

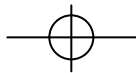
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Flexible Modes of Governance: Making CFSP and ESDP Work

Udo Diedrichs and Mathias Jopp*

The capacity of the European Union to act on the international scene is of key importance for the integration process as a whole. Citizens increasingly expect the Union to become an international actor in its own right, defending the common interests and values of its member states. However, the decision-making procedures in the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP) provide the EU with only limited options for exploiting its full potential. Until qualified majority voting replaces unanimity as the rule, decisions will be hard to adopt – and the accession of new members will further aggravate this situation. Under these circumstances, forms of flexibility in CFSP and ESDP can offer feasible ways of organising decision-making in an efficient manner by allowing some EU members to engage in deeper cooperation or

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integration without having to have all EU partners on board. Without either qualified majority voting or flexibility, it will be difficult to conduct any effective and credible CFSP with 25 or more countries.

The Convention on the Future of Europe addressed this fundamental problem. The draft Constitutional Treaty adopted in June and July 2003 includes new options and opportunities for flexibility within the EU's foreign, security and defence policy.¹ The crucial question is: will the Constitutional Treaty be able to improve the EU's capacity for action and facilitate deeper integration in CFSP and ESDP with 25 members, without overriding basic national interests or excluding individual member states?

To answer this question, a closer look will be taken at present forms of flexibility outside and inside the EU, defining the needs that the Convention had to address. Thereafter, the debate and the results of the Convention as well as their possible impact on the EU will be assessed.

Models of flexible solutions outside the Treaties

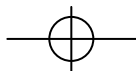
Flexibility in foreign, security and defence policy is already a reality – outside the Treaties, however – in the form of intergovernmental cooperation among a limited number of EU countries. These initiatives cover quite different activities ranging from informal coordination and “mini-lateralism”² in foreign policy to formal agreements on specific fields of defence cooperation. During the Iraq crisis, ad hoc coalitions between EU countries were the dominant pattern of coordination, also stimulated by the US which, finding no single interlocutor in the EU, preferred to engage the EU states bilaterally.³ The fact that one group of EU countries opposed US policy, while another supported it, made an effective role of the EU as a whole impossible.⁴

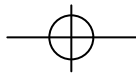
¹ Draft Treaty Establishing a Constitution for Europe adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome, 18 July 2003 (CONV 850/03); hereinafter quoted as draft Constitutional Treaty or CT.

² *The Economist*, 22 March 2002; A. Missiroli, *CFSP, Defence and Flexibility*, Chaillot Papers 38 (Paris: WEU Institute for Security Studies, 2000) p. 29.

³ J. Howorth, “CESDP after 11 September: From Short-Term Confusion to Long-Term Cohesion?”, *EUSA Review*, vol. 15, no. 1, 2002, pp. 3-4.

⁴ S. Keukeleire, “Directorates in the CFSP/CESDP of the European Union: A plea for ‘restricted crisis management groups’”, *European Foreign Affairs Review*, vol. 6, no. 1, 2001, pp. 75-102. Keukeleire hints at the fact that the Bosnia Contact Group, for example, appeared attractive to the larger member states because of the lack of consensus within the EU. It provided them with a way of obtaining results more efficiently.





In certain situations, the “big” EU countries engage in a *directoire* outside the EU. The contact groups for Bosnia and Kosovo are telling examples of this kind of cooperation, where Germany, Britain, France (and in the case of the Kosovo contact group, also Italy) closely coordinated their position with the US and Russia. Smaller EU states are opposed to this kind of cooperation as they are excluded from decision-making and regard it as a breach of solidarity among the EU members.

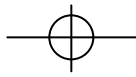
In the field of defence policy, cooperation outside the EU has flourished in the last years. The Franco-German Brigade as the core element of the Eurocorps is the most prominent example of multinational force structures. Apart from this, a number of further initiatives like Eurofor and Euromarfor (bringing together France, Italy, Spain and Portugal for crisis-reaction tasks in the Mediterranean region) have been put in place.

