EUROPEAN COMMISSION

FORWARD STUDIES UNIT

Harnessing Differentiation in the EU-Flexibility after Amsterdam.

Hearings with Parliamentarians and Government Officials in Seven European Capitals

A Report by Christian Deubner

Edited by Thomas Jansen

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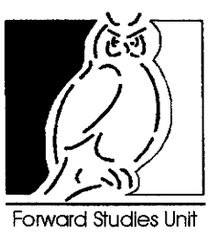

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HARNESSING DIFFERENTIATION IN THE EU - FLEXIBILITY AFTER AMSTERDAM

A Report on Hearings with Parlamentarians and Government Officials in Seven European Capitals

Christian Deubner

Stiftung Wissenschaft und Politik, Ebenhausen

WORKING PAPER, 2000

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Preface

The Forward Studies Unit has been actively involved with the project which gave rise to the present report by Christian Deubner. Our unit has always been interested in questions relating to 'differentiation', 'closer co-operation', 'flexibility' or how ever one might call the possibility of an avant-garde of Member States leading the way to more integration in certain policy areas even if not all the other Member States are able or wish to follow at a given time. See for example the study "How to make use of closer co-operation? The Amsterdam Clauses and the Dynamics of European Integration" by Francesco Milner and Alkuin Kolliker (Forward Studies Unit Working Paper 2000).

The Forward Studies Unit's contribution to this project, carried out by the *Stiftung Wissenschaft und Politik* mainly consisted at organising a workshop in Brussels, giving participants the opportunity to discuss with the officials from the Commission, the Council and the Parliament, dealing with the relevant policy areas.

Also we see the publication of this report in our working paper series as a significant contribution to the realisation of the project, because it helps to ensure an adequate distribution of its content.

The problems raised in this report are at the centre of current attention. Not only with regard to the intergovernmental conference for the revision of the Treaties, but also with regard to the new debate on the ultimate goal of European integration in view of the forthcoming enlargement of the Union to include a considerable number of new Member States.

Jean-Claude Thébault

Introduction and Recommendations

This report presents the results of seven hearings on enhanced cooperation between European Union member states in the light of the changes made by the Treaty of Amsterdam. In this Treaty, the member states added a number of important new clauses on enhanced cooperation. The most momentous innovation brought by these clauses was that enhanced cooperation between member states, which had been practised in a freely agreed manner outside the Treaty system proper since the early days of European Integration in the 1950s can now be implemented within the institutional framework of the EU, and utilise its institutions and procedures. The organisation of the hearings and the types of questions asked derived from the organisation of these new clauses on enhanced cooperation in the Treaty of Amsterdam.

The treaty introduces a (new) general clause (Art. 43--45 Treaty on European Union) on the establishment of closer cooperation, inserted as the new title VII in the common provisions of the TEU. It then added two specific clauses on establishing closer cooperation, in the Treaty establishing the European Community (TEC) which concerns the first pillar (Art. 11), and in the TEU on Justice and Home Affairs, which concerns the third pillar (Art. 40). Negotiators and academics have agreed on calling this the "enabling" method of closer cooperation. The second pillar, Common Foreign and Security Policy (CFSP), gained only a 'negative' way to closer cooperation in the form of the so-called "constructive abstention", a qualified abstention clause (Art. 23, par. 1 TEU) permitting member states to stay out of foreign policy measures decided by others, *eo ipso* making a closer cooperation group for that specific policy. Here, the widely accepted term is "case-by-case" flexibility. And finally, the member states decided *hic et nunc* on creating a closer cooperation group (under Art. 43 and 40, TEU, and 11, TEC) for the transfer of the Schengen acquis into the treaty system, which excluded the UK together with the Republic of Ireland and Denmark. Here, "predefined" flexibility has become the generally accepted term.

The seven hearings were the collective enterprise of leading international relations institutes in five member states and one candidate country, and the forward studies unit of the European Commission. They brought together an international team of experts, parliamentarians and officials in the respective countries and the European Union between January and December 1998. When regarding the results of these hearings, four questions concerning the implementation of the new clauses and the interpreation of their functioning and their consequences are of special importance:

1. Whether and in which fields and circumstances these new clauses are likely to be utilised, in addition to or instead of, the existing mode of enhanced cooperation.

2. Whether, therefore, the face of enhanced cooperation in itself will actually change.

3. Whether the effectiveness of reinforced cooperation can change or be improved.

4. And whether its meaning for the integration process altogether will change.

As the expert team wanted to appraise the enhanced cooperation clauses of Amsterdam in the context of pre-Amsterdam flexibility, the study also included Economic and Monetary Union, the enhanced cooperation in monetary policy which the Maastricht treaty had earlier established in the institutional framework of the EU.

Results:

In summary form, the answers to these questions were as follows:

1. The testimonies heard during the seven hearings gave rise to the following rough ranking, concerning the probability, fields and timescale of the application of new institutional enhanced cooperation (IEC).
   Predefined enhanced cooperation being laid down directly in the Amsterdam Treaty, its utilisation is imminent, as soon as the Amsterdam Treaty enters into force. As it covers a wide range of competences, with the broad sector of free movement of persons in the EU (including the Schengen acquis), and large parts of economic and monetary policy cooperation, predefined enhanced cooperation is certain to play an important and visible role. Second in probability and imminence is likely to be the so-called case-by-case enhanced cooperation in low profile European foreign policy issues. In third place one is likely to find enabling enhanced cooperation in the third pillar within the area of police and judicial policy cooperation, and lastly, enabling enhanced cooperation within the internal market.
   Clearly, the officials we interviewed preferred to consider enabling-mode enhanced cooperation more as a bargaining tool in negotiations to be brandished against obstructive member governments rather than as a new mode of integration policy to actually put into operation. One reason for this lies in member states' fears of incalculable effects on the EU system if the new instrument were in fact to be implemented. The second major obstacle to this option of last resort is to be seen in the severe conditions which have to be met, the very high investment demanded of member states willing to utilise this new instrument, as well as the continuing high controversy surrounding its potential use. Finally, FEC, as practised before Amsterdam will be continued. In part, new initiatives of this kind are seen to spring directly from the enhanced cooperation begun under the new Amsterdam clauses, for example in provoking the creation of limited Councils as in the case of the Euro-11. Others are the result of original member state preferences, in the field of CFSP for instance.

2. The face of enhanced cooperation, as EU member states actually conduct it, has already been substantially changed by the inclusion of monetary cooperation and Schengen into the institutional framework. Highly important fields of enhanced cooperation, which had heretofore been conducted in the mode of freely determined rules established by the groups concerned, have thus been fully subjected to the laws of the European Union. These now actually regulate an important part of enhanced cooperation. However the other category not controlled by these laws, FEC, is unlikely to disappear. In fact it is more likely to increase in the future.

3. The hearings did not reveal that officials were convinced by the potential of enhanced cooperation to increase the effectiveness of EU decision-making and policy implementation. Would the effectiveness of new cooperation groups or of the EU as a whole be improved (a) by advances in certain areas, or (b) by stronger pressure in negotiations exerted against recalcitrant member states? As to (b), the urgency of this problem was seen to be much reduced by the less eurosceptic attitude of the UK government after the general election of May 1997. But even so officials in many capitals clearly expected gains in effectiveness for EU integration in general from the existence of this new option against obstruction. The Spanish position, on the other hand, showed continuing and well argued reservations against the idea that this change in the bargaining powers would actually ease negotiations.
   As for (a), there were very mixed judgements concerning effectiveness gains for the Union to be had from advances in certain areas, and perhaps all policy fields. The pervasive concern was that such advances might produce externalities which would harm neighbouring areas of the acquis making further well-ordered advances in the acquis impossible, and possibly having harmful effects in other important aspects of the integration process.
   In this context, the Commission insisted strongly on the importance of tightly circumscribing the fields in which IEC could be applied. It could not be allowed for any individual directive, i.e. in matters of detail, but only for closely related matters forming a comprehensive policy field. This was the condition for giving a positive contribution. If such enhanced cooperation was permitted in small-scale fields, perhaps to facilitate decision-making on certain contentious directives, even in fields subject to Qualified Majority Voting (QMV), cooperation groups of varying composition and interest risked parceling important policy fields out among themselves and in that way ripping them apart.
   In addition, enhanced cooperation in the new Amsterdam mode seems to have an inherent tendency to provoke initiatives of FEC alongside, which could well neutralise some of the effectiveness gains made under the new rules.

4. In the past, enhanced cooperation contributed substantially to Community building inside European integration. The EU careers of the European Monetary System (EMS) and Schengen confirm this. Could this contribution be maintained or even strengthened if such projects of enhanced cooperation were in the future to be initiated within the institutional framework of the EU? The hearings confirmed the belief of certain governments that such an effect would come about but the majority of those parliamentarians and officials interviewed did not seem to share this opinion.
   On the contrary, uncertainties, doubts and concerns featured strongly among the member state and European Commission officials and parliamentarians who were interviewed. A high ranking Commission official said that uncertainty and doubt were the normal reaction vis-à-vis a new and important institutional change within the EU, and that time and practice would be needed to exploit its positive potential. This was however an optimistic assessment in comparison to all the hearings. Taking all of this into account, it is better at this stage to hold back on answering the question on IEC and Community building.
   First, very little new enhanced cooperation is expected under the clauses of Amsterdam. What Amsterdam brought in the way of predefined fields of enhanced cooperation (Schengen acquis and EMU amendment) dates from before

this Treaty reform and has already made its most important contribution to integration.
Secondly, as they have been established inside the EU from their creation, new enhanced cooperation initiatives in the IEC mode will probably lack some of the potential to challenge the EU into taking new steps towards deepening, which FEC outside the institutional framework had and has. They will not be able to exploit their fund of cooperation will and ability as fully and go as far as a self determined and homogeneous group of member states can. As a consequence there will be no comparable functional challenge to the EU's authority from outside the Union forcing it to catch up or do better. With such initiatives already inside the EU the step of full communautisation of these initiatives, which incidentally deepens the integration of the Union as a whole, is not equally urgent. The negative effects of deepening internal divisions and reducing the efficiency of an established decision-making process accepted by all, are often feared to be greater.

Acknowledgments and caveats

Acknowledgments:

This introduction begins with an expression of gratitude to all those who have cooperated in making these hearings possible and who have participated in questioning six European governments and the European Commission on flexibility after Amsterdam. This gratitude is extended to the seven institutions which organised and financed these hearings and in particular to the contribution made by the European Commission. This thanks also goes to the eleven well-known experts who participated in this project throughout 1998, and in questioning the government officials and parliamentarians in seven European capitals. Last but not least, we have to thank those ministers, officials and parliamentarians who were willing to expose themselves to questions on an issue, on which to a great extent their own governments had not yet definitively reached an official policy line.

This report was written by Christian Deubner. Special acknowledgment must be made of the invaluable aid which he received in this work from the following members of the panel of experts: Andrew Duff, Claus Dieter Ehlermann, Jörg Monar, Alexander Stubb, and especially Eric Philippart.

Caveats:

The views expressed in this report commit nobody other than the author himself.

Two difficulties need to be mentioned.

The first difficulty was to take into proper account the political developments which arose during the thirteen months in which the hearings were held and work on the report concluded. After all, the hearings began in January 1998 and ended only in December of that same year. Most important perhaps during this period was the fact that the German government, which had co-initiated and energetically pushed the new flexibility project of 1997, was voted out of office. Some of the new government's views on the subject differ. For instance, the caution of the old government on enhanced cooperation in the field of economic and social policy has almost disappeared and given place to a very positive attitude. In a more general sense expectations concerning the perspective of enhanced cooperation seem to have diminished within all governments.

The second difficulty was to properly separate the presentation of the *factual evidence* in the First Part from that of *interpretation* in the Second Part. To present the facts in an ordered way has entailed using a measure of interpretation, chosen to be as general and consensual as possible, but which reflects the preferences of the author which may be open to criticism.

Part one: The Factual Evidence

I. General Aims

The aim of this project is to give European decision makers and politicians a better understanding of the potential of the new 'enhanced cooperation' among EU member states, and to find appropriate ways of handling this instrument, in the light of the changes made by the Treaty of Amsterdam. With this aim, Stiftung Wissenschaft und Politik, together with five other policy research institutes and the forward studies unit of the European Commission, organised six hearings with national parliamentarians and government officials responsible for European policy in The Hague, Bonn, Rome, Madrid, Copenhagen and Warsaw, as well as a seventh with the European Commission in Brussels, between January and December 1998. A group of experts from seven European countries conducted these hearings, and the aim of this final report is to present the results, synthesise them and attempt an initial evaluation.[1]

1 For the names of the experts and the officials and parliamentarians who were interviewed, see the annexes. The following general report is based on the notes taken by the author and by Mr.Thomas Schiller, and on the individual reports on each of the national hearings, produced by the participating institutes:

- Flexibility and strengthened co-operation in the EU since Amsterdam, Report on the Dutch hearing, The Hague, 27 January 1998, by Dr J. Rood (The NetherlandsInstitute for International Relations, Clingendael), on behalf of DIA, Amsterdam
- The German Hearing on Enhanced Cooperation in the EU after Amsterdam, Bonn, 17 February 1998, by Christian Deubner and Thomas Schiller, SWP, Ebenhausen
- A More Flexible Europe; Italian Perspectives, Report on the Italian Hearing on Enhanced Cooperation in the EU, 27-28 March 1998, CeSPI, Rome
- Flexibility and Enhanced Cooperation in the EU: A Spanish Vision. Summary of the hearings in Madrid on May 25th and 26th, 1998, by J.M.Beneyto, Fundación BBV, Madrid
- The Copenhagen Hearing on Flexibility/Enhanced Cooperation in the EU, 30 September 1998, DUPI, Copenhagen
- Flexibility in the EU from the Polish Perspective, Warsaw, 1 October 1998, Excerpts from the Hearing protocol, CIR, Warsaw
- Enhanced Cooperation and Flexibility after the Amsterdam Treaty. Hearing with the European Commission, 30 November/1 December 1998, notes by Thomas Schiller.

II. Questions Asked

1. Treaty Clauses and Early Debate

The organisation of the hearings and the kinds of questions asked derived from the organisation of the new clauses of enhanced cooperation in the Treaty of Amsterdam itself. The treaty introduces a (new) general clause (Art. 43--45 TEU) on the establishment of closer cooperation, inserted as the new title VII in the common provisions of the TEU. It then added two specific clauses on establishing closer cooperation in the TEC, which concerns the first pillar (Art. 11), and in the TEU on Justice and Home Affairs, which concerns the third pillar (Art. 40). Negotiators and academics have agreed to call this the "enabling" method of closer cooperation.

CFSP in the second pillar was originally also considered by certain member countries as a candidate for possible closer cooperation.[2] But very soon into negotiations it became clear that this was unacceptable to a number of other member states so the second pillar gained only a 'negative' way towards closer cooperation, in the form of the so-called "constructive abstention", a qualified abstention clause in Art. 23, par.1 TEU, permitting member states to stay out of foreign policy measures decided by the others, eo ipso making a closer cooperation group out of those, for that specific policy. Here, the widely accepted term is "case-by-case" flexibility.

Finally, the member states which wanted to strengthen EU competences pertaining to the free movement of persons inside the Union and which therefore pressed for the transfer of the Schengen acquis into the treaty system, against the resistance of the UK and Denmark, decided hic et nunc on creating a closer cooperation group (under Art. 43 and 40, TEU, and 11, TEC) for this reforming project thereby excluding those two member states and the Republic of Ireland. Here, "predefined" flexibility has become the generally accepted term.[3]

Common to these new Amsterdam Treaty options of entering into and implementing flexibility or enhanced cooperation is that they are explicitly authorised by the member states and that they happen within the institutional framework of the European Union. Meanwhile scientific research has analysed them from different angles and accordingly come up with a number of important differentiations in terminology.[4] For the sake of simplicity, the different options discussed in the following text will nevertheless all be called Institutional Enhanced Cooperation or IEC. This text will give a detailed introduction to each of them to enable the reader to

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2 Alexander Stubb tells the story in his account of the genesis of 'flexibility' in the intergovernmental conference of 1996-7, a Finnish diplomat who was present at the creation, cf. Dissertation in annex.

3 Evidently, EMU's third stage is closer cooperation of the same kind, decided by the IGC of Maastricht.

4 All of the experts who conducted the hearings have contributed to the scientific effort of understanding and interpreting post Amsterdam Flexibility. Cf. the short bibliography in the annex.

identify each category for comparison with their treatment in the work of other authors.

Enhanced cooperation already existed before Amsterdam in an unregulated form outside the institutional framework and it survives after Amsterdam. For the sake of simplicity, and to mark its important difference to IEC, it will be called Free Enhanced Cooperation or FEC.

Now and then the text will also speak of enhanced cooperation in a generic sense, without further specification. This will be meant to include both basic categories, IEC and FEC. In any case, the positions articulated at the hearings frequently referred to the system of analysis and doctrine evolving around the new flexibility. Therefore the presentation of results often takes the form of a commentary on this body of analysis and doctrine.

A number of questions were immediately asked by all the observers.[5] Condensed into just four, they comprised the following:

1. Whether and in which fields and circumstances these new clauses are likely to be utilised in addition to or instead of the existing mode of enhanced cooperation,

2. Whether therefore the face of enhanced cooperation itself will actually change,

3. Whether the effectiveness of reinforced cooperation can change or be improved,[6]

4. And whether its meaning for the integration process altogether will change.

As the expert team wanted to analyse the enhanced cooperation clauses of Amsterdam in the context of pre-Amsterdam flexibility, it did not want to exclude EMU, the enhanced cooperation in monetary policy which the Maastricht treaty had already transformed and drawn into the institutional framework. The procedures, institutions and the scope of EMU were substantially increased and modified during the run up to and at Amsterdam, further increasing the weight of enhanced cooperation in monetary policy. Therefore, even though EMU is absent from the new enhanced cooperation clauses of Amsterdam, it occupied an important place in the programme of the hearings and it figures in this report. It is classed with the cases of pre-defined IEC.

This treaty structure and this early debate largely defined the way in which the team of experts chose the member state administrations it wanted to hear, and together with the participating institutes, the way to organise their hearings with them.

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5 Cf. the bibliography in the annex.

6 „Improve" is here meant in a purely technical sense: Can it be plausibly demonstrated or argued that IEC is more effective than FEC in reaching the goal of successful Enhanced Cooperation in a given policy field, among EU member states (in terms of investment of time, other resources, goal attainment)?

