may also adopt transitional arrangements acting on a proposal from the Minister for Foreign Affairs. However, if the Council considers that any conditions of participation have not been fulfilled, it shall indicate the measures to be taken to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act by a qualified majority in accordance with Article 32b(3) of the Constitution.

Article O (Funding)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article P (Principle of consistency)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

V. DRAFT ARTICLES WITH COMMENTS

PART ONE OF THE CONSTITUTION

Article 32b (Enhanced cooperation)

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Constitution, subject to the limits and in accordance with the procedures laid down in this article and in Articles I to P of the Constitution.

Enhanced cooperation is aimed at furthering the objectives of the Union, at protecting its interests and at reinforcing its process of integration. Such cooperation shall be open to all Member States when it is being established and at any time, in accordance with Article L of the Constitution.

2. Authorisation to proceed with enhanced cooperation shall be granted by the Council as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole and provided that it brings together at least one third of the Member States. The Council shall act in accordance with the procedure laid down in Article M of the Constitution.

3. Only representatives of the Member States participating in enhanced cooperation shall take part in the adoption of acts adopted within the Council. All the Member States may, however, take part in the deliberations of the Council.

Unanimity shall be constituted by the participating States only. A qualified majority shall be defined as a majority of the votes of the participating Member States, representing at least three fifths of the population of those States.

4. Acts adopted in the framework of enhanced cooperation shall only bind those Member States taking part in such cooperation. They shall not be regarded as an *acquis* which has to be accepted by candidates for accession to the Union.

Comments

Article 32b(1), first subparagraph

This subparagraph sets out the fundamental principle that enhanced cooperation is to operate within the framework of the legal bases in the Treaties, as regards both competence and the exercise of competence (procedures and instruments). That principle is variously expressed in different parts of the present Treaties ¹.

¹ Articles 43 and 44 (first sentence) of the TEU, Article 11(3) of the TEC and Articles 27a(2) and 40(2) of the TEU.

The subparagraph also refers straight away to the provisions in Part Two which deal with limits and procedures applicable to the enhanced cooperation mechanism, in particular the fact that it does not apply to specific forms of cooperation in the area of defence, and other general conditions aimed mainly at upholding the Union acquis.

***Article 32b(1), second subparagraph:** Taken from the conditions in Article 43(a) of the TEU and affirming the principle of openness (Article 43b of the TEU), as spelt out further in Part Two.*

***Article 32b(2):** Principle of authorisation by the Council and conditions for such authorisation: last resort (Article 43a of the TEU) and minimum threshold (Article 43(g) of the TEU).*

This paragraph establishes the principle that Council authorisation is required to initiate enhanced cooperation and refers to Article M of the Constitution as far as the details of the procedure are concerned. It also lays down two conditions for such authorisation: the last resort condition and the minimum participation threshold condition.

*The **last resort condition**, as amended by the Treaty of Nice, does not indicate how the Council is supposed to establish that the requirement is met and also appears to overlap somewhat with the Council's authorising decision. The proposed wording shows that it is by means of the authorising decision that the Council formally establishes that the last resort condition is indeed met. In addition, the deletion of the phrase "by applying the relevant provisions of the Treaties" makes it clearer that the last resort condition does not necessarily mean the failure of a previous procedure, or even that any such decision-making procedure has been initiated. In any case, the scope of enhanced cooperation should not be predetermined by any previous procedures, but should be more broadly determinable in the course of the authorising procedure, for example by reference to a number of legal bases concerned by the proposed cooperation.*

*As far as the **minimum threshold condition** is concerned, the question is whether it might be preferable to reintroduce a proportion of Member States, rather than a set number, which makes little sense in a Union where the number of members is not fixed once and for all. In keeping with the spirit of the Treaty of Nice, that proportion could be one third of the Member States.*

Article 32b(3): Taken from Article 44(1)

The main institutional feature of enhanced cooperation is that non-participants do not have a vote in the Council. The draft article, like the present Treaty, nevertheless provides that non-participants may take part in the deliberations.