As regards defence industrial cooperation, the Letter of Intent (LoI), signed in 1998 by France, Britain, Germany, Italy, Spain and Sweden, led to a Framework Agreement in 2000, which defines cooperation in areas like security of supply, export provisions, security of information, research and technology, treatment of technical information and harmonisation of military requirements.⁵ France, Britain, Germany and Italy had already set up the Organisation for Joint Armaments Cooperation (Organisation Conjointe de Coopération en matière d’Armement, OCCAR) in 1996. Tasked with controlling, coordinating and implementing armaments programmes assigned to it by its members and promoting joint activities for the future, OCCAR was endowed with legal status by the OCCAR Convention which entered into force in January 2001.⁶

A key question is to what extent the above mentioned initiatives can be more closely linked to the framework of the European Union, avoiding parallel structures which are – politically and financially – costly and impair the effectiveness of the EU as a whole. It is difficult to conceive of a single solution for all cases described; rather, specifically tailored mechanisms are needed to meet this challenge. Of particular importance are the proposals made by the draft Constitutional Treaty which will be assessed later in this article.

⁵ M. Nones, “A Test Bed for Enhanced Cooperation: the European Defence Industry”, *The International Spectator*, vol. XXXV, no. 3, 2000, pp. 25-35; S. Bauer, “Defence Industry Restructuring: Negotiations Continue”, *European Security Review*, no. 1, July 2000, pp. 4-5.

⁶ Convention on the Establishment of the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en matière de Défense) OCCAR, Farnborough, 9 September 1998.



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Flexible solutions inside the Treaties

The provisions on flexibility in the EU Treaty do not offer feasible possibilities for flexibility. Nor did the Treaty of Nice substantially improve decision-making procedures in CFSP and ESDP. Qualified majority voting remains a rather improbable option under very restrictive conditions and is hampered by the fact that unanimity is nevertheless required in each case before majority decisions can be taken. There is a clear need for improvement.

Flexibility in pre-determined policy areas

Flexibility in CFSP and ESDP within pre-determined policy areas does not yet represent a feasible option. The wording of Art. 17 TEU, stating that the “specific character of the security and defence policy” of certain member countries shall not be prejudiced, and that member states’ obligations within NATO shall be respected, could be interpreted as a form of pre-determined differentiation. The same article also mentions the possibility of “cooperation in the field of armaments” among several member states. But these provisions either remain vague or hint at certain features of member states’ security and defence policy resulting from extra-EU commitments or non-alignment. They do not prescribe a substantial engagement by member states in the framework of the Treaties.

Within the debate on CFSP and ESDP, pre-determined forms of flexibility have been discussed for issues such as a mutual assistance clause, more efficient use of resources and enhanced convergence of national defence policy.⁷ For the defence industrial sector,⁸ they have been suggested for market regulation, technical norms and standards, export controls, and research and development policy. To this end, a revision of Art. 296 TEC could be reconsidered to create a “mini-single market” for arms among countries willing to commit themselves.⁹

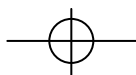
Enhanced cooperation in the Treaty of Nice: a straightjacket

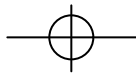
The Treaty of Nice changed the provisions on flexibility established by the Treaty of Amsterdam, and extended the clause on “enhanced cooperation”,

⁷ G. Andréani et al., *Europe's Military Revolution* (London: Centre for European Reform, 2001).

⁸ A. Missiroli, “Coherence, effectiveness, and flexibility for CFSP/ESDP”, in Reiter, E., R. Rummel and P. Schmidt (eds) *Europas ferne Streitmacht. Forschungen zur Sicherheitspolitik*, Band 6 (Hamburg: Mittler, 2002) pp. 119-48.

⁹ B. Hall, *How flexible should Europe be?*, CER Working Paper (London: Centre for European Reform, 2000).





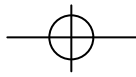
also to CFSP. Some of the new provisions were meant to facilitate future use of the procedure; thus Art. 43 TEU sets down that only eight countries – not a majority of member states as in the Treaty of Amsterdam – are required to initiate enhanced cooperation (this still constitutes a majority in the present EU, but will not in an enlarged Union). But while the veto option was lifted in the first and third pillars, making it impossible for a member country to block a decision on enhanced cooperation, it was left in the second pillar. Another important limitation on flexibility in the second pillar is defined in Art. 27b TEU, which states that enhanced cooperation in CFSP will only relate to the implementation of a joint action or a common position, and not to matters having military or defence implications.