2. Choice of Institutions to be Questioned

a. Member State Governments and Parliamentary Assemblies

At the root of new enhanced cooperation as an institutional approach to the accommodation of differentiation in the EU, lie member state governments with their specific interests in future European integration. The choice of the five member countries to be visited resulted from the impossibility of interviewing officials in all member states, and from the wish to represent at the same time most of the different sensibilities and attitudes adopted vis-à-vis the new rules. Differing traditional approaches to European integration were to be present, as well as basically different objective situations regarding the EU. In that sense, Germany, Italy and the Netherlands represented the founding member states, with high, if differentiated, levels of economic competitiveness, socio-economic development and political stability. Germany and the Netherlands represented a large and a smaller example of north-western states, Italy the southern European type. Spain and Denmark represented the more recent entrants, again from the North and the South, again of very different size, and still further apart in terms of development and competitiveness. They also hold very different attitudes to the instruments and finalité of the politics of integration. Finally, Poland was chosen to illustrate the perspective of a central European candidate country on new Amsterdam style flexibility in the EU.

b. The European Commission

The European Commission was included for a number of reasons:

The major innovation of the flexibility clauses of Amsterdam is that enhanced cooperation can now be conducted within the institutional framework of the European Union. Member states going in this direction can avail themselves of the institutions and procedures of the Union to further their common enterprise and can profit from its status as a Union policy. The operational cornerstone of Union institutions and at the same time the strongest and most influential service agency is the Commission. The new flexibility clauses of the Amsterdam Treaty also sketch out certain procedural innovations for it. Its potential contribution to enhanced cooperation is therefore of enormous interest to member states.

As it watches over the full observance of Community rules the crucially important service contribution of the Commission comes at a price. In Amsterdam style flexibility, within the first pillar, this position is additionally strengthened vis-à-vis those member states wanting to start an enhanced cooperation initiative together. As arbiter and gatekeeper, the Commission decides whether initiatives will be authorised and can start. It will decide if and which conditions have to be observed and which member states may later accede to groups of enhanced cooperation. For member states interested in entering into such initiatives in the first pillar, greater understanding of the Commission's intentions for handling this far reaching responsibility is therefore of great importance.

Even if the Commission's powers as arbiter and gatekeeper of enhanced cooperation are much weaker in the second and third pillars, its contribution to the creation and implementation of Union policies within these pillars is also important enough to merit special regard.

All member state officials and the Commission were interrogating themselves on the effects which the introduction of enhanced cooperation IEC style would have on the European Union's structures and basic character. As the Commission is in an operational sense the central and most important of the supranational institutions of the Union, the development of the Commission's role in IEC would appear to be a good indicator of how the European Union develops as a whole.

3. Thematic Organisation of the Hearings

As a consequence of what has been stated above, the organising institutes, member governments and European Commission easily agreed on a basic plan for their hearings. These were to be organised around the perspectives of closer cooperation after Amsterdam, looking at each of the three pillars, and putting Amsterdam type flexibility (i.e. in implementing the above clauses) into perspective by embedding it into the negotiating and decision-making system among EU member states with certain consideration also to be given to the older types of flexibility. It was also an attempt to give a more general official appreciation and evaluation of the role of flexibility in the EU in the light of the changes made by Amsterdam. Thus, a typical programme for the hearings looked like this:

Table 2 – Typical Programme of a Hearing

Italy's view of a flexible Europe
Opening Speech: Piero Fassino, Undersecretary of State, Foreign Affairs Ministry
The Legacy of the Amsterdam Treaty Silvio Fagiolo, Chief of Staff of the Foreign Affairs Minister
The future of Enhanced Cooperation Giovanni Battista Verderame, Directorate General of Political Affairs, Foreign Affairs Ministry
The Parliamentary debate (one-two members of Parliament)
Economic policy and flexibility
Introductory Remarks: Roberto Pinza, Undersecretary of State, the Treasury Roberto Nigido, Diplomatic Adviser to the Prime Minister
One official of the Bank of Italy
Scenarios for foreign and security policy
Introductory Remarks: Giampaolo Di Paola, Chief of Military Policy General Office at the Italian Defence General Staff Alessandro Minuto Rizzo, Diplomatic Adviser to the Defence Minister
Officials from the Foreign Affairs Ministry
Italy's views of the European area of freedom, security and justice Opening Speech: Giorgio Napolitano, Minister of the Interior
Flexibility as an instrument for common immigration and asylum policy Guido Bolaffi, Department of Social Affairs, Office of the Prime Minister
Flexibility and police cooperation against organised crime An official of the Ministry of the Interior
Fabio Evangelisti, Chairman, Committee for the monitoring of the Schengen Agreement implementation.

III. Answers Given by National and EU-Parliamentarians and Officials

In presenting the results of the national hearings a short introduction to each mode of enhanced cooperation will be given. These introductions, as well as other interpretative or explanatory text paragraphs of the author, are clearly discernible from the account of the hearings themselves. Spacing of lines is narrower, the text is indented.

But the description of treaty changes only has a subordinate place in this report which is aimed at readers who are familiar with the Amsterdam treaty. Therefore with regard to each of our options, we are primarily interested in the interpretations, expectations and value judgements coming from the officials and parliamentarians who were interviewed.

1. Order of Presentation: From the Apparent to the Speculative; From Immediate Legal Obligation to Possibilities of New Behaviour

During the European Commission hearing, one of its legal counsellors insisted on separating the immediate legal obligations of the Amsterdam flexibility clauses from what he called speculation. In deciding on the structure of the report this objective has been taken to heart. The report will therefore address the different legal options of new enhanced cooperation after Amsterdam, beginning with the option which appears clearest, most certain, apparent and most consensual, and ending with the one which remains least clear, most speculative and most contentious.

These criteria suggest a series of subchapters, beginning with one on the immediate *effects* of *legal obligation* under the new flexibility clauses, and ending with one on the more *speculative questions* about the *possible fields*, *extent of their utilisation* and their *effect on the integration* process.

Within each subchapter, a similar order will be observed. The 'Legal effects' subchapter for example, will begin with those instances of closer cooperation which are already *predefined* by the Amsterdam treaty, and pass on to those new clauses which leave the initiation of closer cooperation in the new mode to the initiative and additional political effort of the member states. These are likely to be the *case-by-case*, and the *enabling* methods of closer cooperation established by the new treaty.
The order of presentation chosen for this report deviates from the more familiar one of starting with the 'enabling' mode of enhanced cooperation as the most important of the new options. When Germany and France launched their initiative on a new form of enhanced cooperation in the EU, it was in fact the enabling type which they had in mind. This is reflected in the three principal clauses introducing "enhanced cooperation" into the institutional framework of the EU which only speak of the enabling mode. This is certainly also the most innovative and controversial form which enhanced cooperation can take. In political terms it also remains the most dynamic and interesting for one simple reason. Contrary to the large field of predefined IEC resulting from Amsterdam (and Maastricht, as will be seen), the enabling option relates to decisions which are still to be taken. The contest of

positions therefore is not only one of interpreting a framework already established (important as that may be), but of assembling political coalitions for future battles on the internal power structure of the Union's decision-making including each member state's position in it, as well as on the concrete issues which may become subject to decision-making in this modified manner.

Therefore our order of presentation requires a few words of explanation. To summarise, the enabling mode of new enhanced cooperation Amsterdam style is the most dynamic one, it also appears to be the most difficult to launch.[7] Being the most difficult it appears also from the outset the least imminent mode of IEC to be reckoned with. This assessment will be born out by the testimonies of government officials and parliamentarians. To an extent, the future development of the enabling mode also appears to be the most open and uncertain in comparison to the other options. It seems only fitting that the part of the report which examines the perspective of future developments in EU policymaking in all its controversy and uncertainty should come at the end.

2. Legal Effects under the Amsterdam Treaty

a. Predetermined Results as of 1998/9

(1) Free Movement of Persons, First Pillar

The concentration of civil justice cooperation under the community regime in the first pillar was the most important achievement of Amsterdam. This involved the transfer to the first pillar of a body of rules on the free movement of persons which had already existed in the relevant section of the third pillar. This comprised visa, asylum, and immigration policy, and other aspects of the free movement of persons. The second and even more important body of rules on this and related issues had been established outside the Treaty system proper by the signatories of the Schengen agreements. The member states decided to incorporate this body of law, now designated as the "Schengen acquis", into the EU and also in a subsequent step (through a procedure called "ventilation", carried through by the Council) to decide on the definite position which every part of this acquis should take within the Treaty (TEU Protocol No. 2, Art. 1 and 2). One possible consequence was that different parts of this acquis could be judged to belong to different pillars, namely the first and the third; those parts which could not be clearly ventilated, would definitely find their place in the third pillar. An important piece of information concerns the role played by the prospect of eastern enlargement. Testimonies of IGC participants at different hearings clearly showed that eastern enlargement of the Union had been the most important reason for the incorporation of the Schengen acquis into the Union. The body of common rules concerning the entry of non-EU citizens, immigration and asylum, which had been developed in the 3rd pillar, and the freedom of movement of persons between member states, together with a system of compensatory measures on

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[7] It requires the premeditated conception of new policies among a group of member states, their willingness to insert this new policy into the institutional framework and implement it there (and to refuse the easier way of free Enhanced Cooperation, FEC), against the resistance and at best passivity of the other member states, and at worst risking a veto.

the external borders as a principal product of Schengen, were to be made parts of the acquis. In this way, new entrants from the East would have to fully assume this whole body of law, which protects the Union from fragmentation on its most sensitive geographical flank, the East.

While the United Kingdom, taking Ireland with it, did not want to be drawn into the Schengen system by virtue of its inclusion in the EU Treaty, Denmark did not want to become subject to Schengen in the legal forms of the first pillar. As soon as parts of this acquis are transferred or "ventilated" to the first pillar and become Community law, *Denmark* will therefore drop out of this legal frame as well. Denmark accordingly has a special procedure for adopting amendments of the Schengen acquis in the first pillar, as Danish national law. Legal obligations between Denmark and the EU resulting from this process will not come about under EC law but only under international public law. These three member states therefore remained outside most of this new common policy of the EU concerning both, the former civil justice matter from the third pillar, as well as the Schengen matter newly integrated into the Union or at least its implementation in the first pillar whilst letting the others advance. They do however maintain a right to a partial or complete opt-in into the different parts of the new free movement of persons policy of the EU (TEU Protocol No. 2, Art. 4 and 5; Protocol No. 4, Art. 3ff.; Protocol No. 5, Art. 7).

Under these conditions, enhanced cooperation according to the new Amsterdam enabling clauses was chosen as the legal instrument to permit the adherents of Schengen to implement and further develop that acquis inside the institutional framework of the Union. The relevant protocol authorises them to form a group of enhanced cooperation utilising these new clauses of the Amsterdam Treaty to implement their existing cooperation within the new framework. To this extent their enhanced cooperation will obey the rules established by the enabling clauses, but is already pre-defined by the Treaty.[8]

In the remaining free movement legislation as well, enhanced cooperation in the first pillar for the same group of participants is pre-defined, albeit not by a comparably explicit authorisation, but as the result of the three opt-outs (Protocols Nos. 3 to 5) given to the UK, Ireland and Denmark.

Finally two non-member states, Norway and Iceland, which are already associated with the Schengen group and linked to the Scandinavian EU member states in the Nordic Passport Union, will also be associated in the implementation and further development of the Schengen acquis. According to the opt-outs for the UK and Ireland in this area, a special regulation will be formulated for their relationship with the two Scandinavian non-member states (TEU Protocol No. 2, Art. 6).

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8 The „signatories to the Schengen agreements, are authorised to establish closer cooperation among themselves within the scope of those agreements and related provisions, as they are listed in the Annex to this Protocol, hereinafter referred to as the "Schengen acquis". This cooperation shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community", protocol TEU, No.2, Art.1.

(a) Free Movement Legislation Transferred from the Third Pillar

Enhanced Cooperation in this domain is the most visible and likely to be used of the different categories which figure in the new treaty. On this subject, the treaty leaves national integration policies the least autonomy (whereas for Schengen the ventilation process gives them the time and the opportunity to modulate the degree of its communautarisation). It has already been stated that IEC is prescribed here by the protocols and the different kinds of opt-outs which they give (UK and Ireland on border control (No. 3), the UK and Ireland on title IV (No. 4) and Denmark (No. 5)).

The opinions of the officials and parliamentarians questioned were in general very similar concerning the legal effects and their merits in that they thought a very complicated system would arise. For the most important measures regulating free movement concerning visas and migration and for legal cooperation in civil cases it would never be possible to work simply among all fifteen member states. Instead, the treaty already prescribed that policy would have to be drafted with twelve, thirteen, fourteen or possibly, depending on the positions of Norway and Iceland, sixteen countries. *Danish* officials emphasised their intention to stick to the Danish opt-out, including non-participation in the financial consequences of the new title (TEU, Protocol No. 5, Art. 1-4).

The officials and parliamentarians interviewed were of one opinion in saying that this fragmentation of EU policy on free movement of persons was unfortunate and undesirable. In fact, the *Spanish* government declared having wanted to scrap the third pillar altogether and have a completely new common policy on freedom of movement incorporating Schengen. Amsterdam was considered only second best. Nevertheless, all officials and parliamentarians questioned supported the strategy of enhanced cooperation in this field; the opt-outs of the UK, Ireland and Denmark were the price of this policy's inclusion and communautarisation.

(b) Schengen

With the exception of the *Danes,* the officials and parliamentarians declared themselves in favour of a complete transfer of Schengen into the EU. A first important result of the hearings was that a large consensus became apparent among the participants concerning the aim of 'ventilation' of the complete or almost complete Schengen acquis into Community law (in the *first pillar).* Despite the risks of fragmentation, they considered this transfer even less avoidable (an "overriding necessity") than that of the former third pillar elements, because the continuing existence of Schengen outside the Treaty was thought to jeopardise the development of a coherent policy on free movement of persons inside the Community pillar of the EU. On all of this, there was no difference of opinion among the government officials and parliamentarians interviewed.

Danish officials strongly confirmed the specific position of their country. As to its special procedure for adopting amendments of the Schengen acquis in the first pillar, as Danish national law, they were as yet unsure exactly how it would function, especially in those areas where Denmark would decide *not to follow* the further development of the acquis within the first pillar. An important commentary on this issue emerged from the hearing at the *European Commission* whose officials predicted that Denmark, being particularly closely bound to other full Schengen

acquis members in the Nordic Passport Union, would not be able to exploit its opt-out for any substantial divergence in freedom of movement policies.

The only really controversial point in the hearings on Schengen flexibility concerned the modus of "ventilation" for the different components of the acquis. Ventilation taking place by unanimous decisions of the Council would open the door to additional, case-by-case unilateral conditions. In a number of hearings, Spain was said to exploit this possibility by making a sine-qua-non out of the acceptance of its position on the status of Gibraltar vis-à-vis the UK, thereby seriously impeding the ventilation process. *Spanish* officials did not deny this, but specified and justified these special conditions and sought to minimise the negative effect this might have on the ventilation process.

An interesting aspect was constituted by the external relations of the Schengen group. Would its institutional make-up enable it to conduct such relations? Would they be possible under the post-Amsterdam conditions? German officials insisted on the great interest manifested by third countries to enter into contact and cooperation with the Schengen group, which had led to successful cooperation, the Schengen group giving priority to groups of third states, especially the candidates for EU accession. There had been no Schengen-specific institutional or procedural impediments to this kind of international cooperation. But in fact, its functional capacities had been too limited to give more and more positive reactions to that kind of external demand.

(i) The Potential Fragmentation of the Schengen Acquis

The *distribution* of important components of the Schengen acquis *between the two pillar*s (1st and 3rd), expected as a possible result of ventilation, was feared to subject their future evolution and their application to different legal regimes, thereby fragmenting a body of rules previously considered to be a coherent whole by most governments questioned. This elicited sentiments of regret, especially from the home affairs officials questioned, who had been masters of the creation and implementation of the Schengen system in its original form, and been most affected by its unexpected transfer from their own into Union-competence at Amsterdam.

Additional fragmentation was feared from the new options of *differentiation within the two pillars* through the opening up of the Schengen acquis, formerly *fully* shared among its signatories, to full or partial opt-ins or à la carte participation, as well as the application of the new flexibility clause in the *third pillar* on the one hand, to the whole policy of free movement of persons in the *first pillar* on the other. One case in point was the British interest in a partial opt-in into Schengen (for example, regarding the Schengen Information System). Given the already high degree of predefined fragmentation which had been the condition of getting Schengen into the Treaty, further differentiation in this second sense was considered neither necessary nor desirable by the majority of officials and parliamentarians. Especially in *Germany* and the *Netherlands* they were concerned to have the broadest and most coherent common policy in Justice and Home Affairs (JHA) for the EU. Officials of both countries showed themselves averse to pursuing differentiation.

Testimonies of IGC participants at different hearings clearly showed that eastern enlargement had been the most important reason for the urgent incorporation of the Schengen acquis into the Union. The body of common rules concerning the entry of non-EU citizens, immigration and asylum, which had been developed in the third

pillar, and the freedom of movement of persons between member states, together with the system of compensatory measures on the external borders as a principal product of Schengen, were to be made parts of the acquis. In that way, new entrants to the Union from the East would have to assume the body of law in full. This was meant to be an explicit instrument to protect an important field from the temptations of opt outs, and this meant from a split, which its rigours could awaken in the aspirant members. Having attained this goal, interest in the implementation of IEC in this area was replaced by that of preserving the full unity of this acquis and its assured implementation in the EU.

The *Italian* and the *Spanish* governments appeared to share this concern. In spite of this they demonstrated a more positive interest in developing further the policies of freedom, security and justice in the new IEC clauses in the JHA field.

On this general line, *Spanish* officials introduced a condition of their own, ruling out application of IEC in the first pillar, but foreseeing it in the third. For the Schengen acquis in the first pillar, FEC was the declared Spanish preference. *Polish* officials did not give clear preferences but their general line on the issue of freedom of movement would seem to suggest that they would defend a Schengen application area which was as inclusive as possible.

(ii) Conditionality

Conditionality: A politically (and legally?) difficult point concerned the *conditionality* governing the inclusion of member states into the *application area* of Schengen (in which there are no border controls for persons travelling from one member state to another), a step which had not been identical with becoming a member of the Schengen Convention. Conditionality appears especially interesting because the "*ability*" to participate had figured prominently in the first texts introducing flexibility to the IGC, even though it disappeared from the final treaty, and because the most successful IEC and FEC projects to date, EMU and Schengen (area of travel without border control), both had a strong element of conditionality.

Conditionality for the Schengen application area concerns the detailed agreement among the Schengen Convention signatories, that they will not accord the mutual removal of border controls to the interested member state, unless it fulfills a number of conditions (the so-called compensatory measures) primarily concerning the control of its external borders. In a way, this is FEC inside IEC. The governments questioned showed very different attitudes vis-a-vis this conditionality.