In addition, the effect of applying the legal bases in the Constitution to enhanced cooperation is to carry over the voting rules specified in those bases, viz. unanimity or a qualified majority, into the operation of enhanced cooperation. There is thus a need to specify here, as in Article 44 of the TEU at present, what is meant by unanimity or a qualified majority within the Council when it acts under enhanced cooperation, bearing in mind the Convention's redefinition of qualified-majority voting.

Article 32b(4): Taken from Article 44(2)

Acts adopted within enhanced cooperation are binding on the participants only. Such acts therefore do not bind other Member States, unless of course they take part at a later stage, as is also made clear in the first paragraph of Article L ("subject to compliance with the acts already adopted within that framework"; see below). The further stipulations in Article 44(2) of the TEU do not seem necessary.

Lastly, it is proposed that the sentence "Such acts ... shall not form part of the Union acquis" be deleted. This provision raises an over-general issue, if its purpose is to avoid imposing the (as yet non-existent) acquis of enhanced cooperation on future Member States (i.e. after the forthcoming enlargement of the Union to bring in ten new States, as the question no longer arises for them). The wording proposed is based on Article 8 of the Protocol integrating the Schengen acquis into the framework of the European Union.

PART TWO OF THE CONSTITUTION – SECTION D

Article I (Special forms of cooperation in the CFSP)

The provisions of Article 32b of Part One and Articles J to P of Part Two shall not apply to the forms of cooperation in the area of defence provided for by Article 30 of Part One and governed specifically by Articles 18 to 21 of Title I B of Part Two.

Comments

Article I: New article

This article states that the various forms of cooperation by a group of Member States provided for in the area of defence are governed by specific provisions in the Constitution, so that the enhanced cooperation provisions do not apply in this instance.

For CFSP matters, Article 27b TEU, which confines enhanced cooperation to implementation of a Union joint action or a common position, has not been taken over. In reality, the general mechanism for enhanced cooperation does not appear to be necessary in order to entrust the implementation of a common action to a group of Member States who can be assumed to be acting on behalf of the Union. That was also the approach adopted for the execution of a defence task by a group of Member States (see draft Article 30(5) of the Constitution).

Article J (General conditions)

Any enhanced cooperation proposed shall comply with the Union's Constitution and *acquis*.

Such cooperation shall not undermine the internal market or economic and social cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Comments

Article J: (Taken from Article 43(b), (c), (e) and (f) of the TEU)

Article K (Relations with non-participants)

Any enhanced cooperation proposed shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Comments

Article K: *(Taken from Articles 43(h) and 44(2), last sentence, of the TEU)*

These two provisions have been combined, since they concern mutual obligations between participants and non-participants.

Article L (Principle of openness)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation which may be laid down in the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to any such conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they facilitate participation by as many Member States as possible.

2. The Commission and, where appropriate, the Minister for Foreign Affairs shall keep all Council members and the European Parliament regularly informed regarding developments in enhanced cooperation.

Article L(1): *(Taken from Article 43b of the TEU)*

This article spells out the principle of openness, laid down in Article 32b(1). Under that principle, Member States are free to participate, or not to participate, in enhanced cooperation, either at the time when it is established or later. In principle therefore, the proposal by the Commission (or by a group of States under the CFSP) and the Council's authorising decision cannot exclude Member States wishing to take part, or force Member States not wishing to take part to do so.

It should be noted, however, that the participation of other Member States at a later stage is not automatic, since it is subject to a decision-making procedure. In particular, the fact that participation at a later stage is conditional on compliance with the basic decision and the acts already adopted in that framework, or that "specific arrangements" may be adopted¹, seems to imply that such participation may already be subject to certain conditions under the present system.

It is proposed to make it quite clear that participation in enhanced cooperation may in some cases be subject to objective conditions, which would then have to be established in the course of the authorising procedure. It is therefore also proposed that, if so, those conditions should concern not only participation at a later stage but also participation from the outset.

This approach would extend the scenarios in which the enhanced cooperation mechanism might prove useful, since it would no longer always be based on willingness alone and would thus no longer be designed basically as a substitute for unanimity. The enhanced cooperation mechanism could also be based on objective differences, or even reflect objective criteria for participation by particular Member States, as with adoption of the euro, participation in the Schengen system or indeed some aspects of defence (see draft Article 30 of the Constitution).