The enabling clause introduced in CFSP affairs stipulates that enhanced cooperation shall safeguard the values and serve the interests of the Union as a whole by asserting its identity as a coherent force on the international scene (Art. 27a). It has to respect the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy, the powers of the European Community, and consistency between all the Union's policies and its external activities. These conditions must be seen in conjunction with the general criteria for enhanced cooperation as stated in Art. 43 TEU. Thus, the threshold is still rather high, and it remains to be seen whether the provisions will ever be applied under these constraints. All in all, enhanced cooperation is currently more of a straightjacket than a new opportunity for decision-making.

Case-by-case flexibility based upon constructive abstention

Constructive abstention (Art. 23 (1) TEU) has been regarded as a kind of compensation for the failure to introduce closer cooperation proper in the CFSP title of the Amsterdam Treaty. Although generally subsumed under flexible solutions, it must be clearly distinguished from them: constructive abstention is a decision-making provision rather than a method for "organising" integration, and – more importantly – it tries to make a consensus among all possible rather than facilitating flexible solutions for some to move forward.

Art. 23 TEU stipulates that any member state is allowed to make a formal declaration when abstaining, which means that it will not have to apply a decision, but accepts that the Union as such is bound by it. The respective member state is also called upon not to take any action against the decision or to impede its application (Art. 23.1 TEU). If the member states resorting to constructive abstention account for more than one third of the weighted votes, a decision will not be taken. This underlines that the mechanism was



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not conceived as a tool for flexibility, but rather as an instrument for facilitating consensus.

Improving flexibility within the EU

The models described for flexibility in CFSP and ESDP leave a clear gap: while on the one hand, flexible solutions have flourished outside the formal EU framework, as in the field of multinational forces or defence industrial cooperation, on the other hand, no convincing effort has been made so far to anchor flexibility within the Treaties, either in pre-determined policy areas or by means of an efficient enabling clause for enhanced cooperation or a more generous version of constructive abstention. This gap could lead to major deficiencies in the EU's capacity for action. As the Treaty of Nice left major issues unsolved, the challenge for the Convention was evident: to envisage a reform that would provide the EU with improved decision-making opportunities and more flexibility within the Treaties to avoid a by-passing of the Union through forms of cooperation among some member states outside the Treaty framework.

The European Convention debate on CFSP and ESDP

Franco-German proposals

In order to render decision-making in CFSP and ESDP more efficient, France and Germany submitted several proposals to the Convention on the Future of Europe. In their joint contribution on the institutional architecture of the EU of 14 January 2003, they even went so far as to plea for majority voting as a rule in CFSP, unanimity in ESDP, with the possibility of enhanced cooperation.¹⁰

Some flexible solutions for ESDP could already be found in the Franco-German proposals of November 2002. The core idea was to transform the ESDP into a "European Security and Defence Union",¹¹ enabling willing countries to commit themselves more closely to defence cooperation. A number of recommendations, mainly based on combining a clause for

¹⁰ Franco-German contribution to the European Convention concerning the Union's institutional architecture, Brussels, 16 January 2003 (CONV 489/03). A veto option was foreseen in case of majority voting, but only with the effect of a suspensive veto.

¹¹ Contribution by Mr. Dominique de Villepin and Mr. Joschka Fischer, members of the Convention, presenting the joint Franco-German proposals for the European Convention in the field of European security and defence policy, Brussels, 22 November 2002 (CONV 422/02).

enhanced cooperation with certain pre-defined fields of flexibility, were put forward: in various areas (multinational forces with integrated command capacities, armaments and capabilities, management of human resources, training, development of common doctrines) enhanced cooperation should be possible by qualified majority with a smaller number of participating countries and a special provision for a rapid decision-making procedure.¹² However, the Franco-German contribution suggested the use of constructive abstention instead of enhanced cooperation when the launching and implementation of military operations is concerned.

Furthermore, the proposal recommended that a protocol containing a commitment in terms of the distribution of tasks and resources as well as the improvement of military capabilities and the harmonisation of the planning of military requirements be annexed to the Treaty. In the field of defence industrial cooperation, France and Germany proposed another protocol making reference to projects like OCCAR or the Lol, which could be subscribed to by a number of countries under enhanced cooperation and later expanded to further participants. Member states wishing to do so should also be allowed, through enhanced cooperation, to bring into the EU framework the commitments they have taken on under the WEU Treaty, which would cover the mutual assistance clause of Art. 5.