The *German* officials considered it essential to assure the proper functioning of the Schengen system, and very strongly defended the right of the future Schengen group inside the third or first pillars to continue this conditionality. *Italian* officials also declared themselves in favour of a strict application of this conditionality to the new EU members due to come in from central Europe. A very high ranking Italian representative did however firmly insist that such a conditionality be an "objective one", based on objective, measurable parameters, and "not subjective and arbitrary".[9]

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9 Prior to this, he had complained about the 'unfair' and arbitrary demands which other members of the Schengen application group had made of Italy, which signed the convention in 1990 and was only granted full application in 1998. One cannot help but think of the Italian experience in EMU,

On the other hand, the hostility shown by *Polish* officials against any informal cooperation of this consequential type appeared to derive clearly from the perspective of evaluation according to overstrict criteria and hence possible exclusion from this application area of Schengen.

Among the fifteen current member states the conflict over this question may soon become a moot point. Negotiations between the Schengen application group and Greece on including that country into the area are now well underway. This will be the last member of the Schengen convention to accede to the application area. Will conditionality still be upheld here as stiffly as vis-à-vis Italy? Will it still be, can it still be, "conditionality", after practically every other member state which has the option, has also in fact been granted the right to be in?

Discord might in fact erupt again only after enlargement, when the full extent of the assumption of the Schengen acquis, as a condition of entry (TEU Protocol No. 2, Art. 8, and Annex), is determined for the new member states. This will have to include the whole body of obligations and their effective implementation. Will this implementation – and not just the signature under the Schengen agreements which all present Schengen members started with – therefore be a precondition for acceding to the EU in the first place? This question was asked by certain well informed national participants of the IGC presented in the hearings. Or can one speculate on a kind of EMU model which makes the entrants members of this policy from the beginning, but gives a special derogation to those who cannot materially fulfill this conditionality, and obliges them to cooperate fully as soon as they are able to do so.[10]

(iii) The European Commission

The European Commission presented no specifically divergent interpretations of Schengen or the general freedom of movement title. Looked at from the Commission's perspective and compared with the former state of affairs, the transfer of Schengen into the Treaty system at Amsterdam brought a clear improvement despite some remaining imperfections. However these imperfections, resulting for instance from the opt-outs, were seen to affect not so much the new system as a whole but rather the respective member states. Like the national officials, those of the Commission found the ventilation process of the Schengen matter between the third and the first pillar to be a veritable minefield. Again, it was not the existence of enhanced cooperation which affected the system negatively, but rather the modus of the ventilation (cf. above for the member states).

The problem most on the mind of Commission officials responsible for the domain of free movement of persons was directly linked to the Commission's most important competence in integration politics, the monopoly of initiative. They were concerned

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the other closer cooperation project with conditionality, which took place in the same period and in which the same kind of complaints were heard from Italy.

10 A precedent of another kind, to enforce conditionality in the old Schengen area, was the reintroduction of border controls against a full member of the application group, when its implementation of the rules was considered insufficient. This was what France did against persons arriving from the Netherlands, on the grounds of Dutch drug policy which was considered too liberal in France.

about being compelled by the Amsterdam Treaty to share the right of initiative with all fifteen member states in the third pillar (Art. 34(2) and 42 TEU), and for five years in the first, concerning free movement of persons, and in particular concerning visa, asylum and immigration (Chapter IV of the TEC, Art. 67(1)). According to a responsible official, this introduced a kind of "inherent flexibility", which could provoke very awkward differentiation even at the stage of initiative. Did member states really want this?

In exercising their role as guardians of the Treaties vis-à-vis the ventilation of the Schengen acquis matter, Commission officials acknowledged their limits. They recalled their initial opposition to this method, itself the result of a compromise. Answering concrete questions on this point, which referred to the institutional unity of the pillars to suggest an appeal to the European Court of Justice if the ventilation into the first pillar failed, they did not see any possibilities. In that case, the whole Schengen matter would have to remain in the third pillar, as prescribed by the Treaty in Protocol No. 2, Art. 1.

The role of the Commission in external relations (cf. also the member states) was alluded to in asking, who the Commission would actually represent vis-à-vis third states in the policy domain of free movement of persons and judicial cooperation. Would this be only the enhanced cooperation group(s)? Concerning the first pillar, officials stated that international relations in this domain would be conducted by the Commission according to Community law, even though it did expect opposition from certain member states. As to JHA matter in the third pillar the EU had no means to handle international relations with third countries.

(2) Predetermined IEC in the Maastricht Treaty: EMU

(a) Introduction

EMU has been absent from most studies of new enhanced cooperation post Amsterdam. Therefore this part of the report begins with an introduction to EMU-enhanced cooperation which is richer and more detailed than in the other cases. Every government questioned seemed conscious of the fact that the 1992 Maastricht Treaty contained pre-defined enhanced cooperation in a number of important monetary policy and related fields. *Commission* officials clearly acknowledged this antecedent to Amsterdam flexibility.

When examining EMU, and comparing it to the three new categories of enhanced cooperation post Amsterdam, it quickly becomes clear that it should be classed, like the Schengen Agreement after its integration into the Union, in the category of 'predefined enhanced cooperation'. EMU has had a 'career' very similar to Schengen cooperation. Its predecessor, the European Monetary System (EMS), had also been a cooperation initiative of member states outside the treaty system proper. The Maastricht Treaty did then much of what Amsterdam did to Schengen five years later; it drew the EMS into the institutional framework of the EU and transformed it from an intergovernmental affair into a community one. It also radically changed the monetary system into a true monetary union. The procedures, institutions and the scope of EMU

were substantially added to and modified in the run-up to and at Amsterdam thereby further increasing the political role of enhanced cooperation in monetary policy.[11]

Different to Schengen, the form of monetary enhanced cooperation had already been fixed at Maastricht and as such this made it a precursor to and model of predefined enhanced cooperation under the Amsterdam Treaty. In addition, the Maastricht Treaty did not name the member states which were to take part in the new common currency. It only defined (1) the conditions under which member states would actually be admitted to the common currency and subjected to the monetary policy procedures and (2) the conditions which would therefore also close the door to those countries not fulfilling them, and, therefore, having a 'derogation' (Article 109k of the Maastricht Treaty) vis-a-vis the common policy obligations.

However, the institutional framework and the procedures which determine and constrain the policy behaviour of the 'ins' are so closely defined by the Maastricht Treaty, that those member states which do fulfil the criteria and join behave in a predefined manner and within a predefined framework. This is predefined institutional enhanced cooperation (predefined IEC).

Firstly there are policies managed by the *European System of Central Banks* (ESCB), in particular monetary policy in its narrowest sense. Differentiation inside the institutional framework clearly manifests itself through the division between its two governing bodies. On the one hand, the Council and Executive Board of the European Central Bank (ECB), which manages the common currency and in which only the eleven euro member states participate, and, on the other, a General Council comprised of all member states including those with a derogation for as long as there are non-participants (Article 112 of the EC Treaty; Articles 45-47 of the Statutes of the ESCB and ECB). The latter exercises certain supplementary functions, primarily concerning the management of monetary relations between the 'Ins' and the 'Outs', and the eventual accession of the latter to the euro zone.

Secondly, there are policies managed by the *Ecofin Council*, i.e. the sanctions mechanism in deficit surveillance and control, the international exchange rate policy of the euro (Art. 104 par.9,11; and Art. 111 TEC), and cases of secondary legislation for the euro zone. Here, we certainly have predefined enhanced cooperation but in a more ambivalent and untidy way, as it seems to oscillate between the IEC and the FEC modes, dependent on the exact 'phase' of these policies one observes.

Regarding voting in these policy fields, the case is clear. The member states with "derogations" (not participating in the euro) are not allowed to cast their vote with the others (Art. 122 par.3 TEC), *eo ipso* making *voting* in the three aforementioned policy fields a *moment of predefined IEC* for the others. This corresponds exactly to the Amsterdam clauses for IEC.

But how to prepare this moment *among the Euro-member states*? Can this also be done in IEC mode? The answer is 'No', because *the treaty charges the full Ecofin Council*, and not only the Euro-member states, with the execution of the

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11 The two most important additions were the Growth and Stability Pact and the coordination of employment policies, cf. Treaty establishing the European Community, title VIII.

aforementioned policies, and therefore also with the debate which precedes the moment of voting. In general this corresponds to the IEC clauses. However there was and is a well-founded and irrepressible urge of the euro-member states to reach agreement among themselves on the issues of international exchange rate policy for the euro, or handling the instrument of sanctions, before entering into debate in the full council. They also want to speak amongst themselves about other economic policy questions considered specific to the euro-area.

The way to resolve this dilemma was decided on five months after the signature of the Amsterdam treaty during the Luxembourg European Council on 13 December 1997.[12] It consisted of giving the Euro-member states an exclusive forum of their own, the 'Euro-11' group, which meets regularly before Ecofin meetings to debate problems specific to the euro zone and to prepare euro member states' positions. This solution is a curious hybrid between both IEC (in the first pillar) and FEC, and the predefined and the enabling kinds. In common with IEC the initiating member states have explicitly sought a decision of the Council to go ahead, that has been based on early prodding of the European Commission since 1995, and on its assent, the Euro-11 group unites more than half the EU member states, and regularly invites the European Commission and the European Central Bank to its sessions. But it is FEC, in clearly declaring itself to be an *informal meeting and debating forum*, not a group which becomes fully competent for carrying out EU-policy. It has to share, however awkwardly, control over the aforementioned policies with the full Ecofin Council, which continues to hold formal and institutional competence for them. It is predefined because it is a result of the Maastricht treaty text and a European Council decision about the euro-member states. It is enabling because it was these member states which imposed themselves with their initiative for a separate group with specific competences.

This solution was found amidst the resistance of the four non-euro member states, the UK, Denmark, Sweden and Greece, who wanted to be able to participate in all, even informal, meetings of the Euro-member states at their own discretion, suspecting that topics of legitimate interest to all Ecofin members, such as exchange rate issues, would otherwise be predetermined by this informal group. They had to accept a compromise giving them the right to be informed of the agenda and to raise issues of interest to them in the following Ecofin Council.

The reasons for the hybrid character of this solution lie in the Amsterdam treaty text itself (see above) and in the basic difference between Germany and France over the role of a Euro-11 council. Germany, through its stability pact initiative of 1995, clearly wanted *stability oriented political cooperation*, separate from the Ecofin Council and all temptations of "gouvernement économique", as well as outside the institutional framework "like Schengen"[13]. France on the other hand, wanted an institutional competence for *general economic policy cooperation* among the Euro-member states in the Ecofin Council counterbalancing the ECB. The Florence European Council of 1996, at the instigation of the European Commission, brought

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12 See the reporting in Frankfurter Allgemeine Zeitung, 15.12.1997, and Le Monde, 14.12.1997.

13 Finance minister Theo Waigel in Focus, No. 37, August 1995, pp. 42-44.

the integration of this initiative into the purview of the Ecofin Council and directly linked it to other economic policy coordination tasks. This comforted the French policy line and resulted in reduced interest from Germany. This is basically the form which the Euro-11 took, even though Amsterdam further reinforced the treaty's link between stability and general economic and employment policy. Since then Germany has insisted on its informal character and has resisted all attempts to give it political status and competences of its own, or a role inside EU-procedures. It did not therefore want the Commission to be present and it did not want a formal European Council decision for its creation either. France wanted a more weighty status closer to EU institutions, and has indeed been able to impose her will (smaller countries clearly preferring the inclusion of the Commission), but only to a point. The treaty text could not be overturned.

As for policies in the fields of employment, fiscal policy coordination and harmonisation, other aspects of economic and social policy not already under the control of EMU or internal market legislation, the treaty gives only general rules for multilateral coordination of some of these: economic, since Amsterdam also employment policies (Art. 98-103, 125-130 TEC). Again, these rules demand compliance with the obligation on each member state to report on its economic and employment policies, to debate them in Council and to listen to and take into account the opinion and counsels of the other member states on one's policies. But there are no constraining mechanisms and there is much leeway in the manner to reach the agreed aims. For instance concerning the mode of cooperation which given member states might choose to advance in these fields, and they remain free to do this as long as they do not infringe the treaty rights of the others. This freedom is even greater in related socio-economic and fiscal policy domains. As for the euro-member states nothing hinders them, as it does the others, from entering into grouped cooperation among themselves in their 'Euro-11', or together with others in different constellations, either utilising IEC or FEC modes in order to advance together.[14]

Therefore if monetary policy, and voting on exchange rate policy, the sanctions mechanism within deficit surveillance and control, and certain secondary legislation within the euro area, can be considered *predefined IEC* in the sense of Amsterdam, the debate about these issues and about multilateral economic and employment policy coordination among the Euro-member states can not legally be conceived as anything other than *FEC, albeit in a hybrid form*, half enabling and half predefined. Finally, the whole range of economic, fiscal, social and employment policies which might or might not be related to or motivated by the existence of the common currency appears to be open to *enabling IEC* or to *FEC*.

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14 Quite evidently, the strong legal constraints on IEC in the first pillar will limit the freedom of movement of member states in EMU as well.

Table 3 – Complicated Interplay between IEC and FEC

• the absence of four members from the Euro zone means that the common monetary policy of the ESCB can be classified as IEC • deficit control with sanctions among the 11, exchange rate policy and secondary legislation inside the Euro area, has to be IEC at the time of voting, but FEC during the preparation of decisions, • the relationship with the Euro-Outs is IEC, • deficit control and fiscal and economic policy coordination without sanctions among the 15 *can be* IEC, but *can also be* FEC, • grouped FEC in fiscal and economic policy coordination remains a distinct possibility **Councils** procedure has to be • IEC in deficit control with sanctions, • but can be FEC for other coordination

(b) Member State Positions

The expert group conducted its hearings in 1998 before EMU entered its third phase on 1 January 1999. However, the Treaty of Maastricht and the Euro-11 compromise had already been implemented and agreed on, and the first Euro-member states had been selected by the European Council of May 1998. The Danish hearing took place only after the Euro-11 council had held its first sessions and the ECB had replaced the European Monetary Institute. It was therefore possible to gather initial national reactions to this switch to strengthened enhanced cooperation in monetary and economic policy coordination.

(i) ECB Issues

In the above, EMU policies were subdivided into those managed by the ESCB, the strictly monetary policy part, and those managed by the Ecofin Council, the related policies. If governments' attitudes are now examined, it can be seen that every euro member state government, even those whose membership had been in question and were still suffering from the efforts to meet the membership criteria, placed a high priority on the euro working well and appeared to fully accept whatever IEC appeared reasonable and necessary for this, especially within the ESCB and concerning decision-making and application of rules. This included the resulting differentiation of decision-making institutions and procedures within EMU.

Even though all this had been signed and ratified by *Denmark*, the only non euro member state questioned by the expert team, the reaction from this country was very different. The end of the EMI, in which Danish central bank officials had participated fully in debating and preparing EU monetary affairs, the experience of being relegated

to the general council of the ESCB, while real business now took place in the new ECB council for which they did not even receive the agenda, had a "shock-effect" on them, about which they spoke freely in the Copenhagen hearing. They did not appear to question the justification of these procedures. But the experts sensed, among these high officials, regret about their absence and the wish to participate.

(ii) Council Issues, Euro-11

None of the participating government officials, apart again from the *Danes* and probably also the *Poles*, seemed to consider the question of differentiation at Council level a very serious one. This was perhaps due to the choice of governments questioned and to the fact that experience of the new system had not been gained at the time the first five governments were questioned. But a *certain ambiguity* seemed to facilitate this attitude.

On the one hand, and in their principal reaction, these member states downplayed the role of the Euro-11 group. Certainly in *Germany*, the government of Helmut Kohl, ousted in the October 1998 general election, did not want to accord substantial economic policy coordination or, worse in its eyes, cooperation competences to the EU, whether this coordination was to be exercised by the Euro-11 or by the full Ecofin. They felt vindicated by the intergovernmental conference and the agreements on the stability and growth pact. Officials therefore strongly insisted that the informal and non-obligatory character of debates in the Euro-11 had to be respected; decisionmaking was reserved for the Ecofin Council. The Euro-11 was just a transitory stage and would anyhow dissolve into the full Ecofin when all EU members adopted the Euro. The Euro-11 was not therefore to be considered as an economic government alongside the ECB.

If this served to underplay the issue of differentiation, the Amsterdam European Council on the other hand increased, despite German opposition, the weight of economic and social policy coordination between member states; a fact which was not lost on the German officials. As a consequence, they did show some willingness to utilise the new forum not just for discussing the vote in the Ecofin Council, but also in conducting economic policy coordination between the Euro-member states within the Euro-11.[15] *Dutch* officials had preceded their German colleagues with very similar reasoning. In an important point they alluded to the size of the monetary union in 1999. With almost every member state a member, it was a far cry from the small and homogeneous initial Euro-group that had been envisaged in 1995/6. To an extent inclusive and comprehensive policies flanking it were called for, rather than attempts to devise, via enhanced cooperation, special integration strategies for a small vanguard monetary group. If other governments had always wanted a more activist EU economic policy, even they would appear to have noted the ambiguity contained in the treaty provisions for EMU.

Italian officials seemed willing to imagine tasks for the Euro-11 in an even more concrete form. Could the Euro-11 not give guidance to the ECB on the external value

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15 After the change of government in Germany, economic, social and employment policy cooperation in the Euro-zone has become one of the official policy aims in Bonn, eo ipso increasing the role accorded to the Euro-11 group in preparing relevant decisions in this domain.

of the Euro? Could it not implement fiscal harmonisation among its members, if such harmonisation had been decided on previously in the Ecofin Council?

In *Denmark* the establishment of the Euro-11 council, which now always meets just before the Ecofin Council and in which Denmark does not participate, generated resentment and regret among the officials responsible for this area in the economics ministry. They felt that their influence in the Ecofin Council was being reduced in comparison to the Euro-member states, since having just worked together in the Euro-11, they would hardly start up the whole discussion again in the Ecofin Council. In addition, the Euro-11 discusses all kinds of issues relating to monetary affairs, which concern the non-Euro member states as well.