Moreover, the reference to any objective participation conditions would constrain the discretionary power of the Commission or Council in response to Member States' requests to be allowed to take part in enhanced cooperation after its establishment; the terms of participation would be the same for Member States participating in enhanced cooperation from its inception and for those joining up along the way.

¹ See Article 11a of the TEC and Articles 27e and 40b of the TEU.

Article L(2): *(Taken from Article 27d)*

Originally introduced under the CFSP, the provision of information for all Member States and the European Parliament can usefully be extended to other areas. In particular, it provides a safeguard for non-participating States, regardless of the arrangements laid down in the authorising decision for participation in Council proceedings and deliberations (see Article 32b(3) above). It is useful to keep the European Parliament informed in cases where it is not involved in the decision-making process for implementation of enhanced cooperation and also as regards participation by other Member States at a later date.

Article M (Authorising procedure)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Constitution, with the exception of the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council, acting by a qualified majority on a proposal from the Commission and after obtaining the assent of the European Parliament.

2. In the framework of the common foreign and security policy, the request of the Member States which wish to establish enhanced cooperation between themselves shall be addressed to the Council. It shall be forwarded to the Minister for Foreign Affairs, who shall give an opinion on whether the enhanced cooperation is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council, acting by a qualified majority.

Comments

Article M(1): *Merges Article 11(1) and (2) of the TEC and Article 40a of the TEU*

These paragraphs describe the procedure for authorising enhanced cooperation in the areas currently covered by the TEC and the third pillar. Since the pillar structure is to be dismantled, it may be possible to reduce the existing variety of authorising procedures (as well as those for

participation by other States at a later stage; see below). Furthermore, some members have stressed the importance of the Commission's role in initiating and implementing enhanced cooperation, in order to protect the interest of the Union as a whole ¹.

It would therefore seem advisable to abandon the specific feature whereby those Member States wishing to engage in enhanced cooperation in the field of judicial and police cooperation in criminal matters could address their request to the Council, notwithstanding any refusal by the Commission to accede to the request.

For the sake of simplification, it is also suggested that the possibility of raising the matter before the European Council be dropped. Such referral could in any case take place de facto, if the initiation of enhanced cooperation posed a major problem for any Member State.

It is also necessary to consider the role of the European Parliament. Where enhanced cooperation is not confined to the adoption of an individual act, but relates to the adoption of a number of acts, or even to the implementation of a policy, there may be a number of different decision-making procedures under enhanced cooperation. It would therefore not be possible to establish a link between the codecision procedure involved in implementing enhanced cooperation and the assent procedure involved in authorising such cooperation. It is accordingly suggested that the assent procedure be used across the board for initiating any enhanced cooperation, since the introduction of such a "subsystem" would affect the constitutional structure as a whole. This would provide an additional procedural safeguard ensuring that any enhanced cooperation proposed would promote the process of integration (in accordance with Article 32b(1)).

It has lastly been added that Member States' requests to the Commission must specify the scope and objectives of the enhanced cooperation proposed, particularly for the purpose of checking on compliance with the conditions and limits laid down by the Constitution.

¹ See, for example, the Franco-Netherlands contribution in CONV 664/03.

Article M(2): *Authorising procedure under the CFSP (Article 27c of the TEU)*

Under the procedure for authorising enhanced cooperation in the framework of the CFSP, the Commission and the European Parliament would have a lesser role, while the Minister for Foreign Affairs would be consulted. It is also suggested, as with other areas, that the possibility of raising the matter before the European Council be dropped (see the reference to Article 23(2) of the TEU).

Article N (Procedure for the participation of other Member States at a later stage)

1. Any Member State which wishes to participate in enhanced cooperation shall notify its intention to the Council, the Commission and, where necessary, the Minister for Foreign Affairs.

Within four months of the date of receipt of the notification the Commission shall confirm the participation of the Member State concerned. It shall note where necessary that any conditions of participation have been fulfilled and shall adopt any transitional arrangements deemed necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that any conditions of participation have not been fulfilled, it shall indicate the measures to be taken to fulfil those conditions and shall set a deadline for re-examining the request for participation. When it re-examines the request, it shall act in accordance with the preceding subparagraph. If the Commission considers that any conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall act by a qualified majority in accordance with Article 32b(3) of the Constitution. The Council may also adopt the abovementioned transitional arrangements acting on a proposal from the Commission.