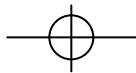
The “four nations’ proposal”

An even further-reaching initiative followed on 29 April 2003, when the heads of state and government of France, Germany, Belgium and Luxembourg presented to the public a proposal that added further fuel to the reform debate on CFSP and ESDP, in particular with a view to flexibility.¹³ There were three main points:

- Certain proposals for procedural and institutional reform of defence policy should be included in the Constitutional Treaty of the Union, such as a provision on enhanced cooperation in the defence sector and the creation of a European Armaments Agency (for Development and Procurement of Military Capabilities).
- The definition of a European Security and Defence Union (ESDU), open to all current and new members of the EU, should be accepted by the Convention and inserted in the Constitutional Treaty. It should include a

¹² Ibid., p. 19.

¹³ Conclusions of the Meeting of the Heads of State and Government of Germany, France, Luxembourg and Belgium on European Defence, Brussels, 29 April 2003.



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commitment for mutual help and assistance, the harmonisation of positions on security and defence policy, the coordination of defence efforts, the development of military capabilities, and an increase in the share of spending on investment in equipment.

- A number of initiatives of the four countries should be open to all interested current and new members: the development of a nucleus capability for rapid reaction, a joint nuclear, biological and chemical protection capability, a nucleus capability for military planning for the European Union, the setting up of a command for strategic air transport, a European system for first humanitarian aid (EU-FAST), European training centres, and a multinational mobile general headquarters by 2004.

These proposals apparently imply a multi-stage process. The EU would have to become more flexible, in particular by improving options for enhanced cooperation,¹⁴ and the ESDU, regarded as a pre-determined field of flexibility, would go in the direction of different speeds and the creation of a core Europe model. The fundamental question is how ESDU and ESDP would be linked and interrelated, in particular if not all members join ESDU in the middle or long run.

The results of the Convention on the Future of Europe

The Convention on the Future of Europe set up Working Groups on External Action and on Defence in order to draft reform proposals in these fields. The final report of the defence group reflects the central role played by considerations on flexibility¹⁵ and propounds a mixture of different options ranging from case-by-case flexibility under constructive abstention to pre-defined fields of flexibility (mutual assistance clause and capabilities in the defence Eurozone) and a clause for enhanced cooperation. Interestingly, the Working Group on External Action devoted only a few remarks to flexibility in its final report, mentioning the possibility of "operational cooperation between a limited number of Member States, as a 'coalition of the willing' to take forward specific operational actions in the framework of implementation of Council decisions" without specifying the

¹⁴ See the joint Franco-German proposals for the European Convention in the field of European security and defence policy put forward by Dominique de Villepin and Joschka Fischer, Brussels, 22 November 2002 (CONV 422/02).

¹⁵ Final Report of Working Group VIII – Defence, Brussels, 16 December 2002 (CONV 461/102 WG VIII 22).

procedures and conditions.¹⁶ The report stated that constructive abstention should be regarded as a way of facilitating decision-making and that emphasis should be put on the extension of qualified majority voting and on institutional reforms, although it admitted that no definite consensus could be reached among its members on all these issues.

Institutional reform in CFSP and ESDP turned out to be a highly disputed issue within the Convention, leading to severe confrontations among its members. In the end, the establishment of qualified majority voting as a rule in CFSP was rejected due to the strong resistance of some member governments (in particular the UK and Sweden) and some Central and Eastern European candidate countries. Only a very reduced and narrowly defined number of options for majority voting were introduced.

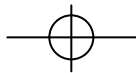
Yet, a major breakthrough on flexibility in CFSP and ESDP was achieved during the last weeks of the Convention, taking up key elements from the working groups as well as from national and multinational contributions like the Franco-German initiatives and the "four nations' proposal".¹⁷ Although elements like the ESDU could not be brought into the Constitutional Treaty, the result is still amazing, especially for ESDP. The pre-final draft of the Constitutional Treaty contained a clause which explicitly excluded from enhanced cooperation issues with defence and military implications. It was in the very last phase of the Convention deliberations that this provision was eliminated. The final draft Constitutional Treaty thus provides for a revised clause on enhanced cooperation in CFSP (Art.III-325 (2) and Art. III-326(2) CT) without any restriction related to ESDP. Authorisation should be granted by the Council at the request of the interested member countries and after receiving opinions from the European Foreign Minister and the Commission on the proposed enhanced cooperation's consistency with CFSP and other Union policies. The European Parliament should also be informed. The procedure is much less cumbersome than the current Treaty version; in particular the nexus to the implementation of a joint action or common position has been abolished. A key condition for initiating the procedure is that enhanced cooperation must bring together at least one third of member states (Art. 43 (2) CT).