(a) *The European Commission*

The European Commission's position in policy relating to EMU is not as strong as in the traditional domains of the first pillar. As to the different steps of deficit surveillance and control, to the exchange rate politics of the Euro or international monetary politics, or finally to economic and employment policy coordination (TEC Art. 99, 104 and 111), the Commission does not enjoy the privileged and comprehensive role in Council decisionmaking, which the monopoly of initiative and proposition gives it in most parts of EC legislation. Even so, it has, importantly, a right of regular surveillance and reporting, and on many issues the Council can only decide "on recommendation" (not proposition!) of the Commission, a privilege which it shares with the European Central Bank in exchange rate and international monetary policy. Formal EMU decisions are taken inside the Ecofin Council and it is evidently here that the Commission's institutional position is maximised.[16]

This creates a dilemma with the informal FEC of the Euro-11, which was visible in the hearing. On the one hand the responsible Commission officials advocate the same position as the more prudent governments that the Euro-11 is a simple informal discussion forum. On the other hand Commission officials acknowledge their interest in making Commission opinions known to the eleven and giving them the chance to debate them before moving on to the full Ecofin. But the Commission could not formally present reports or give recommendations to the eleven, as their duty is to the full Ecofin. Even though it has a right to participate in the sessions of the eleven, it has to avoid even the appearance of giving them special treatment. The way that this dilemma is solved is through the Commission regularly passing its opinions to the Economic and Financial Committee in good time before formal presentation to the Ecofin Council. TEC Art. 114(2) gives the Commission ample opportunity to do this. All member governments are represented on the Committee and consequently all of them, including the eleven, have sufficient opportunity to prepare Ecofin discussions in this or other fora. Up to the spring of 1999, the Commission had not seen any concrete reason to exercise its right of recommendation to the Council in the EMU domain. Experience in this field, and in the way it relates to the enhanced cooperation of the Euro-eleven, is as yet incomplete therefore.

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16 The commissioner responsible for EMU, Yves Thibault de Silguy, has already warned against the institutional digression of the Euro-11 group. See Agence Europe, 28.5.1998.

Regarding concrete policy domains lending themselves to enhanced cooperation, Commission officials mentioned fiscal policy coordination, especially in relation to capital gains tax policy. Here, they declared their preference for clear coordination rather than different competing systems, without saying exactly whether IEC would be the instrument of its choice.

(iii) FEC versus IEC

In terms of economic policy coordination, *German* officials favoured autonomous national adaptations of economic policy, which might well advance in parallel among groups of member states resulting from freely agreed coordination not based on IEC. The same pattern was foreseen for other minor initiatives arising in economic or fiscal policy out of the common currency. *Polish* officials in particular seemed hostile to this kind of freedom and would prefer to conduct all cooperation of that kind within the institutional framework where it could be controlled. As to other economic and fiscal policy initiatives flowing from the common currency, *German* officials considered them normal and expected results which could very well be taken care of in FEC as well. This attitude was echoed in The Hague and in Rome with *Italian* officials making the point that the common currency would have to be well established before such initiatives could be considered. Grouped adaptations of national and sub-national market structures could also be included in this vision.

(iv) Economic Issues

Government officials were on the whole reserved when asked if the common currency would necessitate more intensive economic policy cooperation for the Euro-member states than currently planned, because in the Euro-11, itself a kind of spill-over within an enhanced cooperation context, asymmetric shocks could no longer be neutralised by national monetary and exchange rate policies. In *Germany* the finance and economics ministries foresaw a reduction in such shocks as a result of the absence of contradictory monetary policies. As for other shocks, a more flexible EU-wide labour market would be able to absorb and adapt to them more rapidly. No need was therefore seen for additional and restrictive coordination between member states. Enhanced economic policy cooperation appeared to be securely confined to a very limited field.[17] Little thought was apparently given to the question of whether the Euro-member states might need common minimal standards, for example in social or environmental policy, in order to protect their common currency from damaging challenges in these areas.

(a) The European Commission

The European Commission answered this last question in the affirmative finding economic policy coordination in the Euro group insufficiently developed; the Euro-11 was the "first step" and the stability programmes (of the Euro-member states) "one example". A bad policy mix had to be avoided and "genuine coordination" was needed. This was to include the coordination of structural reform policies whilst

17 The German change of government has basically changed this situation as for Germany, the Schröder administration showing strong interest to increase EU-wide cooperation in these areas in 'Euro-land'.

coordination was to be institutionalised more distinctly than was the case within the Euro-11.

Questioned more closely, Commission officials seemed to move closer to governments' prudently reserved positions. For the management of asymmetric shocks, the stability pact appeared to be sufficient enough an instrument after all, whilst symmetric shocks could be handled by a proper monetary policy, eventually to be flanked by better coordination in fiscal policy. For these fiscal policies, the preferred method would have to be "soft" coordination initially by way of coordination in economic analysis among the Euro-member states, which would allow them to make a common appraisal of economic situations as a precondition for voluntary common decisions. There was no way of enforcing common behaviour.

Another economic relationship, that between the Euro eleven and the four Outs, was highlighted by the Commission. If the eleven were to take coordinated structural policy decisions, this would have a knock-on effect on the other four. And as for the external representation of the Euro vis-à-vis the other leading currencies, the two countries participating in the new exchange rate mechanism with the Euro, Denmark and Greece, would certainly be directly affected. The institutional link between Ecofin and the Euro-11 had to reflect this special situation and the Commission would have to see that it was taken account of.

b. New Future Behaviour Made Possible Under the Treaty

(1) Case by Case: 'Constructive' Abstention in Common Foreign and Security Policy[18]

(a) Common Foreign Policy

The post-Amsterdam rules for enhanced cooperation in Common Foreign and Security Policy comprise important elements of pre-Amsterdam FEC among member states and the option of IEC by default, case-by-case, which is offered by the new qualified abstention rule introduced in the EU Treaty at Amsterdam. The continued explicit authorisation of pre-Amsterdam FEC in CFSP is confirmed by the survival of Art. J. 4(5), TEU 1992, under the Amsterdam treaty Art. 17(4). Whereas there is little disagreement about these two elements in CFSP, some doubt remains as to the role of new enhanced cooperation in the enabling mode.

Enhanced cooperation in the enabling mode for the whole second pillar matter has been a principal aim of the IEC initiative by France and Germany since 1995 (Germany having been one of those who even wanted the introduction of QMV in foreign policy questions). This would have implied introducing a special IEC enabling clause into the second pillar, analogous to the first and third pillars, with a QMV triggering mechanism. Today the understanding shared by almost all government officials and by leading experts in this field would seem to be that the UK, followed

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18 Enactment of Conventions in 3rd Pillar Matters can also be considered a case-by-case ECIF, when not all member states ratify. Even so, it did not seem a problematic topic for audited officials and parliamentarians. Here and there, concern was voiced that their implementation, on the other hand, might prove difficult, because of the possibility that the new rules might be differently interpreted.

by the Danes, the Dutch and others, did not want the existing opportunities for FEC in this pillar, which gave them all desired freedom of action to be reduced by subjecting them to the constraints of IEC Amsterdam style. This reasoning and the fact that the second pillar was seen by most as already highly flexible led to the last minute dropping of the proposed enabling clause. The Amsterdam European Council considered this addition as potentially counterproductive in terms of the visibility, continuity and coherence of the CFSP's action.[19] In any case FEC retains a dominant role in this pillar.

But there are dissenting voices, for example in *Germany*, which maintain that because the enabling mode was not explicitly ruled out in the second pillar by the Amsterdam treaty, this mode of enhanced cooperation remains legally feasible for common foreign and security policy. This may be more of a reminder to all concerned that this issue has to be taken up again on another occasion rather than as an interpretation intended for implementation in the future practice of CFSP. In the *European Commission* as well, certain officials appear attracted by an interpretation which states that title VII of the TEU (with the general IEC clause) can be understood as applicable to both the intergovernmental policy fields, including CFSP! (See below).

The treaty of Amsterdam enlarges and differentiates the abstention option in CFSP, which a declaration to the Maastricht treaty had already opened to the member states. This 'standard' abstention has been carried over into the Amsterdam treaty in the new Article 23(1) of the TEU first paragraph. Its second paragraph adds the new option of qualified abstention, also called 'constructive abstention'.[20] Whereas the 'standard abstention' of a member state did not discharge it from the obligation to participate in the implementation of the policy in question, the new abstention option explicitly allows this possibility to the abstaining member state, even though it commands its solidarity with the Union's policy. A grave disadvantage seen by many observers is that this procedure introduces a much more visible split in any foreign policy move of the EU initiated in this manner than simple abstention ever did.

Certainly this is an option of IEC by default. If one or more member states were to avail themselves of constructive abstention from a foreign or security policy decision taken by all the others, they would thereby make a group of IEC out of the remaining

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19 In March 1997, the Dutch presidency had already raised the question of the necessity of 'a further approach to CFSP flexibility, in the light of the possibilities opened by the constructive abstention mechanism, predetermined flexibility and the mechanism to confer certain tasks on some Member States within the framework of a joint action'. Philippart, Eric and Edwards, Geoffrey, "The provisions on closer cooperation in the Treaty of Amsterdam - The Politics of flexibility in the European Union", *Journal of Common Market Studies*, 37 (March 1999) 1, pp.87-108, p.99. See also Stubb, Dissertation in annex.

20 The results of the hearings and scientific analyses appear to concur in finding that this abstention mode does not really merit the qualification „constructive". On the other hand this term has been so widely adopted in the meantime, even in official documents, that this report would risk confusing the reader if it did not use it as well. Consequently, case-by-case Enhanced Cooperation under Article 23(1) TEU will be referred to in this report under the (misleading) term: „constructive abstention". It is understood that this IEC in the 2nd pillar is different from 1st pillar IEC in some very important respects.

members.[21] But frequently, auditioned government officials would not want to call something 'Enhanced Cooperation' which in their opinion was nothing but the modification of a specific decision-making mode, simple abstention having been supplemented by 'qualified abstention'.[22] This view was evident in *Germany*, but also in *Italy*. Both these member states had originally wanted to introduce enabling IEC into CFSP.

Asked for their opinion on implementing this innovative Enhanced Cooperation option introduced in the second pillar by Amsterdam, the auditioned officials and parliamentarians generally responded reservedly.

In these reservations, considerations of *feasibility* mixed with those of a more fundamental nature, namely concerning the *suitability* of this new option. Firstly, member states are considered to be "very rarely, if ever, neutral" or indifferent enough on a foreign policy issue (as *Dutch* officials stressed), to abstain and acquiesce in common foreign policies conducted on behalf of the EU by other member states. One reason for this, to which *Polish* officials drew attention, was that the EU status of any such policy, together with the obligation of solidarity of non-participants might have far reaching consequences in the second pillar, to which even abstaining states might not want to expose themselves. (Compatibility problems with foreign trade competences handled by the Fifteen, within the EC, do not exist, because there, as here, a qualified majority is the minimum needed to go ahead). And secondly, would not the credibility of a common foreign policy line vis-à-vis third countries be seriously damaged if certain (especially larger) member states ostensibly distanced themselves from that policy? Would qualified abstention not become "destructive" for CFSP rather than "constructive" in such cases? Would this not damage the image of EU CFSP in general? The experts sensed a third layer of concern among *Dutch* officials, concerning the smaller state large state cleavage, in particular in the event of large member states pressuring smaller ones to set aside their opposition to a given policy and letting them advance by means of Art. 23(1), which would smack of an unacceptable directoire by the large states.

Certain governments seemed to apply both of these considerations to all kinds of issues for example the *Dutch*, to whom the absence of an EU foreign policy position was always preferable to one only reached by majority via constructive abstention. In CFSP, enhanced cooperation could at most only be acceptable for the stage of implementing policies which had been jointly agreed beforehand, not for the basic policy decision itself.

Other governments differentiated according to the greater or lesser importance of the issues in question. For important foreign policy questions, where diverging national

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21 It merits mention, that the minimum size of such a group is larger than that of Enhanced Cooperation groups in the first and third pillars: Whereas there, a simple majority of member states can go ahead (even though it needs an OK given by qualified majority), in the second pillar this group has to represent at least two thirds of the weighted votes in the council of ministers (Art. 23(1) TEU, second paragraph).

22 This links up, it would seem, with the concern of the Commission that Enhanced Cooperations not be practized in limited cases of EU policies, but only for long range and comprehensive policies.

interests of one or other member state were involved, they also declared that constructive abstention could not be envisaged because of considerations of both feasibility and suitability. For less important and simpler issues, the 'suitability' of constructive abstention only appeared to be a secondary concern for them. On these, *German* officials asserted that an EU majority opinion on a foreign policy question of common interest – even where one or several member states abstained, was always preferable to the cacophony of fifteen individually nuanced national positions. Examples given related to UN voting or cases referring to other action in UN and other multilateral/international settings. Of the governments questioned, both the *Spanish* and *Italian*, but also *Polish* officials, shared this position, preferring a maximum of common actions supported by all governments, but agreeing to constructive abstention, as *Spanish* officials said, "when a majority would be willing to act, so as to get ahead with CFSP."

FEC maintains its place in foreign policy. According to the officials and parliamentarians interviewed, it is granted a wider range than in defence policy (see below). Officials would not contradict analyses of experts demonstrating the range of FEC in foreign policy, especially where it went beyond the level of fully consensual formulation of common principles, or ad hoc declarations concerning minor issues. Examples cited included ad-hoc groups, directorates and contact groups as well as regionally oriented action. Experts predicted that this behaviour was likely to endure.

An interesting debate arose around the question of whether QMV should be introduced in foreign policy questions thereby rendering the utilisation of enhanced cooperation in this pillar superfluous. This debate took its cue from the previous attempt by Germany (and other member states) to introduce QMV in this pillar as the standard method of decision-making for issues of foreign policy. Regret and dissatisfaction about the failure of that initiative remain in Germany, shared visibly by *Italian* officials and politicians, and possibly by others. Tempering these expectations regarding QMV, a very pragmatic position was put forward that even where formally possible, it was unrealistic to think of pushing policies through against unwilling member states by using QMV. This view was asserted by a very experienced *Danish* official on the strength of his long experience in the council of ministers. In the EU, there was no short cut to the search for consensus. The *European Commission* appeared to share this viewpoint. Experience in the second pillar seemed to confirm this for common foreign and security policy; QMV had never been tried since 1992 even where it was possible under the Maastricht treaty. On the other hand consensus very often did not exist, and so joint action would simply often only be made possible after a lengthy search for compromise, or not at all. Or in the mode of enhanced cooperation, this report would have to add.

(b) Common Defence Policy, Including WEU

The new rules also apply to security and defence policy: FEC predominates, constructive abstention is supplementary. Here as in foreign policy, the wreck of the flexibility initiative on IEC looms (see above), in this case supplemented by a project of the predefined kind, the proposal of *Germany, France, Belgium, Luxemburg, Italy* and *Spain* to integrate the WEU progressively into the EU, which foundered on the resistance of the UK and others at Amsterdam. This would have created, in analogy to the integration of the Schengen acquis (but with a longer period of transition), a substantial set of predefined IEC for the EU in the defence sector. Even though the WEU has therefore not been definitely set on the path to become part of the EU, it

does remain, as the Maastricht EU Treaty states in Art. 17, an "integral part of *the development of* the EU". The view that the WEU is an intermediary case is often articulated; on the one hand that it already constitutes to a certain extent EU treaty-bound cooperation among a number of member states (this seemed to transpire out of certain remarks during the Commission hearing), whilst on the other it takes place in a different institutional framework with TEU Articles, protocol and declarations determining the relations between the two institutions [23], and in the field of defence and military related issues in which the TEU takes pains (Art. 17(1),(4), Art. 23(2) and Art. 28(3)) to assert the remaining freedom of member states to cooperate freely. The transfer of the WEU will in all likelihood be brought up again (see the last chapter of this report).

Government officials and parliamentarians interviewed agreed with this interpretation of the set of rules modified at Amsterdam that FEC predominates, constructive abstention is supplementary. Even so, most officials understood that "freedom" of FEC under CFSP could not be read as meaning true national autonomy, for this they saw only a few remaining and increasingly contested 'windows', perhaps in armaments production, trade and procurement. After all, in defence and military policy EU member states are, as a *German* official pointed out, bound by their membership of either both or one of NATO and the WEU. But in the more widely shared reading of being "free" from restrictions posed by the EU/EC treaty, most auditioned government officials considered their alliance policy in NATO or the WEU as being in that class, even more so where NATO and the WEU themselves afford leeway for grouped action under their roof, as the oft-cited 'Alba'-mission of 1997 illustrated, also often called 'ad-hocery'[24],. Officials did not contradict experts demonstrating the many cases of FEC which characterise European security and defence policy in particular (for instance in ad-hoc groups, in directorates and contact groups, in armament cooperation), and predicting that this situation was likely to endure.

Limits to FEC in this sense, were certainly set by officials' determination to protect the credibility and viability of the WEU and especially of NATO, from being put at risk by venturing too far into the field of military ad-hocery and accepted by almost all officials. Accordingly, an outspoken priority was accorded to a functioning

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23 An example of how difficult the exact evaluation in terms of EU Enhanced Cooperation, of relevant initiatives may be, is supplied by the approval in September 1997 by the WEU Council of a harmonization of the EU and WEU presidencies from 1999 onwards. "Considering that five members of the European Union are not full members of the WEU, having the status of observers (Austria, Ireland, Finland, Sweden and Denmark), the WEU Council has decided that: - when the Presidency of the European Union is taken over by one of its ten Member States *ipso jure*, this same Member State will also preside over the WEU Council; - in all other cases, the Presidency of the WEU Council will be filled by one of its ten member countries *ipso jure*, following the current succession of presidencies in alphabetical order in English". This new order of succession applies from 1999 with Germany chairing both Councils for the first semester (*Europe*, n°7062, 20 September 1997). Is this Enhanced Cooperation under EU-terms, not inside the EU but at WEU-level, among those EU member states which are full WEU members at the same time?

24 Antonio Missiroli, Background, in: A.Missiroli (ed.), Flexibility and Enhanced Cooperation in European Security Matters: Assets or Liabilities?, Occasional Paper No.6, of the Institute for Security Studies of the WEU, Paris: January 1999, esp. pp.15 - 16 of his article.

Atlantic Alliance, and its reform, by a number of governments, especially those in *Spain* and *Italy*, but also in *Poland*. With regard to the WEU, the persistence of FEC (ad-hocery) under its roof appeared to frustrate certain governments more than others. The hearings showed this to be the case especially in *Italy* and *Spain* (both of which had supported the integration of the WEU into the EU), whose officials regretted that military actions even of a size which were accessible to the full WEU would still have to be practised within a free cooperation initiative/coalition in the WEU framework. *Spanish* defence officials insisted that enabling IEC for security and defence policy would have been an additional help in disciplining and restructuring the security policy behaviour of member states, even under the WEU.

As to the place of constructive abstention in EU security and defence, the *Dutch* consideration seemed especially well taken, in that it could be one way to implement certain joint actions, which had previously been decided on consensually in the full council.

(c) The European Commission

As to the possibility of making Amsterdam enabling IEC applicable inside the second pillar as well, it has already been stated, that a high ranking official of the Commission put forward an argument along those lines, without though really defending it as a policy line.

