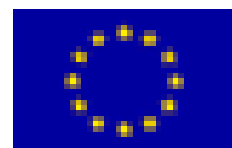


From the Convention to the IGC:  
Mapping Cross-National Views  
towards an EU-30



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**“Capacity and Actor building: Which Instruments and Institutions does the EU need to enhance its Capacity to act with regard to its Trade, economic Cooperation and foreign, Security and defence Policy?”**

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**PAPER BY**

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**“CFSP DECISION-MAKING AND PROCEDURES  
FOR ENHANCED COOPERATION”**

1. Introduction .....	2
2. CFSP decision-making (from Maastricht to Nice).....	2
3. Proposals for facilitating CFSP decision-making .....	3
4. CFSP and Closer/Enhanced Cooperation from Amsterdam to Nice .....	4
5. Proposals concerning Enhanced Cooperation.....	6

## **1. Introduction**

This is a rather conventional, some may say technical, paper. It does not analyse the extent to which the present and future EU is split between the “old” and the “new” Europe and whether a real Common Foreign and Security Policy might only be in sight in the event of a consensus among the member states.

The paper is based on the assumption that Europeans are not living at a time (after Monetary Union) where they can wait and see whether their interests coincide or not and then decide (or not) which institutions should be used for what purpose or action. Rather, institutions and modes of decision-making seem to be terribly necessary for shaping national interests (which are not static at all), for establishing trust and transparency among the member states and for helping to build a consensus.

Perhaps we would need to differentiate between high and low politics. An issue of high politics would then only be decided by consensus; for all other issues various types of decision-making might be used. The big difficulty is to define what is high and what is low politics (war-fighting, peace-keeping, recognition, sending observers or special envoys)?

Finally, no decision-mechanism should be designed to bulldoze others in. But decision-making can also not be designed in a way that one vote would be sufficient to block the whole EU from taking action. The art of decision-making will therefore lie with modalities allowing for a certain degree of flexibility should not all member states want to move into a specific direction, and modalities which aim at promoting consensus among the member states wherever possible.

## **2. CFSP decision-making (from Maastricht to Nice)**

Since the negotiations on the Maastricht Treaty there had been a struggle between those in favour of QMV on foreign policy issues and others insisting on unanimity for reasons of

national sovereignty in decisions on international affairs. The proponents of QMV lost the battle several times. At Maastricht, QMV was introduced into Title V only for follow-up decisions in implementing what had been agreed before by unanimity or consensus – a possibility which had never been used in practice. The Treaty of Amsterdam provided for QMV for implementing common positions or joint actions on the basis of a common strategy defined before in the European Council acting by consensus. This was a compromise – which still holds for the Treaty of Nice – worked out by the French and the Germans and then agreed upon by all member states since it combined two different strands of thinking, the communitarian and the intergovernmental philosophy. But even that did not work well in practice since some sort of a Luxembourg compromise had been introduced into the Treaty: a member state, for important reasons of national interests, can object the use of the QMV-procedure, a problem which the Council (by using QMV) can bring to the attention of the European Council which will decide on the issue by unanimity. In effect, QMV has not been used and the Council, usually, decides by unanimity or consensus with constructive abstention according to Article 23, first sentence of the Nice Treaty.

### **3. Proposals for facilitating CFSP decision-making**

The uneasiness on part of Germany and other more integration-friendly member states as well as the meagre and slow output of European Foreign and Security Policy led to intensive debates about reforming CFSP decision-making in the framework of the European Convention.

The European Convention's **working group on external action** makes the following recommendations in its final report:

- “The Working Group underlines that, in order to avoid CFSP inertia and encourage a pro-active CFSP, maximum use should be made of existing provisions for the use of QMV, and of provisions allowing for some form of flexibility, such as constructive abstention.” (p. 7)
- “In addition, the Working Group recommends that a new provision be inserted in the Treaty, which would provide for the possibility of the European Council agreeing by unanimity to extend the use of QMV in the field of CFSP.” (p. 7)
- “The Group discussed the possibility [...] of introducing a new type of initiative. A joint initiative which would present an approach integrating foreign policy aspects and external relations instruments could be put forward by the European External

Representative (or the HR) and the Commission.” (p. 25). Several members consider that the Council could approve such "joint initiatives" by QMV (p. 7).

The proposals in the **”Franco-German contribution to the European Convention concerning the Union's institutional architecture”** of January 15, 2003 (p. 6) go beyond the working group recommendation. They stress that: “Decisions in the field of CFSP are generally taken by using QMV.” Furthermore:

- “If a member state claims a national interest against the taking of a decision, the “European Foreign Minister” is engaged with the aim of finding an amicable solution with the member state; if this is not successful, the president of the European Council tries to find an amicable solution. If no solution is found, the European Council deals with the question by using QMV.”
- Decisions referring to military or defence policy (ESDP) are taken by unanimity, respectively consensus with constructive abstention.

As far as the relevance of the Franco-German proposals is concerned it is worth noting that France has accepted, for the first time, QMV in CFSP affairs in the Council and the European Council, albeit in combination with a hierarchical “filter” through the new European Foreign Minister and the elected fulltime President/Chairman of the European Council. This compromise might be attractive also for others thinking in categories of intergovernmentalism and sovereignty. But it means that the introduction of a general QMV-provision is linked to the future existence of a “European President” and a “European Foreign Minister” (with an own right of initiative). Whether both would be acceptable for smaller member states is still an open question.