For ESDP, further elements of flexibility can be found in the draft Constitutional Treaty:¹⁸

¹⁶ Final Report of the Working Group VII on External Action, Brussels, 16 December 2002 (CONV 459/02 WG VII 17).

¹⁷ See the draft Constitutional Treaty, Brussels, adopted on 13 June and 10 July 2003, Brussels, 18 July 2003 (CONV 850/03).

¹⁸ Ibid.



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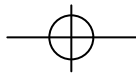
- Member countries that establish multinational forces may make them available to the common security and defence policy (Art. I-40 (3) CT).
- The Council may entrust the execution of tasks to a group of countries (Art. I-40 (5) and Art. III-211 CT). This refers in particular to crisis management operations (Art. I-40 (1) CT); the member states concerned shall agree between themselves on the management of the task (Art. III-211 (1) CT).
- Member states fulfilling higher criteria for military capabilities and having made more binding commitments with a view to more demanding tasks shall establish structured cooperation within the Union (Art. I-40 (6) and Art. III-213 CT). Those member states will be listed in a Protocol annexed to the Constitutional Treaty, which also shall contain the military capability criteria and commitments which they have defined (Art. III-213 (1) CT). The EU Council may ask the countries under structured cooperation to carry out crisis management tasks (Art. III-213 (4) Part II CT).
- A European Armaments and Strategic Research Agency will be set up, open to all member states wishing to participate; within the Agency, specific groups of countries engaged in joint projects can be established (Art. I-40 (5) and Art. III-211 CT).
- Until the European Council decides unanimously on a common defence, closer cooperation shall be established as regards mutual assistance (Art. I-40 (7) and Art. III-214 CT).

The basic decision-making rules in CFSP and ESDP remain nearly unchanged, that is unanimity is the key procedure, and even where qualified majority voting is allowed in CFSP, there must be a consensus at an earlier stage. In cases of unanimity, constructive abstention provides for at least some flexibility (Art. I-40 (4) and Art. III-201 (1) CT). The newly created options will now be analysed in more detail with regard to their impact on EU governance in CFSP and ESDP.

Assessing the forms of flexibility in the draft Constitutional Treaty

Enhanced cooperation: new potential for flexibility?

The Convention took an important step forward by introducing a revised clause for enhanced cooperation to be applied to CFSP: elimination of the linkage between enhanced cooperation and the implementation of a joint action or a common position found in the Nice Treaty will facilitate use of the instrument. As the draft Constitutional Treaty defines ESDP as an "integral part" of CFSP (Art. I-40 (1) CT), enhanced cooperation will also be



applicable to ESDP, although no explicit mention is made in this regard. Here, the point could have been made more clearly to avoid uncertainties.

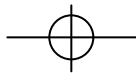
The clause on enhanced cooperation offers a broad range of possibilities for cooperation among member states. They may initiate the procedure for foreign policy initiatives, defence cooperation or any other subject that does not fall under structured cooperation or closer cooperation on mutual defence. However, explicit reference to the decision-making provision for initiating enhanced cooperation should be made, as this point of the draft Constitutional Treaty is not fully clear at first sight.

Structured cooperation: improving capabilities

The provision of the draft Constitutional Treaty on structured cooperation enables the establishment of a pre-defined version of flexibility in the area of military capabilities. Member states willing and able to fulfil higher military capability criteria and to take on more binding commitments with regard to the most demanding tasks, will be listed in a Protocol annexed to the Constitutional Treaty (Art. III-213 (1) CT). This provision contains two elements that could cause problems. The first refers to the possession of capabilities: what criteria should be applied to identify the capabilities required to enter structured cooperation? There is no mention of the method by which these criteria will be defined. A specific definition of the "most demanding tasks" is also lacking. So far, it remains unclear whether concrete figures, that is the amount of national spending for defence, will be set or whether rather diffuse provisions will be introduced. Second, structured cooperation is about "more binding commitments" among the countries concerned. Here, the core question is how the fulfilment of these commitments will be assessed and what measures will be taken if a participating country fails to fulfil them. In the latter case, is exclusion from structured cooperation or some kind of sanction possible?

