

**THE EUROPEAN CONVENTION**

THE SECRETARIAT

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from           Secretariat

to             The Convention

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**Subject :       Contribution by Mr Andrew Duff, member of the Convention:**  
**- “Do we really need enhanced cooperation?”**

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The Secretary-General of the Convention has received the contribution annexed hereto from Mr Andrew Duff, member of the Convention.

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**Contribution by Mr Andrew Duff, Member of the Convention****DO WE REALLY NEED ENHANCED COOPERATION?**

This contribution is a reaction to the Praesidium's paper CONV 723/03 on enhanced cooperation. It questions the assumption that, outside the security and defence dimension, the Union needs enhanced cooperation provisions in its Constitution.

***No debate***

The Praesidium has had to formulate its position on the complex issues involved in enhanced cooperation without the benefit of a proper debate in either the plenary or a working group. Although there seems to be wide agreement in the Convention that an avant-garde should be permitted to form in the area of security and defence policy, one has not detected the same enthusiasm for differentiated integration as far as the traditional first or third pillars are concerned. Indeed, there seems to be widespread support for the notion of striving for greater solidarity and cohesion. The constitutionalisation of the Union militates against the plethora of opt-outs and derogations that have so cluttered the existing Treaties since Maastricht. Constitutionalisation strengthens the ties that bind, and requires greater respect for the principles of equal treatment of the citizens and states.

One should recall that the large debate about the concept of enhanced cooperation within the European Union was sparked by the need to circumvent the British veto. There were certainly other strands to the theoretical debate, especially in France and Germany, notably the suggestion that the formation of a core Europe among a few could act as the motor of integration for all.<sup>1</sup> But the introduction of the closer cooperation clauses to the Treaty of Amsterdam came about because a safeguard was needed against the reactionary stance of the then British government.

***Inferior alternative to QMV***

Enhanced cooperation was then, as now, an inferior alternative to extending the use of Qualified Majority Voting in the Council. The Praesidium admits that the mechanism "seems to have been conceived originally as a substitute for majority voting". It follows that in a situation where QMV becomes the norm in the legislative work of the Union, enhanced cooperation is less and less a credible option.

The formulation of the closer cooperation provisions at Amsterdam and their revision at Nice were complex and intricate. The resulting articles are hardly models of lucidity, and their very existence runs counter to the Convention's drive towards simplification of decision-making procedures and rationalisation of instruments.

Designed to prevent a fragmentation of policy within the Union between disparate or even competing groups of member states, it was necessary to insist on the use of the single institutional framework of the Union. Nevertheless, the prospect of having to manage enhanced cooperation is undeniably disconcerting for the institutions, without exception. First and foremost, enhanced cooperation would rupture decision-making in the Council. But the collegiality of the Commission would also be under threat, and how MEPs would cope with being divided between the ins and outs

is not self-evident. The Court of Justice would have to insist on the necessity of upholding the corpus of EU law, and would be wholly justified in fearing the development of two separate *acquis*.

Despite the numerous qualifications installed in the mechanism, the judicial and institutional cohesion of the Union would certainly be weakened if it were ever to be put to the test. Non-participant member states, especially, would never be quite sure that their interests were being protected by the arrangements, and the suspicion of discrimination would be ever present. Were the experiment of enhanced cooperation to fail, the flexibility that it brought to the relationship between member states might well turn to divorce.

Nor would the existence of these provisions in the Constitution entirely prevent a number of more frustrated or ambitious member states from choosing to experiment with closer collaboration outside the framework of the Union.

As the Praesidium has rightly stated, the enhanced cooperation articles are not useful for multi-speed approaches to integration, such as Economic and Monetary Union, where all member states sign up to the same objectives but take different times to achieve them.

Enhanced cooperation is not about variable speeds but variable goals. It is, therefore, as the Convention has agreed, perfect for the security and defence dimension where member states do not agree on a single political strategy. It is a much less satisfactory way to manage disagreements over the core competences of the Union to which all member states have in any case to subscribe, and where the integrity of the *acquis* is at stake.

There may be some justification for the retention of these clauses on closer cooperation if it were intended to create an *avant-garde* to drive forward integration in a specific area (such as we intend in defence). However, the Praesidium, in its revised drafting of the key article, is specifically precluding such an approach. (Here the Praesidium follows the logic of Nice, but not of Amsterdam which incorporated the Schengen Agreement as part of the *acquis*.)<sup>2</sup>

### ***Dysfunctional***

The fairly obvious shortcomings of the enhanced cooperation provisions are such that they have never been used. In the three cases where their deployment has been mooted - the tax package, energy taxation and the company statute - the steady extension of QMV either has sufficed or will suffice to neutralise the case for proceeding by and with all member states.

One is drawn to the conclusion, therefore, that Article 32b of Part One and Articles I to P of Part Three (CONV 723/03) should be suppressed.

That being the case, the draft Constitution would then be left with only two forms of differentiated integration.

The first would be an enhancement of the existing provisions concerning regional unions. We have already tabled an amendment to Article D, General and Final Provisions, Part III, as follows:

#### **Article D: Regional unions**

The *Constitution* shall not preclude the existence or completion of regional unions between *neighbouring Member States* to the extent that the objectives of these regional unions are *in accordance with the provisions of the Constitution and are* not attained by *its* application.

The second form of variable geometry would be the core group approach anticipated by Article 30.6, Title V, Part One and in Articles 20-21 of Part III.B on defence.

If the Convention is minded to follow the proposal to annul the closer cooperation clauses, it should as a consequence address more boldly the issue of what happens if there is a serious breakdown of political relations within the Union. The Praesidium has already proposed a secession clause (Article 46, Title X, Part I). We take this opportunity of reiterating our earlier proposal for the creation of a distinct class of associate membership for member states who choose to resile from the full complement of their obligations:-

**Article 46 bis: Associate membership**

***1. Any European state not being a Member State of the Union or ceasing to be a Member State may notify the Council of its intention to become an associate member of the Union. The Union shall negotiate with that state and the Council shall conclude an agreement, acting by a qualified majority, after obtaining the assent of the European Parliament.***

***2. Associate members shall cooperate closely with the Union. They shall respect its values, principles and objectives.***

***3. Associate membership agreements will set out the modalities of the close cooperation, the scope of coordination and the reciprocal rights and obligations.***

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<sup>1</sup> One recalls especially the contributions of Wolfgang Schäuble and Karl Lamers in the summer of 1994 in which they argued for a 'solid core' Europe, John Major's reaction, the intervention of Edouard Balladur in favour of concentric circles, and M. Giscard d'Estaing's own reflections on 'l'Europe-puissance' and 'l'Europe-espace'.

<sup>2</sup> Draft Article 32b.4 is explicit that: "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."