The Commission seemed very conscious of the prominent place of enhanced cooperation in CFSP, but one which was not IEC in the Amsterdam sense, but rather "multipoligammic in attitude". There was Europe à la carte, differentiation according to external memberships, for example in the UN security council which is sometimes a powerful temptation for taking distances to a common EU line, in NATO and the WEU, as well as in contact groups. This being as it was, further progress via IEC in CFSP was considered doubtful. Constructive abstention was one instrument to facilitate the implementation of common strategies by the Council. QMV was the next stage, for instance, to facilitate further decisions on joint actions.

In defence policy, the WEU could be considered as an enhanced cooperation group, confirmed by TEU Art. 17 which states that the WEU is an "integral part of the development of the EU". Defence, including military questions, was already in the second pillar, but its full fusion with the EU has not yet been achieved. As all defence initiatives would have to be compatible with NATO, the problem of the different membership of the two organisations posed a problem; NATO having 11 adherents among the EU's 15 members, the WEU only having 10. Here the main problem for an effective enhanced cooperation at least among WEU members seemed to lie in the absence of a homogeneous group among the 10. Member states often took different positions in the EU, the WEU and in NATO. Perhaps there was a chance, given the changing British attitude on this issue that the next important step of European integration could come about here.

On armaments industry cooperation, one important determining factor was the fact that only six member states had such industries.

(2) Enabling

As this report reaches the potentially most dynamic and controversial category of enhanced cooperation under the new rules of Amsterdam, namely the mode of 'Enabling IEC', it is necessary to recall once more the introductory remarks made at the beginning. They also give the reasons for introducing enabling IEC only at this late stage in the report.

The enabling mode of enhanced cooperation is considered to be permitted only inside the third and the first pillars. Its application is subjected to a very large number of stringent conditions concerning the subject matter chosen for cooperation, the procedure for triggering enhanced cooperation, and the decision-making methods of the cooperating group. Of the whole complex of rules governing enhanced cooperation after Amsterdam, these conditions are probably the best known part. Therefore they will not be presented in detail here. We will start instead with the third pillar.

(a) Third Pillar

In the third pillar, the clause explicitly permitting FEC (TEU Art. K.7) was eliminated at Amsterdam. This seems to indicate a prohibition on the use of FEC, and a clear obligation only to use IEC in this pillar.[25] Many government officials were of the opinion that possibilities for flexible integration in the enabling and in the predefined mode are particularly strong in this pillar.

(i) Enabling in Schengen and Related Matter

The *Italian* and the *Spanish* governments welcomed the possibility of advancing using the new IEC clauses in the JHA field in order to develop further the policies of freedom, security and justice. Although *Spanish* officials were much more reticent about applying IEC in the first pillar they explicitly foresaw it in the third.

Danish officials considered themselves fully bound by the provisions of the Schengen acquis as long as they were located in the third pillar. They would participate in their further development and found this pillar more suitable for flexibility than the first.

(ii) Police Cooperation and Judicial Cooperation in Criminal Matters

A common concern for the officials we interviewed, and related to the belief in equality of legal protection for all EU citizens, was the unity of the legal order as an aim for the EU, especially with regard to criminal law. Therefore, grouped cooperation in penal law was to be avoided as far as possible.

Although *German* officials stressed this concern they saw the intergovernmental sector in the (reduced) third pillar as the most obvious candidate for IEC. On the one hand, the danger of citizens' legal rights being infringed could be partially checked via the grouped recognition of ECJ competence for jurisdiction in criminal cases

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25 The officials interviewed appeared not fully certain of the legal meaning of this treaty change. A number of the experts consider however that FEC does indeed remain admissible in the third pillar.

within this field (in fact to be considered as IEC in the logic of this report). On the other hand, there were fields where enhanced cooperation seemed better than no advance at all.

This related to intensified cooperation of judicial authorities and police (for transfer of judicial files and evidence, for facilitating extradition and for easing hot pursuit). Enhanced cooperation on legal proceedings in criminal cases was thought to help in this field. Grouped common work on what the officials called 'legal cultures' seemed to be right as well, in order to find more common ground for punishable offences among member states which are geographically close, for instance on membership of criminal or terrorist organisations or associations. This approximation of material law was considered most difficult, but again, at least among states of the same legal cultures, considered better than nothing, especially if flanked by enhanced cooperation on proceedings with other member states.

For *Spain, Italy and Germany*, enhanced police cooperation in the fight against crime and organised crime was considered both desirable and likely. Spanish officials considered the development of IEC in the area of police cooperation (development of Europol, in particular) to be a possibility.

A very interesting aside was the sentiment expressed by high-ranking police officials in Italy (and known from France as well), that IEC between member governments and ministries should not impede operational flexibility between different national police organisations. Political authorities should be conscious of the fact, that in spite of new institutions the networks of personal knowledge and mutual trust between police forces would remain crucially important prerequisites for successful international cooperation in the fight against international crime.

However, officials in Italy also stressed their interest in seeing this cooperation becoming as deep and as inclusive of as many member states as possible, otherwise organised crime might actually take advantage of the different levels of cooperation and crimefighting in different member state groupings within the EU.

Another Spanish idea to advance via IEC is to facilitate extradition among member states to the point where this would pass in the same way as within one national judicial system.

The *Danish* officials accepted the legal possibilities, but did not see any perspective of actual use debated in Denmark or other member states. It was only in the immigration sector, that related interests existed.

(b) First Pillar

(i) The European Commission

In first pillar IEC, and there only, the Commission holds a uniquely strong position which deserves further explanation (cf. TEC Art. 11, compare also the paragraphs on Schengen above). Not only does it fully play its normal role in the Community process here, but it is also the gatekeeeper deciding on the authorisation of IEC initiatives (11(2)), and on the entry of additional member states to IEC groups including the right to specify additional conditions to be fulfilled on admission (11(3)). Commission officials showed themselves to be fully conscious of the

exceptional powers they wielded in these cases. They justified them by citing the resistance of member states during the IGC to new rules on IEC which would have given members of established groups the right to decide on the entry of others. Schengen was held up as the example not to be followed as it had caused the strongest antagonism towards its self-defined norms of accession and full participation for newcomers.

In this sense, they also seemed decided on interpreting their right of setting further conditions in authorising additional entries to IEC groups in favour of the applicants in order to ensure that the openness of such groups did not amount to empty words.

In its role as gatekeeper in controlling the compatibility of enabling IEC initiatives with the conditions set out in Art. 11, and as guardian of the Treaties in overseeing the proper utilisation of the new IEC clauses, Commission officials demonstrated their willingness to exploit these competences to the limits of their legal and material capacities. They also agreed with the experts that political as well as legal viewpoints had to be included in their judgments.

(ii) Enabling in the Schengen Context and the New Title IV – Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons

Cooperation within the Schengen acquis matter in the first pillar will be IEC as long as the three member states which opted out at Amsterdam do not change their stance. To an extent it is *pre-defined IEC*, but the treaty also opens up this field along with the rest of the first pillar to *enabling IEC,* in which as few as eight member states could participate, through the respective clauses (Art. 11, TEC). Finally, *FEC* is also permitted, a point which we will return to later.

This seems uncontestable, but it has already been stressed that many of the governments interviewed had not really appreciated opening up the Schengen acquis, formerly fully shared among a 'coalition of the willing', to partial opt-ins and à la carte participation, allowed under the predefined form of enhanced cooperation in this field. The *Italian* and the *Spanish,* as well as the *Danish* governments appeared to share this concern. Nevertheless they welcomed the possibility of moving forward using the new IEC clauses in the JHA field, in order to develop further the policies of freedom, security and justice. However as has already been mentioned, the solution preferred by the Spanish for the Schengen acquis in the first pillar was FEC, not IEC.

Even though *Denmark* had opted out of the first pillar vis-a-vis the Schengen acquis, and despite strong overall caution towards Amsterdam style flexibility, immigration officials from the Danish interior ministry were able to imagine three possible areas for enhanced cooperation under IEC. These were minimum standards for provisional protection (new Art. 63,2,a), burden sharing on refugees (new Art. 63,2,b), and harmonisation of subsidiary protection ("everything which goes beyond the Geneva-convention"). In addition they did not seem averse to grouped advances in the control of illegal immigration by means of a system of fingerprinting and of repatriating illegal immigrants.

As to the *European Commission* and its responsibility for evaluating initiatives under enhanced cooperation and in triggering them in title IV of the first pillar, Commission officials thought it important to judge such initiatives not only on their legal but also

on their political merits in the context of integration policy. Concerning this, and other important tasks of the Commission in this field, they explicitly pointed to the limited means and manpower of the Commission, which restrained its ability to fulfill them in a comprehensive manner (this corresponds to the *German* comments outlined above). In exercising their role as guardians of the Treaties, Commission officials showed themselves determined to look out for misuse of the new clauses.

Respect for the aims of IEC was demanded for the JHA field if it was to enable the EU to become one common legal sphere. This aim has in fact encouraged the initiation of IEC.

(iii) Judicial Civil Law Matters in the First Pillar

Officials from the governments that were questioned demonstrated very different attitudes regarding judicial cooperation in the other non-Schengen civil matters which had been transferred from the third to the first pillar at Amsterdam. There seemed to be unanimous agreement that IEC should not be used in the areas of asylum and immigration policy (newly communautised) because this would seriously undermine the effectiveness of any EU action on migration. Again, many of them showed their belief that the unity of the European legal sphere (as far as it exists) should be preserved.

One field considered worthwhile for grouped progress for large parts of the Union were fields of law which were close to the legal matter of the common market. Here, the most positive attitude seemed to exist in *Madrid*. For *Spanish* officials, IEC not only appeared likely, but also desirable, in:[26]

- civil law
- commercial law (a convention on bankruptcy which is expected to be the next case of enhanced cooperation)
- banking law.

Spanish officials attached great importance to progress in EU-wide civil law enforcement, for instance through the creation of a common European enforcement title, and seemed interested in applying IEC to advance in this field as well. They did not however say how and in which legal sector exactly they would want to go ahead.

Other fields of law were considered much less promising because of persisting differences between member states. Even here, *German* officials when pressed to give examples of enhanced cooperation, saw some possibilities. Within what they called the great 'families' of the same 'legal culture' inside the EU differences were often relatively less important, for instance in family law, where the big difference seems to be between the latin and the protestant/nordic 'families'. Although unable to advance at the level of the fifteen, at least the relative closeness within the 'families' could be exploited in trying to extend the common elements of material law, for which IEC might be useful.

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26 We return to these points in the internal market section.

Danish officials reiterated the point that Denmark will not participate in judicial cooperation in civil matters in the first pillar although it will stay at the negotiating table. This alone will make IEC of any decision-making in such cooperation among the other member states and in the application of such decisions.

(iv) Internal Market Matters in the First Pillar

Officials from all member state governments questioned (including *Poland*) shared the consensus that the internal market had to be protected against all initiatives which could endanger the open and level playing field for the free exchange of goods, services and capital, established for all members. All of these officials, therefore, accepted the severe conditions for introducing IEC in internal market matters in the first pillar.

Within the internal market, initiating *IEC in the enabling mode* appears to be regulated, in a way, in the most explicit and most consensual manner among member states, perhaps because it is here that the treaty also establishes its most explicit and restrictive procedure. Not surprisingly, *FEC* was also often invoked by government officials, as an alternative procedure of enhanced cooperation in subject matter pertaining to or immediately affecting the internal market. FEC would have to respect the acquis as scrupulously as IEC in the enabling mode even though it is not subjected to the same set of conditions. Thus even in this apparently so clearly regulated field, different interests and interpretations make for varied and contradictory modes of enhanced cooperation in the future.

One very predominant motivation for favouring FEC in this field was the very complicated and cumbersome nature of procedures following on from the choice of IEC, and the institutional status which IEC would confer on such policy initiatives. *German* speakers wanted, for example, to be able to freely exploit opportunities for enhanced cooperation in the internal market resulting from EMU and its procedures, without making IEC projects out of them each time and thereby also avoiding all semblance of a "gouvernement économique". *Dutch* officials insisted that they wanted to be able to go ahead with grouped cooperation among member states with shared common interests, without having to make community projects out of them each time and therewith implicating the European Commission.

Another kind of motivation was fueled by a strong reservation against opening up the internal market and the first pillar to IEC in the first place. *Spanish* officials demonstrated this motivation in the most assertive language, demanding that all enhanced cooperation in the first pillar should be FEC, not IEC. They, and officials from *Denmark*, went out of their way to show their hostility towards any possible future initiative of IEC which might put the integrity of the internal market at risk.

In spite of these temptations towards FEC, IEC in the internal market domain was not considered impossible. Officials from economics and finance ministries or in the case of *Italy* even from the prime minister's office, were when asked nevertheless able to envisage a number of fields where such IEC could after all, be legally feasible and politically conceivable. It was however conceded that an opposing member state could probably block IEC initiatives in almost all of these fields by energetically invoking the conditions of Art. 11, TEC, in the council of ministers, or in the ECJ. Claus-Dieter Ehlermann and the Commission made this point especially forcefully and a *Polish* official argued in the same way.

(v) The European Commission

Asked for their opinion on these questions, European Commission officials insisted on the existence of clear limits to IEC in the internal market. They named the *external* effect of IEC initiatives on the internal market as the leading criterion for acceptance or refusal. External effects on the freedom of exchange and the equality of competition on established EU policies within the internal market or leading to other kinds of discrimination were unacceptable. IEC initiatives carrying such a risk would be rejected. The *issue* area and the *regional* scope of such initiatives were also considered to be important. It was possible to envisage IEC initiatives which were regionally concentrated, for instance among only Baltic states, perhaps in regional fisheries policy, which would not interfere with the legitimate rights of the other member states in the internal market or under established EU policies.

As to social and employment law the Commission did not see any necessity for harmonisation alongside the common monetary policy of the Euro-group. Social affairs and employment were concerns of the EU of the Fifteen.

(vi) Synopsis

The table No. 4 (see following page) lists these more or less hypothetical options for such enhanced cooperation within the internal market, as they were put forward by the officials questioned, grouped by country and with the specific qualifications added in one or the other case. (Asterisks precede those options which were named by more than one government).

This short list shows a clear convergence of views, among the governments questioned as to hypothetical possibilities for utilising enhanced cooperation in the institutional framework. They see them in more fiscal policy harmonisation, where all Fifteen cannot be drawn in. The next candidates are environment legislation and the handling of services and intellectual property in external economic relations. Other policies were only mentioned by certain governments questioned, even though closer questioning might have revealed more identities of ideas, for example in the field of banking law or company legislation.

(vii) Economic Policy Coordination

Economic policy coordination has already been referred to in the context of the internal market and to a greater extent of EMU. It was very evident that the IEC enabling mode was frequently considered as too constraining and that *German* and *Dutch* officials in particular did not like it as it was a step towards "gouvernement économique". They clearly preferred to stay either within the mould of the treaty procedures for the Fifteen, or to choose the freedom afforded by FEC for advancing further in this domain.

c. Legal Obligations of IEC and Member States

(1) The Quality of Legal Obligations Resulting from IEC Engagements of Member States

Officials were asked for their appreciation of the quality of legal obligations resulting from IEC, compared to 'normal' EU legislation, its compatibility with other EU legislation in related areas, its effect on non-participants in the respective IEC

initiative and to its durability. Member state officials appeared conscious of the fact that there were open questions here, but they did not yet appear fully able to measure the kinds of problems which might present themselves, or decide how to prepare for them.

It may be interesting to see which of these options were named in more than one of the EU governments questioned:

Table 4 – Options for Enhanced Cooperation in the Internal Market

Denmark	IEC could theoretically be used "where the community has not preempted the field already", in: • **environment • **employment • health • **education One possibility could be environmental tax coordination between Denmark, Germany and others • **with regard to Art. 133,5 TEC – i.e. with regard to extending the application of Art. 133 to services and intellectual property
Germany	Envisageable eventually for: • **harmonising certain direct *and indirect* taxes (in case of generalised harmonisation being blocked) but perhaps better via competition than via design • rules governing capital movements • **company/enterprise legislation • **environmental legislation (if not product oriented) • **eventually, in limited ways (benchmarking, synergetic effects) in em ployment policy n o t in trade policy (Art. 133 TEC)
Italy	• **services and intellectual property in foreign trade (Art. 133,5 TEC) may become an occasion for some form of flexibility • **fiscal harmonisation, but as a follow-up to Euro-establishment, implemented in a Euro-11-group, but decided on by the Ecofin Council
Poland	IEC/FEC only very grudgingly accepted: • **for environmental protection, temporary flexibility exempting member states from fully fulfilling standards • **fiscal harmonisation flexibility only in very narrow limits, because of the high value of uniformity of the tax system

Spain	IEC Amsterdam style not accepted in the internal market sector, FEC initiatives envisageable in: • **fiscal matters in the Euro-zone, capital gains tax, savings of non-residents, pushed by stability pact; • **commercial law (a convention on bankruptcy expected to be the next case of enhanced cooperation) in FEC • banking law in FEC • national competition law application, in FEC • deregulation and structural reform policies, in FEC
Netherlands	IEC Amsterdam style should not disrupt the single market, affect the acquis or threaten institutional unity. Sole areas for application in: • **fiscal matters • **environment • **external economic relations (Art. 133,5 TEC) But room for FEC, in: • **education, • infrastructure development, • research and environmental planning, • eventually also in heavy vehicle road transportation.

Table 5 – IEC Options Named in more than one Hearing

Fiscal harmonisation	**D**	**DK**	**ES** ***FEC***	**I** ***FEC***	**NL**	**P**
Environment	**D**	**DK**	**ES**	**I**	**NL**	**P**
Services and intellectual property, in external economic relations	**D**	**DK**	**ES**	**I**	**NL**	**P**
Company/enterprise legislation	**D**	**DK**	**ES** ***FEC***	**I**	**NL**	**P**
Employment policy (internal market)	**D**	**DK**	**ES**	**I**	**NL**	**P**
Education (internal market)	**D**	**DK**	**ES**	**I**	**NL**	**P**

German officials emphasised the point that if a member state were to participate in an IEC initiative it would be permanent, even if it were at a later stage interested in exiting. *For this member state,* the legal quality of this participation equalled that of membership of the EU itself. The same was accepted, it seemed, for legislation resulting from IEC.

It seemed equally accepted that such legislation must not affect the non-participating member states. In this sense, IEC aquis was not acquis communautaire, a point which a legal specialist of the *European Commission* asserted.

(2) New Members Acceding to the Union

An important question concerns the attitude which new members entering the EU adopt vis-à-vis established IEC projects and their legal acquis. The general position was made clear by a high ranking official of the *European Commission*, who referred to the precedent of the social protocol on the occasion of the previous enlargement. New entrants were then asked to chose, in which camp they would want to place themselves. This would be the model for future enlargements as well.