Much of the attractiveness of the idea of defining criteria in the defence sector comes from the successful model of EMU. But caution is recommended, analogies can be misleading. Convergence criteria in the field of EMU had a clear goal: the achievement of the third stage of monetary union. This served as the primary incentive for most EU countries to consolidate their budgets and cut public spending. In defence policy, such a concrete and attractive finalité is much more difficult to identify. For many, a European army would be the least desirable project, and mobilising the public in favour of increased defence spending is in itself very difficult.

At the same time, apart from the difficult issue of convergence criteria, there was also a political dimension to the EMU process, meaning that certain countries (Germany and France) were considered indispensable for



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entering the third stage of EMU. This situation is quite similar in the defence field: to give structured cooperation real meaning, a certain number of large EU countries will be indispensable, given their overall military capabilities and political weight, and this would imply involving Britain and probably also Italy and Spain in addition to France and Germany. Finally, measures to help the weaker countries, for example the new members, meet the criteria could also be considered.

The European Agency for Armaments, Research and Military Capabilities

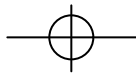
In the field of defence industrial cooperation, the setting up of a European Agency for Armaments, Research and Military Capabilities also falls under flexible forms of cooperation. In Art. III-212 (2), the draft Constitutional Treaty provides that it "shall be open to all Member States wishing to be part of it". Additionally, inside the Agency, specific groups of countries will be able to engage in joint projects (Art. III-212 (2) CT). This would follow a "flexibility-within-flexibility" approach.

The main tasks of the Agency will be to identify the member states' military capability objectives; observe the member states' capability commitments; promote harmonisation of operational needs; adopt effective and compatible procurement methods; propose multilateral projects; coordinate programmes implemented by the member states and manage specific cooperation programmes; support defence technology research and coordinate joint research activities; contribute to the identification and possibly implementation of measures for strengthening the defence industrial and technological base (Art. III-212 (1) CT). It remains to be seen if the Agency will be a more technical body without substantial powers or if it will gain influence over the member states' procurement decisions and promote European initiatives.

The draft Constitutional Treaty stipulates that the Council of Ministers will, acting by qualified majority, adopt the statute, seat and operational rules, taking account of the level of participation in the activities of the Agency (Art. III-212 (2) CT). It is interesting to note that the Council as a whole will take this decision, even if only a limited number of countries participate.

A key question is the Agency's linkage to OCCAR. OCCAR could be taken as a starting point and could constitute a core for the European Agency, so that in fact the final outcome would be a transfer of OCCAR into the EU. But if this were to prove impossible, it would have to remain a separate body and the European Agency would be set up in parallel. The existence of two armament agencies would be an enormous waste of resources and would lead to an unfruitful duplication of activities.

Finally, the EU Agency for Armaments, Research and Military

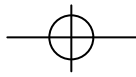


Capabilities has another dimension of interest. Its tasks cover the harmonisation of operational needs, the adoption of procurement methods, as well as support for research in the defence industrial area. In the area of research, in particular, the Community has already developed activities that have implications for the defence industry, therefore a closer connection with EU instruments could be envisaged in the future since the draft Constitutional Treaty affirms that the Agency "shall carry out its tasks in liaison with the Commission where necessary" (Art. III-212 (2) CT). This could also relate to issues dealt with in the Lol process. Unfortunately, Article 296 TEC (now Art. III-342), generally excluding the armaments sector from single market legislation, remains unchanged. Here, an option for flexibility would have facilitated a more ambitious commitment by some member countries. But certain steps opening the way for a "mini-single market" in the defence industry may perhaps be taken through the new EU Agency.

Fulfilling the expanded Petersberg tasks: group-building

Art. I-40 (5) and Art. III-211 of the draft Constitutional Treaty allow the Council to entrust a group of member states that are willing and able with the implementation of an ESDP mission (whose range has been expanded beyond the traditional Petersberg tasks). The group will, in association with the Foreign Minister, agree on the management of the mission and keep the Council regularly informed. In the event of new consequences or amendments to the initial decision authorising the mission, the Council may adopt further decisions (Art. III-211 (2) CT).

