

From Threat to Opportunity

Making Flexible Integration Work

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Executive Summary

This paper argues for a thorough reappraisal of flexibility as an instrument of integration and outlines the conditions under which it would help the enlarged EU to move forward. Too often in the past, flexibility has been used as an (efficient) threat to induce reluctant or laggard member states to keep pace with the integration process. Therefore, it should not come as a surprise that flexibility has such a poor image in many member states.

So far flexibility mechanisms have been initiated only outside the treaty framework – like the initial stages of the Schengen agreement – or they have been limited to a series of opt-in or opt-out clauses, such as those associated with EMU. In a European Union enlarged to 27 or more members, however, the potential need for member states to move at different speeds requires fresh consideration. In the past, the main fear was that flexibility could break the EU in two. Present concerns are more focused on an overly rigid European Union that may stall and eventually even collapse. At a time when many consider further enlargement to be incompatible with further integration, the treaty-based mechanism of enhanced cooperation could help reconcile both views. A larger membership base should not be seen as preventing the European Union from deeper integration, but as providing incentives for certain member states to move integration forward. Instead of categorising European countries in three more-or-less closed groups (first-class core EU members, second-class EU members and third-class non-members), enhanced cooperation could offer opportunities to redesign the integration process. Member states could move from the fringes to the core of the European project depending on merit and political commitment, and not according to size or other unalterable factors.

For this scenario to materialise, however, a new approach to managing flexibility is needed. This paper puts forth the following conditions for the successful application of the flexibility mechanism:

1. Flexibility should be seen as a complement and not as an alternative to settling the current constitutional crisis.
2. Flexibility should be used as a constructive tool and not as a threat.
3. It should be initiated within the legal EU treaty framework, i.e. through enhanced cooperation; initiatives outside the EU treaty framework should only be encouraged with a view to later integration into the EU's legal framework.
4. Establishing exclusive core groups must be avoided, whereas the political significance of the Eurogroup for flexible integration should be acknowledged.
5. Rules applying enhanced cooperation should be interpreted in a pragmatic way in light of the *effet-utile* rule.
6. Projects under enhanced cooperation should be based on a *mandate* that gives an overarching idea and a sense of direction. The mandate's scope should go beyond a concrete legal initiative to avoid the possibility that flexibility becomes a substitute for majority voting.

1. Flexibility - A complement, not an alternative to a constitutional settlement

The failure of the Constitutional Treaty in France and the Netherlands has fuelled the debate about flexible approaches towards European integration. Many scenarios for cooperation between a limited number of member states have been put forth in recent months. This paper does not intend to present flexible integration as an alternative to the Constitutional Treaty. We think that the EU deserves a more transparent, efficient and democratic institutional framework. The Constitutional Treaty does contain important elements to that end. Regarding future integration, however, the enlarged EU will be increasingly dependent on flexible arrangements – with or without the Constitutional Treaty. Both approaches should not be seen as alternatives, but rather as complementary elements. This argument is reinforced by the fact that the constitution itself includes a number of new provisions, which make it more attractive to use flexible integration within a treaty framework, e.g. the permanent structured cooperation concerning defense matters in art. I-41.6. Already today, both the eurozone and the Schengen cooperation show how crucial flexible integration can be to the entire integration process. We will need more flexible arrangements in the future, since it is increasingly unlikely that all member states will want to take the same steps forward at the same time. Some countries are eager to move ahead in certain policy fields, whereas others show no interest for the foreseeable future. Flexible integration is often criticised for its potentially divisive effects. However, in assuaging both the frustration among those feeling held back and the reluctance among others that feel pressured to move ahead against their will, flexibility, if and when certain conditions are met, could avoid increasing tensions and divisions among EU member states.