The predefined IEC in the Schengen acquis field is the acknowledged exception to this rule, as the treaty of Amsterdam expressly treats it as a part of that acquis which has to be assumed in full by the new members. In fact, officials from the *Council Secretariat* asserted that certain member states had only asked for the transfer of Schengen into the Union framework, because they wanted to make sure that the new entrants from central Europe would have to take on the Schengen system as part of the acquis.

Part two: Interpretation

The Role of *Enabling IEC* in the Context of EU Decision-making Structures

Having presented the evidence as to how those government and EU officials and parliamentarians who were interviewed perceived the new legal flexibility obligations and options after Amsterdam, the report now shifts to the domain of 'speculation', of the expectations and apprehensions vis-à-vis the new treaty situation which the official interlocutors revealed to the team of experts. It will quickly be seen that the most sensitive questions concern the future role of *enabling IEC*, the concept from which Amsterdam flexibility derived and which was most closely linked with the challenge represented by the Lamers-Schäuble paper of 1994.

The first of these speculative points concerns the motivations which member state governments link to their own attitude or attribute to that of other member states towards the different kinds of enhanced cooperation in the EU. The second translates the interviewed officials' and parliamentarians' reactions into certain 'types' and a rough estimate and ranking as to the scope and role of IEC we can expect in the coming years. This is compared to the role of pre-Amsterdam FEC. The third, finally, presents some of the consequences, which governments drew for their own future behaviour under the rules of IEC especially in the enabling variant.

IV. Motivations for Introducing Enabling IEC in the Future

The motivations for initiating and applying future projects of enabling IEC (and incidentally of FEC), which the expert team encountered among the officials and parliamentarians, have two aspects:

- Simple acceptability or legitimacy of using certain institutional/procedural *instruments*, of advancing in grouped enhanced cooperation, instead of in the full membership mode;

- the second of the policy lines or major *goals* which are pursued by the introduction and utilisation of this specific new instrument of European policymaking, or in reacting to it:

– To ease and improve the introduction or implementation of distinct major new policies into or within the institutional framework of the European Union; to solve individual issues, face individual major challenges;

– to change the decision-making structure (and the internal balance of power ?) of the European Union, (be it just in a pragmatic sense to make it more flexible and amenable to resolve certain blockages, or more normatively to open the way to further deepening of the Union).

1. Acceptability

Since Amsterdam enhanced cooperation can be undertaken in a more positive climate of acceptance. That was what a *German* official from the justice ministry, referring to the field of civil law cooperation, but in fact making a more general point, stressed in pointing to the new and more positive treaty language vis-à-vis enhanced cooperation (IEC), and comparing the very "defensive, tolerating" language of the old Article K.7 TEU (FEC), to the new and quasi "encouraging" language on using the new instrument for the establishment of closer cooperation to reach the objectives of the treaty (the general clause (Art. 43, TEU), and in Justice and Home Affairs concerning the first and third pillars (Art. 40, TEU and 11, TEC). Governments would therefore have fewer legal qualms about exploiting this possibility. Experts did not hear explicit statements like this from other governments. But this seems indeed to be a relevant sentiment, which underlines the much increased explicit and official legitimation which enhanced cooperation of member states in the enabling mode enjoys post Amsterdam in certain governments where the goal is to increase the effectiveness of integration.

Certainly, this increased facility for or acceptance of the option of enhanced cooperation, having modified the former consensus-searching premium when beginning important new policy initiatives, was exactly what other governments feared and disliked.

High ranking Commission officials seemed split on this issue. They did bring attention to the important constitutional advance made by an opening of the treaty for enhanced cooperation, by getting away from the former one-issue-opening as had been the case for the social protocol, and by refraining from putting down a positive list of policies open to IEC. They highlighted the positive aspect of groups of member states advancing in common instead of putting the negative one of a single problem state in the centre. In future, IEC could be initiated without an IGC. It is very clear though that strong misgivings about the higher legitimation of enhanced cooperation caused by Amsterdam continue to exist in high ranking Commission quarters.

2. Policy Lines and Major Goals

Characteristic for almost all the parliamentarians and officials questioned was the pervasive uncertainty and hesitancy regarding the major goals to be pursued with the introduction of new enhanced cooperation. A "strategic project" was avowed only in *Germany* (see below); but even there the perspective of its successful implementation is much reduced in 1998, compared to 1995/6, the year of its conception. Both the governments which were questioned and the Commission appeared astonishingly uncertain as to the benefits to be attained by implementation of IEC or the risks to be eschewed in its utilisation. Policy lines had often not been formulated. Unsurprisingly, coming from a candidate state the *Polish* officials had the smallest contribution to make to this debate in the context of specific policy fields. They did however take very strong positions on the principal aspects of enhanced cooperation.

a. Eastern Enlargement

The different European policy issues evoked in the hearings did not promise to arouse the strong motivation necessary for entering into enabling IEC in the status-quo-

Union of the Fifteen. Many government officials conceded this. For the *German* foreign office, it was the perspective of EU Enlargement above all for which the strategic instrument of IECwas intended. It was supposed to guarantee that even the enlarged EU would be able to introduce the policies it needed, that the acquis could be preserved and that further deepening of integration remained possible for those member states intent on going ahead. In a more hesitant vein *Dutch* diplomats made the same point when saying that the true test of the new instruments would come at the moment of enlargement.

But the hearings also showed implicit and explicit contradictions. First and implicitly, *German* officials like others questioned by the experts, were unable to provide a single example of the kind of policy which might have to be introduced or implemented in applying enabling IEC in an enlarged European Union. *Dutch* officials stressed the need to renounce to projects of additional differentiation at a moment when entry negotiations with central Europeans were imminent and at which the Union had to make sure that the whole acquis could be fully accepted by the candidates and preserved within the entire Union. Their advice was to use the proven method of temporary derogations, not IEC. Very explicitly, *Danish* officials doubted that eastern enlargement would generate the need to use the new instruments as flexibility was for areas where member states did not share the same objectives. Typical of Poland and Hungary et al, as Portugal and Spain in their time, was however that they were eager to join everything. They would ask for derogations where they were temporarily unable to fully assume certain policies, but they would probably give very little cause, either through unwillingness or inability concerning certain EU policies, for the existing member states to resort to utilising the instrument of enabling IEC.

In the *Polish* hearing the contradictions around enlargement were brought home with special intensity. Very high-ranking *Polish* officials did not accept the veiled mistrust of their European commitment, which they sensed in flexibility being justified by eastern enlargement. They insisted strongly that they wanted to be part of "the acting, functioning, decisive organisation...We do need to join an institution that is able to make decisions". The Poles clearly expressed their concern that they might not be able to keep up with the rest if the strongest member countries combined to move ahead. Therefore from their national perspective there were two good answers to the challenge of flexibility. Either squeeze into any IEC initiatives regardless of the cost, or if they could not get in, block and hamper such initiatives.

(1) The European Commission

The *European Commission* also, appeared to think less along the first than the second of these lines. On the one hand it seemed to find the deterrent function of IEC useful against increased obstruction in an enlarged EU.[27] Yet on the other hand it was very apparent from the officials' declarations that IEC was not to be an instrument to facilitate enlargement. The most important, and also contradictory example cited in this context was the Schengen acquis. It had been rapidly incorporated into the EU to make the Schengen matter part of the acquis to be accepted by new members, thus

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27 Cf. also its remark in the Agenda 2000: „The introduction of Enhanced Cooperation will also make it easier to take up the challenge of a broader and more heterogeneous Union".

preparing the Union's negotiating position for enlargement. In particular, French and Dutch negotiators pushed in that direction. The price had been its institutional organisation as predefined IEC. After this had been achieved, high ranking officials acknowledged that it was now the preservation of the full unity of this acquis among its members, and its implementation in the EU which had to be safeguarded against the risks of an enabling IEC which might encourage differentiation between old and new EU members.

b. Changing the Institutional Framework of Integration Politics

As to the change of the institutional framework, the motivations of the policymakers questioned will be grouped under three headings: *Deepening of European Integration, Improvement of its Effectiveness, IEC versus FEC.*

(1) Deepening of European Integration

Most of the government officials and parliamentarians questioned, including those from the candidate state *Poland*, and the experts present, acknowledged the crucially important contribution which grouped initiatives for closer cooperation in new policy fields have made to deepen European integration among member states. *Generalized deepening* came about through the attraction generated by grouped progress, either over a shorter, or longer term, for instance in EMU and Schengen. But insofar that not all member states immediately rally under the banner of such initiatives, they also constitute forces of differentiation with potentially divisive effects on the EU. In the past four decades, European integration has been able to profit from the deepening effect of this differentiation, and avoided its risks.

For the government officials and parliamentarians questioned this differentiation was considered an important and positive dynamic relationship of the EU. Even sceptics would agree that it cannot be made to disappear. The principal question about the new procedures for incorporating IEC is whether they can harness this potential to reach the two goals of deepening integration and avoiding the risk of division, in a better way than was possible prior to Amsterdam under FEC.

This effect was the declared goal of the *Franco-German* initiative, which persists in the text of the general enabling clause Art. 43 TEU. *German* officials were the only ones to present the deepening effect – in the sense described above – loudly and clearly as their overarching strategic goal for the new Amsterdam clauses. Deepening would thus come about through *positive differentiation.*

This attitude is contested by the more inclusive strategies of other governments, which would rather pursue the deepening of European integration by reforming the institutions and procedures of the European Union. An argument often heard was that the promoters of IEC had taken the relatively easier road to avoid having to grapple with true institutional deepening, for instance by introducing generalised qualified majority voting on EU legislation. In this view, the motivation for attempting the necessary deepening of institutions and procedures was being reduced, not improved, by opening this side-alley. Two more negative versions of this argument were that some member governments had preferred IEC to QMV, because (a) they wanted to advance in areas of cooperation specially dear to them without having to wait for the rest, thereby creating a privileged group within the EU, and (b) this would increase their political clout in future EU negotiations. The *Spanish* government officials were

most vocal in these apprehensions as they thought that IEC would work against further deepening of integration. As such they took a very reserved general view on the new enhanced cooperation rules of Amsterdam (IEC). *Polish* officials were likewise very much opposed and openly referred to the risk that a privileged group might be created leaving the other members behind.[28] Both results were according to this view contrary to the true goal of deepening European integration.

(a) The European Commission

Opening the institutional framework for enhanced cooperation in the interest of further deepening of integration did not really appeal to the European Commission either. It did not seem to find any strong arguments for this hypothesis, arguing rather 'e contrario' and defensively. High ranking officials stressed that IEC was not intended for those who wanted to advance backwards and reduce integration or extract themselves from certain of its policies. It was conceived for those who wanted to advance forward. In the hearing however, Commission officials showed they shared the scepticism and concern of certain states.

They preferred, as did the Spaniards, outright institutional deepening of the complete decision-making structures, by for instance introducing generalised qualified majority voting on EU legislation. They too were concerned that IEC might become a poor substitute for the more difficult work of treaty reform.

(2) Improvement of Effectiveness for European Integration Policy

Related to the argument of deepening integration and advanced during more than one hearing, was that of raising the effectiveness of European integration policy in general. On the one hand in increasing the effectiveness of integration in given policy areas, at least among a given number of member states, by permitting IEC, and on the other hand by increasing vis-à-vis the others the persuasion power of certain member states promoting a new policy. They now have the option of IEC, instead of having to wait for the last opposing member state to change its mind. Constructive abstention in CFSP was considered in the same vein, as a facilitating instrument, to ease the way out of deadlock and make a decision possible. Several *German* officials made this point, whilst *Danish* government officials expected the new clauses to be used as a negotiating tool, allowing "compromises which would not otherwise have been reached".

But for many government officials, this had only been a British problem. And this was seen to have been resolved with the election of Tony Blair as prime minister. For the *Dutch* officials, among others, it seemed evident that the more pro-European position of the new government should not be endangered by implementing EU policy instruments intended to discipline or exclude the UK. Inclusive integration politics

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28 This issue has a second more basic aspect, it concerns the relevance of the QMV-issue as such, for deepening the EU and therefore as credible alternative to the introduction of flexibility: a *Danish* high official contested this relevance, denying that QMV would ever be the true solution to member states' disagreements about policy. In such cases outvoting member states would jeopardize the unity of the Union; patient search for consensus was the only realistic strategy. A logical consequence of this reflection would be to accept flexibility as one exit out of the resulting dilemma.

were the trend, not potentially exclusive ones. But the most vocal opponents against this vision were again the *Spanish* officials. Their arguments will be presented in full because they explicitly voiced sentiments which other governments probably share in different respects, even if they did not voice them as frankly. For the *Spaniards* the effectiveness-argument presented an open challenge to the accepted balance of power and the legitimacy of important considerations in EU negotiations:

- the potential for threats by powerful member country coalitions would increase unfairly, even in decision-making by qualified majority;

- this would reduce the consideration of solidarity which underpinned the QMV procedure in the first pillar, making IEC not only a counter-veto, but also a counter-solidarity instrument;

- certain governments could now be tempted to think that they need not follow the normal treaty procedure and compromise any more and that they could introduce new policies at the EC level at will as well as control their application.

- Formalising IEC in the treaty risked giving these governments a blank cheque and encouragement. A highranking offical even declared that Monnet was being replaced by Metternich.

- IEC would not thus advance integration or its effectiveness, but rather the specific agendas of certain member states. Indeed, effectiveness of EU policymaking would certainly be endangered by: more opaqueness and complicated procedures, less transparency, unnecessary resistance to future initiatives of certain states and increased use of the veto-option than was rationally justified.

Spain would consider blocking IEC initiatives in the first pillar, if first pillar integrity were threatened.

(a) The European Commission

The effectiveness argument was not fully shared by the European Commission either. Certainly it seemed to accept the anti-blockade function of the concept, preferring the threat to the application of IEC. But apart from this, its officials did not seem to find any additional arguments supporting the hope for improved effectiveness through IEC. As in the debate on the deepening hypothesis, Commission officials concentrated their efforts on showing that IEC might not after all be as dangerous for the political system of the EU as it seemed.

After seeing that IEC went ahead, in spite of its own original misgivings, the Commission contributed to hardening the IEC-clauses against the risks of misuse and to reduce the fields of application. Application had become difficult as a consequence and officials stressed the different conditions, including the obligation of IEC groups to remain open to newcomers, and the ECJ's power of judicial control. The Commission itself held the key to triggering IEC in the first pillar, and was the guarantor of successful application. In the first pillar again, it also controlled the later access of initial abstainers to established IEC groups.

The scope of the subject matter for enhanced cooperation was considered a crucially important point for effectiveness as well (see below).

(3) What Kind of Enhanced Cooperation for Which Member State?

Behind the debate about the merits of the new procedure of enhanced cooperation, vis-a-vis the old one, stood the central question of how to appraise the forces of differentiation within the EU, how best to harness them for the benefit of EU-integration in a general sense, the widening of its competences, the deepening of its institutional and procedural structures, and the improvement of its effectiveness.

For the positions taken by parliamentarians and officials, the first determining variable appeared to be self-evaluation by the member states, of their basic attitude towards more integration, influenced by their ability to participate and by the influence they felt able to exercise through their weight and politics.

The second position was the quality of the new legal set-up of Amsterdam for enhanced cooperation, which already mirrored the contradictory aims behind it. The experience of pre-Amsterdam enhanced cooperation clearly influenced the opinions about the value of the new rules, about how to interpret them and the role to accord them in the future, as compared to FEC.

In spite of the generally positive evaluation of pre-Amsterdam FEC, there were strong differences of opinion concerning the merits of future enhanced cooperation in its pre- and post-Amsterdam forms. It is important to note that this comparison mainly concerns the *'enabling'* form of IEC, sometimes also the *'case-by-case'*, but *not* the cases of *'pre-defined'* IEC, which had already been jointly agreed on by all member states at Amsterdam.

Looking at what may be called the self-evaluation of member states, the hearings permitted a rough division between:

1. A majority group of member governments which in principle welcome the further common extension of integrated policies or even consider them unavoidable. For want of a better term, they can be designated as 'deepening optimists'. This does not mean that all of them support the new Amsterdam rules on enhanced cooperation, but only in this first group do these rules find outright supporters. Of the governments interviewed, we can count the Dutch, German, Italian and Spanish among them;

2. a minority position which opposes generalised further integration and procedures which reduce their control over its further development. These can be designated as 'deepening sceptics'. These first opposed new rules the during the negotiations and only reluctantly accepted them at the end. For this second group, the consensus-premium of the pre-Amsterdam EU-Treaty was an important insurance that they could not be forced against their will into a deepening dynamic inside the Treaty. They are conscious of having lost part of this insurance as a consequence of the Amsterdam flexibility clauses. Of the governments questioned, the *Danish* one must be classed with this group. Both of these attitudes *welcomed or at least accepted* the reality of differentiation and enhanced cooperation among member states and wanted, even accepting the disadvantages and risks, to exploit the dynamic community building potential of enhanced cooperation in the future.

3. The one candidate country government to be questioned, Poland, seemed to share fully the 'deepening sceptic' attitude. It differed from both preceding positions

in that it did *not accept further differentiation and enhanced cooperation*, at least for a certain time.

Within what is here called the 'deepening optimist' attitude, three different types of attitude towards the new enhanced cooperation clauses were visible. Two of these concurred in supporting the new enhanced cooperation rules in the Amsterdam Treaty:

– The attitude of those who wanted to open the institutional framework for their own enhanced cooperation initiatives thereby increasing their integration potential for all; a stance voiced mainly by the *Germans* and to a lesser degree also by the *Italians*;

– and other supporters of this strategy who wanted to prevent future initiators of cooperation ventures from realising them outside the community, where other members cannot participate at will nor influence them. Here one might place the *Dutch*.

The first of these attitudes seems typical for the two member states from which the proposition originated in the first place, namely Germany and France, big member states and makers rather than takers of integration, confident that they would always participate in the important groups of enhanced cooperation and have a decisive say in their creation. Of the countries questioned, Germany seemed to represent this optimist attitude.

The second attitude, in comparison, seemed a typical reaction of integration minded member states, which because of inferior weight and political means, or ability, could not hope to initiate such projects themselves and, in the logic outlined above, wanted to gain a voice in defining the kind of initiative which they have to follow. Therefore they remain interested in the application of the Amsterdam clauses which promise the recuperation of FEC into the treaty framework, and the kind of institutionalised influence and assured access they look for.