#### **4. CFSP and Closer/Enhanced Cooperation from Amsterdam to Nice**

At the **IGC** which led to the conclusion of the **Treaty of Amsterdam**, concerning the CFSP, a remarkable move could be observed over time. In the run-up to the negotiations there was a widespread conviction that closer cooperation should also be used in the second pillar; particularly the German and Italian governments supported such a step (Hall 2000: 13). By the end of the negotiations, however, the climate had changed; a majority of delegations – with the United Kingdom at the centre - did not consider closer or enhanced cooperation as a viable and wishful instrument in the CFSP (Giering and Janning 2002: 680). Instead, constructive

abstention was chosen. Missiroli sums up the key rationale for this decision: “(...) in the end, no European government was in reality in favour of a specific flexibility clause for the CFSP proper: the smaller countries, in general, for fear of being outvoted, Italy and Spain for fear of being excluded, Britain for reasons of principle and tradition. Yet even Germany and France did not insist on that point (...)” (Missiroli 2000: 9f.).

Constructive abstention (Art. 23 (1) TEU) has been regarded as a kind of compensation for the failure of introducing closer cooperation proper into the CFSP Title of the Treaty. However, a clear distinction must be made. Constructive abstention is rather a decision-making procedure than a method of ‘organising’ integration, and - most important – it tries to make *consensus* possible rather than facilitating flexible solutions.

In the run-up to the **IGC 2000**, the discussion about closer cooperation gained new dynamics, and this time, models of flexibility were discussed also for the second pillar.

The **Treaty of Nice** has changed the relevant provisions on closer cooperation now renamed ‘enhanced cooperation’. Some of the new provisions helped to facilitate the use of the procedure in the future: a majority of member states as foreseen in the Treaty of Amsterdam is no longer required, but a minimum of 8 countries wanting to cooperate closer (Art. 43 TEU). This still constitutes a majority in the present EU, but not so in an enlarged Union. On the other hand, the veto option remains in the second pillar whereby it had been dropped in the first and third pillar. This still threatens to ‘kill’ enhanced cooperation even before it can be initiated.

The **enabling clause** introduced in the CFSP stipulates that enhanced cooperation 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 (Art. 27a). It has to respect:

- the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy;
- the powers of the European Community, and
- consistency between all the Union's policies and its external activities.

These conditions must be seen in conjunction with the general criteria for enhanced cooperation as defined in Art. 43 TEU. The threshold still can be considered as rather high, thus not

encouraging the countries interested in enhanced cooperation in their ambitions. It remains to be seen if the provisions will ever be applied under these heavy restraints.

An important limitation is defined in Art. 27b TEU which states that enhanced cooperation in CFSP will **only relate to the conduct of a joint action or the implementation of a common position**. It will furthermore *not* relate to matters having military or defence implications.

The result of Nice was in a way putting upside down the whole discussion of the previous months and came as an unpleasant surprise to many observers (Regelsberger 2001; Missiroli 2002). Exactly the field where flexibility was most intensively discussed, was finally excluded in the Treaty, i.e. defence policy and in particular armaments cooperation. In the end, British resistance, accompanied by the lacking commitment of France and Germany in the final stage of the Nice negotiations, contributed to the 'strange' outcome. The discussion on flexibility had apparently become a victim of different national priorities and the high amount of political attention and energy absorbed by the fight about seats and weighted votes in key institutions.

## **5. Proposals concerning Enhanced Cooperation**

The final report of the **Convention working group on external action** made the following statement:

“Some members considered that forms of operational cooperation between a limited number of Member States, as a ‘coalition of the willing’ to take forward specific operational actions in the framework of implementation of Council decisions, could contribute to enhancing CFSP.” (p. 26)

The final report for the **Convention working group on defence**, which was chaired by Commissioner Michel Barnier, reflects the central role played by considerations on flexibility, although it became clear that no overall consensus had been found (Working Group on Defence 2002). Instead, a high level of dispute seemed to be prevailing in this sensitive field. Some members of the group pleaded for flexible constellations like the creation of a "defence Euro-zone" including countries ready to accept the introduction of defence criteria and willing to make pre-identified forces as well as control and command capabilities available, and to participate in multi-national forces with integrated command structures (Working Group on Defence 2002: 19). Others were strictly opposed to the use of enhanced cooperation in the

defence field (Ibid.). No clear picture emerged from the debate in the working group, so that the Convention, so far, has not presented a unique proposal, but a menu of possible solutions.

The **"Joint Franco-German proposals for the European Convention in the field of European security and defence policy"** of November 22, 2002 (p. 3) argue in favour of enhanced cooperation in the field of the ESDP to be included into the Treaty. Enhanced cooperation should be applied for:

- setting up multinational force elements with integrated command structures,
- joint armaments projects,
- the management of human resources and training and
- the formulation of joint doctrines.

Concerning enhanced cooperation proper modalities would have to be determined:

- decision of establishing such a cooperation by qualified majority
- securing rapid decision making procedures (amongst other things review of Art. 27 c TEU-Nice)
- lowering of the threshold for the required number of participants [perhaps down to 5].

Apart from this, according to the Franco-German paper, the use of other instruments of flexibility within the Treaty for the ESDP should also be examined. Special rules should apply to the use of instruments of flexibility as to the initiation and implementation of military operations. Here, the requirement of unanimity should still apply, with the possibility of constructive abstention.

Finally it is suggested that those member states, who wish to do so, could transfer their obligations under the WEU Treaty to the European Union by using enhanced cooperation, which would include the possibility of introducing a mutual assistance clause into the EU framework.