2. From threat scenario to constructive tool

While intergovernmental cooperation may be an easier way to start a flexibility initiative, it holds a considerable risk of undermining mutual trust among the ‘ins’ and ‘outs’ of such an arrangement if the initiative is not open to everyone from the beginning. This point may not be obvious at first, and some European leaders may be desperate for some action to make up for the constitutional crisis. However, in a political environment that is already very sensitive and where recent summits have shown a considerable lack of unity as well as a sense of direction, such an approach would be misguided. A divisive debate about core Europe and uncoordinated or – even worse – opposed ad-hoc coalitions would further fuel this mood and ultimately do a great disservice to the European project. In the past, flexible integration has too often been used as a threat scenario against unwilling member states. It has yielded short-term gains, but in return discredited the flexibility concept in many countries. The most famous incident in recent years was the Franco-German threat to turn towards a core Europe after the failed IGC in December 2003. When Poland and Spain refused to accept the double majority system of the Constitutional Treaty, French and German politicians were quick to float rather unsubstantiated ideas about a new core group, solely to force the unwilling countries into agreeing to the Constitution’s package deal. Similarly France and Germany supported by Belgium and Luxembourg pushed for a European defensive initiative during the Iraq war. This was seen as an unfriendly and divisive act. Particularly in many new member states today, flexibility is largely seen as a threat to create second-class member states.¹ To gain acceptance, conditions and

¹ In the current political context, one may not rule out the fact that flexibility proposals continue to be part of member states’ strategies to have the Constitutional Treaty ratified. For example, the pamphlet by Belgian Prime Minister Guy Verhofstadt on “The United States of Europe” can be seen as programmatic and/or tactical. As such, each flexibility initiative must be examined and credited differently from the original motives of those launching them.

safeguards foreseen in the treaty provisions for enhanced cooperation must be observed. An open door for all member states willing to join at any later point must be provided, and decisions must be clear to all interested parties. A critical mass of at least eight member states can prevent competing *avant-gardes* countries from moving ahead in different directions. In this way, safeguards could be in place to make sure that the original reasons behind the initiative, whether programmatic or tactical, do not affect the actual initiative if and when it is adopted.

3. Integration outside the treaty only under strict conditions

In the absence of concrete efforts to initiate flexibility within the treaty framework, certain member states seem to be increasingly inclined to move outside treaties and start intergovernmental cooperation on very selective matters. Especially in justice and home affairs, different types of intergovernmental agreements are ‘mushrooming’, by-passing the Commission as the representative of community interest or the democratic control of the European Parliament. Of course, national parliaments and courts maintain a certain level of control. Reality shows, however, that international agreements between member states are rarely sufficiently scrutinised when the cooperation is strictly intergovernmental and the community method is not applied (i.e. no or limited involvement of the European Parliament and the Court of Justice).

Some put forth the argument that the Schengen agreement was also concluded between several member states in an intergovernmental context, and then others adhered to the agreement until it was finally integrated into the European Community framework. There is an important difference, however. At that time, a policy on justice and home affairs *within* the EU framework did not yet exist, so that risks to undermine common EU efforts were extremely limited. Since today these risks are much greater, measures must be taken to ensure that flexible integration does not fuel a trend towards more intergovernmentalism at the expense of existing community programmes and the supranational approach of the European Union. An enlarging EU that gives up its ambitions for strengthening its institutional framework will inevitably lead to an ‘ever-looser Union’. As useful as coalitions of the willing may appear in the short term, they would risk undermining common EU efforts by creating an opaque and unaccountable coppice of uncoordinated intergovernmental structures. If they were to become the main model for future integration, it would hardly be the kind of European model citizens would endorse.