2. In the framework of the common foreign and security policy, the Council shall confirm the participation of the Member State concerned, after consulting the Minister for Foreign Affairs. It shall note where necessary that any conditions of participation have been fulfilled. The Council may also adopt transitional arrangements acting on a proposal from the Minister for Foreign Affairs. However, if the Council considers that any conditions of participation have not been fulfilled, it shall indicate the measures to be taken to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act by a qualified majority in accordance with Article 32b(3) of the Constitution.

Comments

Article N(1): *Procedure concerning participation at a later stage, with the exception of the CFSP (merger of Articles 11a of the TEC and 40b of the TEU).*

Under the present system it is the Commission which decides whether other Member States may join in enhanced cooperation being conducted in the Community framework, whereas in the framework of judicial and police cooperation in criminal matters it is the Council, meeting in its restricted configuration of enhanced cooperation, which decides in accordance with an implicit approval system (which is more in line with the principle of openness).

Since the pillar structure is to be dismantled it is probably necessary to establish a single procedure for the areas covered by the TEC and those covered by the current third pillar, along the lines of the initial authorising procedure. The question therefore arises of which institution should take a decision on subsequent participation, the Commission or the Council meeting in its restricted configuration of enhanced cooperation.

The solution proposed involves conferring this role on the Commission (this is already the case with the areas covered by the TEC) for the same reason as in the case of its role when enhanced cooperation is initiated, i.e. that it is best placed to decide on the interests of the Union as a whole, those of enhanced cooperation and those of the non-participants. However, it is also suggested that, following a second negative decision by the Commission, the Member State concerned should be able to address its request to the restricted enhanced cooperation Council itself.

Moreover, in accordance with the principle of openness, it is suggested that the discretionary power of the Commission (or of the Council) be limited by stating that a negative decision on participation at a later stage may be based solely on failure to meet any objective conditions which may have been laid down in the basic authorising decision.

As for the acts already adopted within the framework of enhanced cooperation, Member States must be in a position to apply such acts as soon as they actually participate in enhanced cooperation. However, the Commission or the Council should be able to adopt transitional arrangements designed, inter alia, to phase in application of such acts, so as to facilitate the participation of those States which so request. A more precise meaning would thus be given to "such specific arrangements as it (the Commission or the Council) may deem necessary"¹, while underlining their transitional nature.

¹ Article 11a of the TEC, Articles 40b and 27e of the TEU.

Article N(2): *Extract from Article 27e of the TEU*

As far as participation at a later stage in enhanced cooperation in the CFSP framework is concerned, the wording adopted is based on that set out in the preceding paragraph except that the Council, not the Commission, takes the decision. It is proposed here that the Council meeting in its restricted configuration of enhanced cooperation take the decision rather than the Council in its full configuration (following the example of the current procedure under the third pillar). Furthermore the Ministry of Foreign Affairs is to be consulted, as for the original authorising procedure.

Article O (Funding)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Comments

Article O: *Follows Article 44a of the TEU*

Article P (Principle of consistency)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

Comments

Follows Article 45 of the TEU.

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Comments on the provisions of the TEU and the TEC which have not been included in the draft articles of the Constitution

Some of the provisions of the current Treaties concerning enhanced cooperation have not been included in the draft articles.

Thus in the CFSP sector, Article 27a of the TEU states inter alia that enhanced cooperation in this area "shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene", and that it "shall respect the principles, objectives, general guidelines and consistency of the CFSP and the decisions taken within the framework of that policy". These points are covered by the general clause in the second subparagraph of draft Article 32b(1) of the Constitution.

Similarly, Article 43(i) of the TEU referring to the Protocol integrating the Schengen acquis into the framework of the Union has not been included. This provision states that the articles on enhanced cooperation shall not affect the provisions of the Protocol concerned. It seems unnecessary since enhanced cooperation in the Schengen acquis area is a variant of the general enhanced cooperation mechanism. In other words, the specific and exceptional nature of the Schengen Protocol is already clearly established by that Protocol.

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