But, still within the 'optimist' group, there is also a third attitude of those who hold a diametrically opposing view and see more of a risk than an opportunity in letting enhanced cooperation enter into the treaty framework and be widely applied. The *Spanish* officials seemed to be the most vocal representatives of this line of argument which was shared to a certain extent by the *Danes,* not because they are opposed to further integration, but because they fear two negative effects:

– firstly concerning cooperation initiatives that they approve of; that even if they want to they will neither be able, nor asked, to participate in enhanced cooperation initiatives of other member states inside the institutional framework, because they lack the means to do so and cannot force the others to aid them;

– secondly concerning cooperation initiatives that they do not approve of; that the safeguards are not strong enough to prevent other member states from going ahead, leaving them behind against their will.

A widely shared concern common here and also among the principal opponents of enhanced cooperation, is the fear of destroying traditional power balances in EU policymaking, of an unacceptable reduction of their negotiating clout in the EU where opposition to initiatives is often a means for states to get their own favoured policies

accepted in exchange for agreeing to the wishes of initiators, or of being absent from decision (or opinion-) making circles, the decisions of which might affect their interests.

When one now tries to rank the governments questioned according to their preference for new IEC or for old FEC the result is the following:

Germany, the Netherlands and Italy, all 'deepening-optimists', clearly did not welcome the perspective of important new inititiatives of FEC of the pre-Amsterdam kind, because they saw growing disadvantages to this method. They wanted to harness the potential of differentiation by applying *IEC* and not *FEC*.

On the other hand, the governments of Spain and Denmark, the first a 'deepening optimist', the other a 'sceptic', clearly did not accept this logic. For them, the preferred option for harnessing differentiation in a beneficial way for overall EU-integration was FEC, outside the treaty system proper. IEC constituted an unacceptable risk for the unity and governability of the Community system, which the others wanted to consolidate by opening it up to closer cooperation. Therefore Spanish and Danish officials consented only grudgingly to the majority opinion in favour of IEC, and voiced their opposition to any future application of these clauses.

Spanish officials explicitly foresaw FEC, for instance in Schengen acquis matters in the first pillar, finding it "not unthinkable that some progress based on only three or four countries could take place in the near future", although "outside the framework of the Treaty".

The *Poles*, the most hardline of the 'deepening sceptics', did not go along with the Danes but adopted an apparently contradictory position. They too, wanted to apply IEC, but as restrictively as possible in order "to hamper and block" any enhanced cooperation whatsoever, be it IEC or FEC.[29]

An important consideration in this context concerned the *efficiency and legitimacy of integration progress via FEC*. For example, Schengen (like EMU's predecessor the EMS a form of pre-Amsterdam closer cooperation – FEC), was very successful in bringing home affairs of signatory members closer together and increasing the effectiveness of their common work. Many officials, for instance from *Germany* and *Denmark* doubted that flexibility could ever function with comparably good results inside the EU as it had done outside as in the case of the Schengen group. There was concern about how the communautisation of Schengen would affect its effectiveness.

But in making a success of Schengen, participants had built up a separate body of rules within a field of competence of the EC/EU, namely that of freedom of movement for EU-residents and of external border surveillance, thereby reducing the EU's ability to create coherent legislation in an original competence field of its own and increasing the tension with their obligations under the Article No. 10 (formerly

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29 Only a very isolated minority *Polish* voice pleaded for accepting more internal differentiation inside the EU in the interest of enhancing its flexibility and international competitiveness, for accepting that better developed member states can work together to form the vanguard in this sense, and to accept a (temporarily ?) inferior position for countries like Poland in the interest of the EU's global position.

No. 5) TEC. This clearly called into question the legitimacy of the Schengen project. This problem was conceded by officials from *Germany* and to a great extent in the *European Commission*. The IGC's goal was to end parallelism/cleavage in this important field of EU legislation. In addition, and to preempt this kind of risk for the future, new FEC was to be discouraged.

(a) The European Commission

High ranking European Commission officials clearly belonged to the first group which gave priority to IEC, in spite of the high risks they saw in its application. They were reserved vis-à-vis FEC. An important criterion for judgment was EU-competence; FEC was a good method to work together in areas not falling under EU-competence, as Schengen and the EMS had been. But in the view of Commission officials, there was not much room left for member state cooperation outside the competence domain of the EU. For matters falling under EU-competence, FEC was on the contrary not acceptable. IEC was the right method as it was fully subject to EU disciplines and minimised the disintegrative tendency inherent in free cooperation.

This position merits further comment. The Schengen agreement had from the beginning been organised *within* the EC's area of competence, namely in the free movement of persons in the Common Market. Many member states uninterested in quick advances in that field at the time authorised France, Germany and the Benelux states to start joint cooperation in that field. So in fact, FEC had already been possible in the EC's area of responsibility in the past. Certain member states, such as Spain, also envisaged future FEC exactly within and not outside this domain. If the Commission holds to its position, this could create conflict.

Even so, the high ranking which FEC received in the prospects for future post-Amsterdam enhanced cooperation (see above), seems to confirm the enduring attraction of this freer and less constrained mode of working together for groups of EU member states.

(b) In Place of a Summary

The following table summarises the basic findings of this subchapter:

Table 6 – What Kind of Enhanced Cooperation for Which Member State?

Revealed Self Evaluation of Member States as to their:		Basic Position vis-à-vis **Enhanced Cooperation** of Member States		
		Apply		Avoid
--Basic attitude to further deepening of integration	--Weight in the EU	Preference to Utilise Enabling **IEC** in Logic of: Positive differentiation <==> Defensive consolidation	Preference to Utilise **FEC**	
Willing and Able	Large	**D**		
	Medium	**NL** Commission		
Willing and (not always) Able	Large	**I**	**ES**	
Unwilling, but Able	Small		**DK**	
Unwilling and not Able	Large	**Pol**		**Pol**

V. Probability and Fields of Application of IEC in Comparison to Pre-Amsterdam FEC

1. A Rough Estimate Based on the Hearings

The testimonies heard during the seven hearings allow the following rough ranking (presentation No. 7), concerning the probability of and likely fields, and timescale, of the application of new IEC, according to the revealed preferences of the parlamentarians and officials interviewed and compared to the continued utilisation of pre-Amsterdam FEC. The result is that predefined IEC is the most probable and likely category, touching the biggest policy fields, and that enabling IEC in the first pillar seems to be the most improbable and least imminent. The case-by-case in the second and enabling in the third pillar lie somewhere in between. This is a ranking which appeared very probable from the beginning of the hearings, taking into account the different degrees of legal obligation, national governments' unavoidable investment of effort and risk, controversy surrounding the various options of IEC, and the number of member states required for triggering the initiative. The experts were not surprised to have their expectations confirmed.

Evidently, this ranking is not the result of systematic opinion research, giving confirmed ratios or percentages of probability or expected quantities of occurrence. It results from listening to the seven hearings and summarises the opinions heard on intentions in the different fields as well as the remarks and judgments made in reference to already existing or imminent examples of IEC. Readers will see its

findings confirmed when they leaf back to the subchapters on the different policy fields.

Nevertheless, this estimate, based to a large extent on opinions and intentions in 1998, may be proved wrong by one or two dramatic steps in the coming years, when the constellations between member states could generate unexpected coalitions. This too was clearly said by our interviewed officials. The estimate cannot yet be based on concrete experience of initiatives in enabling and case-by-case IEC, simply because these could only be launched after the Treaty of Amsterdam entered into force in May 1999. The little concrete and *positive* experience there was with IEC at the time of the hearings was limited to the aforementioned EMU and Schengen acquis, existing initiatives inherited from the past. In this sense, there was some *negative* experience as well. Initiatives in FEC have been started since Amsterdam, for which one could have imagined the member states wanting to mould them in the form of future IEC, if they had been interested enough or able to do so. The first example to come to mind is the Euro-11 Council and the second armaments industry cooperation. In five years' time, it will be necessary to see whether reality will have verified, or proved wrong, some of the opinions and expectations synthesised here.

Table 7 – Factors Determining the Probability and Fields of Application of IEC

	degree of legal obligation	**degree of memberstate investment**	**number of member states required**	**degree of controversy surrounding options**
1) IEC predefined, in the Schengen acquis, and EMU field;	very high	very low	Schengen: nn EMU: 11	low
2) FEC, mainly applied;				
in CFSP and related issues;	low	tending more to high	1 + n*	tending more to low
in EMU-related issues;	medium	tending more to high	11 + n	tending more to low
in other 1st-pillar issues;	very low	tending more to high	1 + n	tending more to high
3) case-by-case IEC in CFSP;	very low	tending more to high	1	tending more to high
4) enabling IEC for 3rd pillar issues;	very low	very high	7 + n	very high
5) enabling, IEC for 1st pillar issues.	very low	very high	7 + n	very high

* "n" equals one (1) or more member states

The continuing strong role which FEC is to play among EU member states even after Amsterdam, is perhaps the most significant finding of this first rough estimate. The

second important, though not really surprising, finding concerns the weak perspectives of *enabling IEC.*

VI. Goal Achievement: A short Resumé

1. Deepening of Integration:

When trying to assess the potential for deepening in the new IEC procedures, one often invoked criterion was, if and how they contribute to, and whether they are compatible with more orthodox steps of deepening integration, especially with the implementation of qualified majority voting where it existed, and with its extension into even more EU policy fields. During both the Commission hearing and national hearings, a number of officials expressed strong concern regarding this compatibility, and in some cases went so far as to impute the initiators of IEC at Amsterdam to have established this new procedure instead of an extension of QMV. Even for those who did not share this extreme view or contradicted it, like certain Commission officials, there appeared to be a high risk that IEC might in the future if not surveilled very carefully be chosen instead of QMV, even where this was the official decision-making procedure, thus de-communautising and not deepening integration politics.

A second indicator to be considered was whether the volume of intentions to actually utilise enabling IEC could be identified among the parliamentarians and officials, and whether these intentions were concentrated in certain member states. Could they lead to the formation of a core group of integration deepening in the future? On the basis of the hearings a very rough table was produced which groups the parliamentarians' and officials' declarations on the different policy fields of the EU. But as already pointed out, these declarations only indicated intent in very rare exceptions. Often they only indicated hypothetical possibilities perceived by one or the other parliamentarian or official. In consequence, no speculation about grouped intentions can be made on the basis of the hearings. The table is reproduced as Table 8.

A second indicator was found by asking whether functioning IEC projects could be shown to be attractive for non-participating members. In 1998, examples of functioning IEC could only be found among predefined IEC initiatives already in existence; the most prominent case being EMU. Here the *Danish* hearing proved very instructive showing from a government having opted out of the single currency, that exclusion from decision-making of the restricted eleven was clearly seen as a serious setback to the Danish position in EU fiscal and monetary policymaking. It also seemed to show that Danish officials were highly interested in joining those decision-making and debating circles from which they had excluded themselves. A second example is in fact the fate of the Schengen group. Here, for example, the hearing in Rome showed the strong interest which former non-participants like Italy develop to participate fully in functioning inititiatives of enhanced cooperation.

Both of these cases seem to indicate the attractiveness of enhanced cooperation for other member states. However, a very important caveat must be born in mind. Schengen and EMU were started, and developed an irresistible attractiveness, outside the institutional framework as projects of FEC! Would they have gained this same

attractiveness as IEC projects? Only time will tell but the indicators at our disposal do not appear to point in this direction.

And certainly the hearings showed that the intention to create successful new IEC groups in important issue areas is vehemently opposed by a number of member states who count themselves as either unwilling or unable and that the antagonisms generated by their creation could counterbalance any attractiveness and even outweigh it. The price of partial deepening would be splits in the Union as a whole.

In a wider sense, deepening of European Integration can only be safely pursued if accompanied by an increasing acceptance amongst the population. Greater transparency in EU decision-making and policy implementation would be an important precondition for this. In a number of hearings the experts and officials came to the conclusion that the implementation of IEC would as a consequence produce not more but less transparency and less acceptance.

Finally doubts concerning the need for further important initiatives in IEC in the enabling mode and reservations against them, seem to be such that only very few initiatives can reasonably be expected in the future. As many officials questioned found, Amsterdam style IEC seems to be a far cry from the original *positive* logic behind closer cooperation initiatives since 1995. *France and Germany* as the initiators had wanted to open the treaty itself, including CFSP, to closer cooperation among relatively *small* groups of willing *and able* member states, which could *not be prevented* by other member states. A liberal enabling mode for all three pillars would have best suited this logic. The goal seemed to be to open a vanguard group option for member states which wanted to deepen mutual integration in the future and would be able to do so. The logic was positive differentiation.

An exactly opposite logic of defensive consolidation motivated the integration of the Schengen acquis and predefined IEC in the Schengen and freedom of movement domain. Compared to positive differentiation, the logic of defensive consolidation is more inclusive regarding member states, more attentive to the unity of the institutional framework and the legal acquis, more tolerant of deficiencies in ability and conceived as temporary, to be corrected in the spirit of EU solidarity. Compared to these priorities new advances in integration take second place; new FEC is discouraged.

This logic became the common denominator in which a disparate coalition against positive differentiation came together in the IGC ensuring that the logic of defensive consolidation also permeated the new clauses of enabling IEC. This is confirmed by the conditions and procedural prescriptions attached to them. That result suited not only those member states who wanted to go ahead with further integration, but feared for their free access to IEC initiatives in the logic of positive differentiation. It could also satisfy those who wanted to reduce to a minimum what they saw as the risks of member states breaking out of the logic of consensus in integration politics, or of creating different layers of EU-legislation for different groups of members.

Table No. 8 – Hypothetical Application Perspectives of IEC

1st Pillar								
Internal Market	:							
		DK	D	NL	I	ES	Comm	Poland
	environment; ecological legislation	■	■	■				
	employment at non obligatory level	■	■					
	fiscal matters, taxes direct and indirect		■	■				
	services and intellectual, external economic relations	■		■	■			
	rules governing capital movements		■					
	company/enterprise legislation		■					
	health	■						
	education	■		■				
Freedom of Movement + Schengen	Even after transfer into 1st pillar Schengen acquis will only bind the 13 signatories = IEC predefined, and possibilities for enabling							
		DK	D	NL	I	ES	Comm	Poland
	minimum standards for provisional protection (new art. 63,2,a),	■						
	burdensharing on refugees (new art. 63,2,b),	■						
	harmonisation of subsidiary protection („everything which goes beyond the Geneva-convention")	■						
	grouped advances in the control of illegal immigration by means of, a system of finger prints, and of returning illegal immigrants	■						

Civil Law	Civil justice neither expressly mentioned by the EU- nor the EC-treaty. It is still left to the free cooperaiton of MS.							
		DK	D	NL	I	ES	Comm	Poland
	practical questions like cross-border-cooperation in groups							
	harmonisation in „material law" and legal assistance							
	common judicial space							
	commercial law (bankruptcy most imminent)							
	banking law							
	Judgements of courts of law in all member countries should have the same status as in the pronouncing state, in all other MS							
EMU	IEC							
		DK	D	NL	I	ES	Comm	Poland
	ECB							
	Ecofin council, deficit alert/sanctions, external exchange rates							
2nd Pillar								
CFSP, Foreign Policy								
		DK	D	NL	I	ES	Comm	Poland
	Qualified abstention, for less important onedimensional issues; issues close to national interests, and more complex not to be handled this way. Positive example UN voting or UN and other international organizations/multilateral related cases							
	Qualified abstention to apply only to the stage of implementing resolutions rather than to instrinsic policy formulation.							

CFSP, Security Policy								
		DK	D	NL	I	ES	Comm	Poland
	Qualified abstention to apply only to the stage of implementing resolutions rather than to instrinsic policy formulation							
	Arms procurement (OCCAR)							
	„Ad hoc" Petersberg-type missions such as operation „Alba".							
3rd Pillar								
Criminal Law	Criminal justice grouped cooperation would appear to be limited exclusively to IEC, considering that Amsterdam has suppressed the old article 7 which expressly permitted enhanced cooperation outside the treaty procedures for this legal matter							
		DK	D	NL	I	ES	Comm	Poland
	Transferring judiciary files and evidence, for easing extraditions, for easing hot pursuit							
	Find some more common ground for punishable offenses among member states not too far apart from each other, for instance on membership in criminal or in terrorist organisations or associations							
	Enhanced cooperation on proceedings with other member states							
	Transfer of operational competences to Europol					(?)		
	Fight against organised crime, cooperation as wide and as deep as possible							
	Matters of extradition (suppression among member states)							

2. Effectiveness:

The hearings showed that officials were not convinced by enhanced cooperation's potential for raising the effectiveness of EU decision-making and policy implementation. Would the effectiveness of the EU as a whole be improved by advances in certain areas, or by stronger pressure exerted in negotiations against obstructive member states? On the latter, the urgency of this problem was seen to be much reduced by the change of government in the UK. But even so, officials in many capitals clearly expected effectiveness gains for EU integration in general from the existence of this new option against obstruction. The *Spanish* position, on the other hand, showed the persisting and well argued reservation against the idea that this change in the negotiating power balance would actually ease negotiations.

As to effectiveness gains for the Union to be gained from advances in certain areas, judgments were very mixed indeed, and this related to all policy fields. The pervasive concern was that such advances might produce externalities which would harm neighbouring areas of the acquis or make further well-ordered advances in the acquis impossible, or additionally might have harmful effects on other important aspects of the integration process.

In this context the *Commission* insisted strongly on the importance of severely circumscribing the fields for which IEC could be applied. It should not be allowed for one or the other individual directive, for matters of detail, but only for coherent matters forming a comprehensive policy field. This was a precondition for giving a positive opinion. If IEC was permitted in small-scale fields, cooperation groups of different composition and interest risked parceling important policy fields out among themselves and ripping them apart. This was similar to the effect of a bomb, the direct opposite of both more effectiveness and of deepening. Even if IEC initiatives, which satisfied this criterion could be realised against the reservations of other partners; they risked provoking fears of domination and resentments which might, as the *Spanish* officials thought, damage the functioning balance of give and take in traditional EU negotiations to the detriment of future effectiveness. It was to neutralise this kind of argument that officials of the Commission and of certain governments also insisted that IEC had to be open and avoid any hard core structure in order to fulfill a positive role.

An important caveat must be made as to gains in effectiveness for the procedures *within* prospective groups of enhanced cooperation in the enabling mode. If one takes the experience with EMU and the Euro-11 Council as a precedent, and accepts the arguments heard from government and EU officials as valid not only for this but also for other policy fields, then the new legal situation does not appear favourable for gains in effectiveness either. As in the Ecofin Council, the Treaty (Art. 44, TEU and Art. 11, TEC) restrains efficient and trustful work among such group members because its IEC format does not offer them an official form for meeting and working among themselves. According to the Treaty, they prepare their separate policies in full council, and then exclude the non-participants for the moment of the vote. As a consequence, other future enabled IEC projects will in all likelihood follow the model of EMU and the Euro-11, thereby producing separate and informal political councils, which bring together participants in the intimacy demanded for trustful and open deliberation of common policies, FEC within IEC. It is doubtful that this will aid effectiveness or deepening.