The acceptability of a limited number of member states that cooperate outside the current treaties depends on the potential to draw other member states in and eventually integrate this entire cooperation into the existing treaty framework. In certain cases, member states solve a collective action dilemma by deciding to unilaterally provide certain public goods, e.g. security matters. In return, they gain the advantage of shaping the emerging policy in ways that fit their national interests. Member states with weak preferences or less intense national interests benefit later from the initiative without having contributed to its provision costs and initial risks. Under these conditions, initiatives outside the treaties can be regarded as initial stages of (flexible) integration rather than intergovernmental alternatives at the expense of the community method. However, they can be regarded as welcome ‘integration laboratories’ to promote policy learning, innovation and diffusion, only if the door for all member states is kept open at all times, and if the resulting outcome aims to provide the European Commission and other member states with adequate standards for harmonisation. Any assessment of an initiative outside the treaties² should be based on the extent to which they are open, transparent and ultimately benefit all member states. Member states participating in these initiatives should

² E.g. the Treaty of Prüm, which includes provisions for DNA and fingerprint data sharing and which has been signed so far by the Benelux countries, Austria, France, Germany and Spain.

provide evidence from the beginning that they seek to develop and reinforce the *acquis communautaire* and the integration process instead of weakening it.

4. Avoiding exclusive core groups while acknowledging the Eurogroup's political significance

This paper argues in favour of enhanced cooperation since flexible integration would then be based on clear rules established by EU treaties. According to this view, an exclusive or selective core – just like the coalitions of the willing in the other extreme – is not an acceptable solution to move Europe forward. In the long run, a selective core would sacrifice the overall coherence of an already complex institutional setting. It would thwart the only recently achieved ‘reunification’ of Europe, and it would indeed create second-class and first-class membership on a long-term basis. Scenarios that support objective qualification criteria for core membership would endanger the spirit of integration.

The danger emanating from the exclusive/selective core concept is illustrated best by Nicolas Sarkozy’s idea for a core of the largest six member states.³ Firstly, the proposal of the French presidential candidate does not correspond to the reality of the decision-making process in the Union. European progress at both the macro and the micro levels are very rarely the result of large member state coalitions, but rather the combination of small and large ones. Secondly, it also ignores the fact that very often smaller member states have moved integration forward. They traditionally regard the Commission as their natural ally and have supported the supranational elements of the EU in recent years much more convincingly – the stability pact being just one prominent example. Beyond that, the proposed *directoire* of the large member states also fails under a normative aspect. The EU would become a ‘Hobbesian’ Europe ruled by the most powerful in which the other member states would be mere policy-takers regarding issues of great importance. They would be forced to accept the decisions of the large states, opt out or leave the Union all together. In principle, a core of large member states is meant to drive integration forward, while in practice, it would lead to an intergovernmental Europe ruled by the larger member states. Consequently, flexibility arrangements must always keep the door open to any member state sharing the political commitment shown by the original proposal-makers.

Having recalled the danger of restricting integration to an exclusive core, it would, however, seem counterproductive to underestimate the potential of an existing core of member states: the Eurogroup. Further integration among the states belonging to the eurozone, especially regarding economic coordination, would make sense because the common currency creates a particularly high degree of mutual interdependency. Although political visions differ within that group, it is worth emphasising the political symbol and significance that is linked to the idea of a common currency. The advantage of this core group is that it remains open to those wishing and able to join the eurozone as the recent decision about Slovenian membership illustrates. Stronger cooperation on matters of economic governance within the eurozone would therefore be of particular political relevance.

5. Conditions for enhanced cooperation can be met

The strongest argument against treaty-based enhanced cooperation is that it has never been used so far. Critics claim that the conditions are so strict that it cannot actually be applied. The broad safeguard clauses in article 43 TEU are judged to be a major obstacle. Especially the provisions demanding respect for the *acquis communautaire*. The common market rules as well as intra-

³ Speech at the Konrad Adenauer Foundation, Berlin, 16 February 2006 (retrieved from: <http://www.u-m-p.org/site/GrandDiscoursAffiche.php?IdGrandDiscours=169>).

EU trade and competition rules are seen as an insurmountable barrier for any meaningful effort on enhanced cooperation. This opinion ignores a fundamental principle of EU law: the *effet utile* rule established by the European Court of Justice. According to this rule, a European treaty provision or law must always have a meaningful field of application in practice. A provision can never be interpreted in such a way that it has no legal effect. This would also apply to article 43 TEU since the broadly formulated safeguard clauses are subject to a reasonable interpretation. The ECJ's tradition of rather integration-friendly rulings in the past decades also suggests that it will take a favourable approach towards enhanced cooperation.

In many areas, there is no doubt that Art. 43 TEU can be met. In fact, possibilities for enhanced co-operation abound. Nothing would prevent, for example, a group of member states from fully opening their services markets and adopting the rule-of-origin principle if they so wished. Similarly, member states may use enhanced cooperation to harmonise standards for labour contracts without third-party damage claims. Possibilities for enhanced cooperation also exist in economic governance, justice and home affairs. Even a common corporate tax base and an eco-tax have been under discussion.

6. The advantages of enhanced cooperation

There is, of course, an important question concerning the incentives for member state: Why should countries actually bother with the numerous conditions and limitations linked to enhanced cooperation when they can also cooperate independently outside the treaty framework with no strings attached?

One of the main reasons is the benefit of the European Commission and its administrative resources: the benefit of good coordination and management. As policies evolve, matters often become increasingly complex and difficult to manage. When a greater need for continuity and coherence arises, it makes sense to use existing European institutions instead of creating costly double structures. Art. 44a TEU stipulates that administrative costs for the European institutions are covered by the common budget and under certain albeit strict conditions even EU financing would be available for implementation of acts agreed under enhanced cooperation.

Another incentive is linked to policy-shaping opportunities that enhanced cooperation can provide. Integrating an initiative initially started outside the EU framework is likely to reopen many questions or even trigger a battle between different member state camps, while enhanced cooperation would avoid these problems. Knowing that once adopted, definitions and decisions are rather hard to reverse within the community framework, there is an obvious comparative advantage for those member states more interested in a particular policy field and thus likely to participate in a corresponding enhanced cooperation initiative from the very beginning.

7. A mandate to ensure coherence and direction

There is also a question concerning the scope of enhanced cooperation initiatives. Theoretically, it ranges from very concrete legal acts to whole new policy areas. We argue that, on the one hand, the scope should not be too limited, since flexibility mechanisms should not mainly be used to by-pass national vetoes on single legal acts. Otherwise, the result would be such a diversified political system that it would quickly lose its overall coherence, and it would become impossible to keep track of which country is actually 'in' and which is 'out'. On the other hand, flexible integration initiatives should also be concrete enough to demonstrate the practical benefits and added value at first sight. A good approach would be to formulate a framework mandate for any initiative. Such a mandate would clearly define the initiative's rationale and, within this framework, enhanced cooperation could then be developed step-by-step. Concrete legal acts would be agreed upon, but they would be part of a bigger picture that would allow

citizens to understand the overall logic that links individual elements. It would also remind decision-makers of the initial direction of the initiative.

8. Conclusion

This paper has sought to establish enhanced cooperation as a credible and necessary tool to deepen European integration at a time when the European Union has been considerably widened. Instead of a threat scenario, flexible integration can be a productive tool for integration if certain standards of openness and coherence are observed. Rather than an exclusive core, emerging as a backlash to the recent enlargement and the constitutional crisis, enhanced cooperation is an instrument to keep a widening European Union on track for necessary reforms. Enhanced cooperation avoids many of the disintegrating effects that purely intergovernmental methods of flexible integration risk. Despite a general reluctance to employ this policy measure so far, enhanced cooperation should be seen as a practical EU policy tool. In an enlarged Union of soon to be 27 members, enhanced cooperation could turn the idea of flexible integration from a measure of threat to a real opportunity for deeper integration.

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EPIN is a network of European policy think tanks and research institutes. It has more than 25 member think tanks across 21 countries, including all the EU member states and candidate countries. Within the framework of the Ratification Monitor Project, EPIN monitors the debates that surround the European Constitutional process in all of the member states. It provides comprehensive, coherent and easy access for all those interested in the European policy debate. EPIN's network of think tanks also provides analysis of all the different national debates and of the complex political dynamics of the pan-European debate.

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- To develop *interaction, contacts and exchange of information* and analysis across the members of the network.
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