Finally, TEU Art. 44(1) sets another barrier to important gains in effectiveness within IEC groups by forcing them to hold on to the decision-making procedures set by the Treaty for the policy field in question. Even if they wanted to replace among themselves consensus by qualified majority voting, they could not do so. Officials in one of the hearings deplored this as an unnecessary rigidity going against the spirit of enhanced cooperation; an important reason was seen in Luxembourg's opposition to this kind of flexibility, for example in questions of fiscal policy.

3. Eastern Enlargement:

The hearings did not permit the conclusion that enhanced cooperation in its Amsterdam form is to play an important role in solving the difficulties of eastern enlargement of the Union. This eventuality was often alluded to as a determining factor for the introduction of IEC in the Amsterdam Treaty. But conclusive arguments in that sense were put forward by neither government nor Commission officials, except perhaps for the vague expectation that new deepening initiatives might be carried through by willing and able members, in spite of the recalcitrance or inability of one or the other of the new entrants.

4. The European Commission:

The Commission's status as an impartial supranational institution was of crucial importance to the functioning and further deepening of European integration. Asked if this status would not be impaired by more enhanced cooperation, especially in the form of IEC, and whether there was any concern about the impact which use of the Amsterdam clauses could have on the effectivness of policy development and implementation, Commission officials showed different attitudes, depending on whether the Commission's own status, or whether Community procedures in a more general sense were involved. In a general sense, the European Commission seemed, at this stage, not to have any defined strategy on the new elements of differentiation and on whether IEC should be used in the future, as they were mainly concerned about limiting the negative effects. As for the complications and difficulties of the new clauses, they were the natural result of compromises between fifteen different national positions and would have to be applied and then perhaps adapted further.

The Commission's own status as guardian of the Treaty, as important or even crucial actor in integration politics, as the motor of integration, was not seen to be endangered. In fact, seeing themselves entrusted vis-à-vis the interested member states with extraordinary powers in authorising enabling IEC in the first pillar, and in deciding on the accession of non-participating member states to such groups, Commission officials considered their status enhanced. They saw status confirmation for other supranational institutions, for instance pointing out that the European Parliament's participation in enabling IEC decision-making in the first pillar had not been reduced either, in comparison to full EU decision-making. Grouped voting in the EP, along the lines of the IEC procedure in the Council, had been proposed by certain IGC participants. Out of concern for the integrity of the supranational institutions, it was not retained.

This basically optimistic position can be seen in its evaluation of the triggering procedure for IEC and the implementation phase of enhanced cooperation, when the Commission might have to take the side of member states which wanted to establish

grouped cooperation in the 1st pillar, against the wishes of others who might oppose this initiative in the name of Union integrity. Commission officials saw no reason for concern. Had the Commission not already begun to assume an arbitration role between member states in other questions as well, such as the conflict between Italy and the other member states over landing rights at the new Malpensa airport near Milan?

Concern is more discernible in rather narrowly procedural points, where IEC affects the Commission's institutional role in certain policies. Officials saw an important case in the opening of the Commission's initiative monopoly in the Schengen acquis – in the first pillar for five years – and by the indeterminate preservation of this opening in the second and third pillars. Member state officials appeared to confirm this concern when some of them, for instance in *Germany*, justified a shorter or longer term reduced role of the Commission in these fields by the limited capacities and expertise which the Commission had there and which prevented it for a certain time from playing its full Community part.

But as for Community procedures in a more general sense and their part in them, certain Commission officials showed clearly more concern. For them enhanced cooperation especially in its enabling variant, constituted a potentially dangerous innovation, the application of which had to be closely watched, and in which the Commission had to use its far reaching competences in the first pillar with the greatest circumspection and determination. Otherwise, there was a risk that the whole logic of integration politics might be turned upside down. One of the most important points was to protect areas subject to QMV from an invasion by enabling IEC.

In arguing in this manner, certain Commission officials shared the concern of many national government officials, who were apprehensive about the impact which the use of the Amsterdam clauses could have on the unity and effectiveness of European Union policy development and implementation. There was a widespread feeling that there was already enough differentiation because of Schengen and the other elements introduced by Amsterdam.

VII. Consequences for Future Procedural Reform

When they compared goals and perspectives of realisation, many parliamentarians and officials of the EU and national governments began to reflect on the correct strategy to follow for further handling and development of enhanced cooperation in the EU. This report will conclude with a summary of the principal options emerging from these reflections.

1. Make the Best of the Amsterdam Clauses and Improve them

The first line of propositions coming from the member state officials takes as its point of departure, that the Amsterdam treaty changes were a step in the right direction. What they require is application and, for certain governments, improvement in a number of areas. This line was taken by the positive governments, *Germany and Italy.* In the

defensive sense the clearly more sceptical *Netherlands* and *Denmark* also belonged to this group, as did the *European Commission.*

Improvements on the new clauses for IEC, were openly demanded by *German* officials, who wanted primarily to ease the triggering of enabling IEC, and eventually to enlarge the scope of this instrument in the sense of the original Franco-German proposal to the Amsterdam IGC. The next IGC would be the occasion to reform IEC in this sense. It has already been stated that certain top officials in the European *Commission* concurred. It was advisable to test and eventually improve IEC clauses, in the perspective of finally getting a simpler and better adapted tool for the use by the member states.

a. Ease Triggering

The main impediments to easier triggering of IEC were seen in the new veto-possibilities introduced against IEC in the first and third pillars and the exaggerated importance accorded to the states, in relation to their populations, in determining the necessary quorum.

– Accordingly, the veto-option is to be further reduced,

– the conditions for entering IEC in the enabling mode, contained in the three flexibility clauses of Amsterdam, have to be loosened,

– The minimum number of member states has to be reduced, and replaced or supplemented by a minimum expressed in terms of population.

b. Enlarge the Scope of IEC and Include the Second Pillar

In addition, the scope of IEC was to be widened further in security policy by reintroducing the demand for the transfer of the WEU into the EU.

Would this have to be done by means of an IGC? In fact the new Article 17(1) of the TEU appears designed to ease that task, once the opposition to this plan, which blocked it at Amsterdam, ended. It expressly opens a way to achieve this transfer without having to organise an IGC, through a simple consensus decision of the European Council.

The British reflections on EU defence policy at the Pörtschach European Council have given new vigour to talks among a number of member state governments including the French and Germans, on the best way to integrate defence policy, and that means the WEU, into the EU.[30] If and when this happens, it seems certain to be a major first step in the utilisation of the Enabling IEC clauses of Amsterdam. On the other hand it will again, as with EMU and Schengen, mean the incorporation into the EU of an already existing external project of closer cooperation among member states. Difficult as it will be, major planning elements for such a take-over may already be found in the pre-Amsterdam initiative of transferring the WEU into the EU, making this also, in certain ways, predefined IEC (cf. see above, enhanced cooperation in defence). But the new challenge to master may come when the initiators attempt to transfer the mutual assistance obligation of Article 5 of the WEU treaty into the second pillar of the EU as

30 An echo of this was already audible on the occasion of the hearing with the European Commission.

well. This will certainly require truly creative handling of the new clauses created by Amsterdam.

2. Reduce the Application and Role of the Amsterdam Clauses

This line was taken, in varying intensity, by *Spanish*, but to a certain extent also by *Danish* and *Dutch* interlocutors. *Danish* government officials and parliamentarians maintained that Denmark would not be active in using the new paragraphs, or would even oppose such use by others. It expected these paragraphs to be used as a negotiation tool, allowing compromises which would otherwise not have been reached. *Dutch* officials also seemed mainly interested in discouraging enabling IEC from being applied over and above its two functions as a negotiating ploy to facilitate decision-making and barrier against free coalition building of big member states. *Polish* officials clearly shared these two concerns, but showed themselves willing to be more assertive in their resistance against almost any enhanced cooperation in the EU. Finally, the *Spanish* interlocutors wanted to prevent enabling IEC, particularly in the first pillar, but would allow FEC.

3. Facilitate other Methods to Accommodate Diversity in the Union

Another way to reduce the role of the Amsterdam clauses for IEC was explicitly recommended in in the Dutch and the Danish hearings. Officials of both governments wanted to accommodate diversity between EU member states and societies, or even exploit them for the future improvement of EU policies, by proposing a "far more flexible, less centralist and institutionalised approach to integration in the future", in the spirit of more *Subsidiarity*. IEC on the terms of Amsterdam appeared to be a traditional approach in this sense, which should not be followed too far. During the Danish hearing, certain voices suggested permitting de facto flexibility, by allowing member states greater discretion in the application of EU legislation. This could create circles of member states sharing a certain spirit in applying EU legislation. Another accent in the same vein was audible from Dutch officials who pleaded for less EU legislation and more policy competition to enable member states or groups to identify and follow best practice. Commission officials accepted the subsidiarity argument as an important approach in designing and implementing common European policies and implicitly permitting an amount of flexibility. But the important point for them was that this approach must not impair the EU's competence for creating effective common legislation. In that case, well constructed enhanced cooperation was, in the end, preferable to exaggerated subsidiarity.

Annexes

VIII. Partner-Institutions

Center for International Relations at the Institute of Public Affairs Ul.Reja 7, PL 00-922 Warszawa 54	Janusz REITER, director
CeSPI; Centro Studi di Politica Internazionale 11, Via d'Aracoeli, I-00186 Roma	Marta DASSU, director
DUPI; Dansk Udenrigspolitisk Institut Nytorv 5, DK1450 Copenhagen	Niels-Jørgen NEHRING, director
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Fundación BBV, Visions of Europe project Alcala 16, E-28014 Madrid	José Ignacio OYARZABAL, project director
SWP; Stiftung Wissenschaft und Politik, Forschungsinstitut für internationale Politik und Sicherheit Zeller Weg 27, D-82067 Ebenhausen	Christian DEUBNER, head of research group Europe
EU-Commission, Forward Studies Unit Rue de la Loi 200, B-1049 Bruxelles	Jean-Claude THEBAULT, director

IX. Participating Experts

Prof.José Maria BENEYTO Pérez	Professor of Law Madrid, Universidad Complutense
Prof.Christian DE BOISSIEU	Professor of Economics Paris, Université Paris I, Panthéon
Prof.Deirdre CURTIN	Professor of Law Utrecht, University of Utrecht
Christian DEUBNER, project director	Political Scientist, Head of Research Group 1 Ebenhausen, Stiftung Wissenschaft und Politik
Andrew DUFF	Director London, Federal Trust
Prof.Claus-Dieter EHLERMANN	Professor of Law Florence, European University Institute
Prof.André GAURON	Professor of Economics Paris, Institut d'Etudes Politiques
Prof.Kay HAILBRONNEr	Professor of Law Constance, University of Constance
Prof.Jörg MONAR	Professor of Political Science Leicester, University of Leicester
Prof.Eric PHILLIPPART	Professor of Political Science Brussels, Université Libre de Bruxelles
Prof.Christian SAINT-ETIENNE	Professor of Economics Fontainebleau, INSEAD
Alexander STUBB	Political Scientist Brussels, Finnish Permanent Representation EU

X. Participating National and EU-Officials

1. Hearing in The Hague, January 26-27, 1998

BORSTLAP, Hans, General Director, Ministry of Social Affairs

BRUIJN, Tom de, Director European Integration, Ministry of Foreign Affairs

BURGER, C., Ministry of Economy

DEMMINK, Joris, General Director, Ministry of Justice

EISMA, Doeke, Member of the D66 Parliamentary Group of the Second Chamber

GONÇALVES, Carmen, Department of European Integration, Ministry of Foreign Affairs

HOEKEMA, J.Th., Member of the D66 Parliamentary Group of the Second Chamber

KETTING, Ir N.G., Member of the First Chamber of the Staten-Generaal

KUIPERS, Mr. S.A., Director European Department, Ministry of Economy

SCHEPER, E.Z.G., Department of International Affairs, Ministry of Social Affairs

SCHRIJVERS, Mr., De Nederlandsche Bank

SZASZ, Prof. André, former Director of De Nederlandsche Bank

WEYENBERG, S.van, Ministry of Economy

2. Hearing in Bonn, February 17, 1998

BERG, Axel, European Department, Ministry of Foreign Affairs

DEWITZ, Wedige von, Director European Department, Ministry of Economy

EISEL, Horst, Deputy Director Department of Police, Ministry of the Interior

ELFENKÄMPER, Helmut, Deputy Head Planning Staff, Ministry of Foreign Affairs

JEKEWITZ, Jürgen, Deputy Director European Department, Ministry of Justice

KÖLSCH, Eberhard, European Department, Ministry of Foreign Affairs

MEYER-LANDRUT, Nikolaus, European Department, Ministry of Foreign Affairs

NANZ, Klaus Peter, European Affairs, Ministry of the Interior

PILLATH, Carsten, Ministry of Finance

SCHWEPPE, Reinhard, Deputy Director European Department, Ministry of Foreign Affairs

STATZ, Albert, Parliamentary Group Bündnis90/Die Grünen, Bundestag

WALDERSEE, Bernhard Graf von, Parliamentary Group CDU/CSU, Working Group of Foreign Policy, Bundestag

WIESINGER, Horst, Otl i.G., Ministry of Defence

3. Hearing in Rome, March 27-28, 1998

BETTAMIO, Giampaolo, Deputy Chairman, Parliamentary Committee for the Monitoring of the Schengen Agreement

BOLAFFI, Guido, Department of Social Affairs, Office of the Prime Minister

CABRAS, Daniele, Secretary, Foreign Affairs Committee, House of Deputies

DE GIOVANNI, Biagio, European Parliament

DI PAOLA, Giampaolo, Chief of Military Policy General Office at the Defence General Staff

FAGIOLO, Silvio, Chief of Staff, Ministry of Foreign Affairs

FASSINO, Piero, Under-Secretary of State, Ministry of Foreign Affairs

FINOCCHI Ghersi, Renato, Head Legislative Office, Ministry of Social Affairs

GENNARO, Gianni de, Deputy Chief of State Police

GUELFI, Carlo, Cabinet of the Minister of the Interior

NAPOLITANO, Giorgio, Minister of the Interior

NIGIDO, Roberto, Diplomatic Advisor to the Prime Minister

PAPADIA, Mr., Deputy Director for International Relations, Bank of Italy

PINZA, Roberto, Under-Secretary of State, Ministry of Finance

SACCOMANNI, Fabrizio, Director, Bank of Italy

SINISI, Giannicola,Under-Secretary of State, Ministry of the Interior

SPINI, Valdo, Chairman, Defence Committee, House of Deputies

VERDERAME, Giovanni Battista, CFSF Coordinator, Directorate General of Political Affairs, Ministry of Foreign Affairs

4. Hearing in Madrid, May 25, 1998

AREILZA, José M. de, Oral Advisor, International and Defence Department, Presidential Office

BARDAJI, Rafael, Parliamentary Advisor for the Ministry of Defence

BENZO, Fernando, Cabinet Director of the Secretary of State for Security

BODELON, Gloria, Subdirector General for Asylum

CALVO-SOTELO, Leopoldo, Under-Secretary for the Interior

DASTIS, Alfonso M., Oral Advisor, International and Defence Department, Presidential Office

GARCIA-BERDOY, Pablo, Cabinet Director of the Secretary of State for Foreign Policy

GUINDOS, Luis de, Director General of Economic and Competition Policy

MIGUEL ZARAGOZ, Juan de, Executive Advisor to the Secretary of State for Justice

MARTIN BURGOS, Juan Antonio, Sub-Director General for Justice and Internal Affairs

PISONERO, Elena, Cabinet Director of the Second Vice-President and of the Ministry of Economy

ROLDAN, Felix Sanz, General, Sub-Director General of International and Defence Matters

5. Hearing in Copenhagen, September 30, 1998

ADLER, Lone, Advisor, Ministry of Labour

AHRENKIEL, Thomas, Head of Section, Ministry of Foreign Affairs

ANTONSEN, Charlotte, MP, The Danish Liberal Party

BARTHOLDY, Niels, Assistant Head of International Division, The Central Bank

BUKSTI, Jacob, MP, Chairman European Affairs Committee, The Social Democratic Party

CHRISTENSEN, Thomas Alslev, Head of Division, Ministry of Economic Affairs

FICH, Christian, Head of Section, Ministry of Foreign Affairs

FRIIS, Svend, Advisor, Danish Energy Agency

GADE, Steen, MP, The Socialist Peoples Party

GRUBE, Claus, Deputy State Secretary, Ambassador, Ministry of Foreign Affairs

HANSEN, Marie, Deputy Under-Secretary of State, The Prime Minister's Office

KJELGAARD, Peter Brix, Ministry of Finance

LARSEN, Lars Bay, Deputy Permanent Secretary, Ministry of Justice

LAUGER, Hanne, EU Advisor, Ministry of Food, Agriculture and Fisheries

MATTHIESSEN, Michael S., Head of Division, Ministry of Foreign Affairs

MIKKELSEN, Jeppe Tranholm, Advisor, The Prime Minister's Office

MOLDE, Jørgen, Head of Division, Ministry of Foreign Affairs

NILAS, Claes, Director, Danish Immigration Service, Ministry of the Interior

PETERSEN, Friis Arne, Permanent Secretary of State for Foreign Affairs, Ministry of Foreign Affairs

PETTERSON, Preben, Head of Division, Ministry of Business and Industry

RYOM, Steffen, Head of Section, Ministry of Foreign Affairs

SVANE, Freddy, Head of Division,, Ministry of Foreign affairs

SØNDERGAARD, Carsten, Head of Department, Ministry of Foreign Affairs

SØRENSEN, Jens Adser, Head of International Department, Parliament

ZIEGLER, Pia, Head of Section, Ministry of Business and Industry

6. Hearing in Warsaw, October 1, 1998

ANSELM, Wiktor, Director Department of Treaties, Office for European Integration

BECZA³A, Joanna, Legal and Treaties Department, Ministry of Foreign Affairs

DOWGIELEWICZ, Miko³aj, Office for European Integration

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XII. List of Abbreviations

CFSP	Common Foreign and Security Policy
ECB	European Central Bank
ECJ	European Court of Justice
Ecofin	Council of Ministers of Economy and Finance
EMS	European Monetary System
EMU	Economic and Monetary Union
ESCB	European System of Central Banks
EU	European Union
FEC	Free Enhanced Cooperation
IEC	Institutional Enhanced Cooperation
IGC	Intergovernmental conference
JHA	Justice and Home Affairs
MS	Member states
QMV	Qualified majority voting
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
WEU	Western European Union

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