This provision introduces flexible constellations for carrying out crisis management missions, so that not all EU members have to be engaged. However, the establishment of such a group of countries leaves some questions open. Actually, the second step will probably come first. The Council will only decide upon a mission if there is a group of countries available, able and willing to carry out the operation. In this regard, the provisions are not revolutionary. It should not be forgotten that the present missions in Macedonia (Concordia) and Congo (Artemis) are not being implemented by all EU countries. Hence different groups of countries performing specific missions is already a reality. The committee of contributors (including non-EU countries) provides a forum in which the day-to-day management of an operation is dealt with under the political control and strategic direction of the Political and Security Committee (PSC). The establishment of groups of countries might enhance their operational autonomy vis-à-vis the PSC, but it is not specified in what way the PSC and the groups of states interact.



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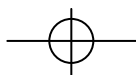
Mutual assistance as a long-term objective

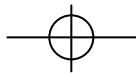
Many of the proposals on CFSP and ESDP for reforming the Treaties included a provision on mutual assistance open to those countries willing to subscribe to it. As it was impossible to get all EU members to accept such a clause,¹⁹ flexibility provided a solution. The draft Constitutional Treaty adopted this approach in Art. I-40 (7) and Art. III-214 by introducing “closer cooperation on mutual defence”. A declaration shall announce those member states willing to take part in closer cooperation; any member state wishing to join at a later stage may do so by informing the European Council and subscribing to the declaration. If all EU members that are also members of WEU were to subscribe to the closer cooperation clause on mutual defence, the Article 5 commitment of the modified Brussels Treaty would lose even more of its value and the EU could take over the remaining functions of the WEU.

Closer inspection of the provision, however, reveals some unclear points. Art. I-40 (7) states that, in the event that a participating country is a victim of armed aggression on its territory, the other participating countries shall provide aid and assistance by all means – military or otherwise – in their power, in accordance with Art. 51 of the UN Charter and in close cooperation with NATO. Art. III-214 (2) specifies the procedure: a member state that is victim of an aggression must inform the other participating states and may request aid and assistance (Art. III-214 (2) CT). The participating states shall meet at ministerial level, assisted by their representatives within the PSC and the EU Military Committee (EUMC). The UN Security Council will also be informed. These provisions do not seem to be totally compatible: while Art. 40 (7) hints at an unconditional and binding commitment to assistance and seems to lean heavily on the relative WEU Treaty (Article 5), Art. III-214 seems to involve much less of an “automatism”, and prescribes, if the country concerned invokes it, a consultation process that could cause delay in an emergency situation. A more coherent wording of these provisions is therefore recommended.

In any case, it is clear that a mutual assistance clause can have no more than symbolic value at present as those EU countries that are also members of NATO regard the Alliance as the primary organisation for collective defence. A problem arises, however, if EU countries that are not members of NATO subscribe to mutual defence. In that case, the EU clause would not

¹⁹ G. Herolf and B. Huldt, “The European Union and the Inclusion of a Collective Defense Clause” Reiter, E., R. Rummel and P. Schmidt (eds) *Europas ferne Streitmacht. Forschungen zur Sicherheitspolitik*, Band 6 (Hamburg, Berlin, Bonn: Mittler, 2002) pp. 60-85.





be overarched by the more substantial provisions within NATO, and the credibility of an EU commitment could pose a problem.

Multinational forces: the forgotten issue?

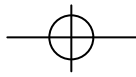
The improvement of military capabilities through multinational forces and common planning and command structures is an aspect that has gained importance in the European debate. The "four countries' proposals" presented a range of options in this regard: a core of rapid reaction forces formed by the Franco-German brigade and complemented by Belgian and Luxembourgese command and reconnaissance components, also available for NATO tasks; a planning capacity for the Union and a European mobile headquarters.²⁰ The draft Constitutional Treaty remains silent as to specific arrangements for flexibility in this field. Instead, Art. I-40 (3) states that "member states which together establish multinational forces may also make them available to the common security and defence policy". This means that multinational forces basically remain outside the EU framework, but could be offered to fulfil tasks in ESDP. This solution is far less ambitious than the ones offered in the Franco-German or four nations' proposals. On the other hand, there is no provision preventing the use of enhanced cooperation to bring multinational force structures, headquarters or planning elements into the treaty framework over time. Thus the door remains open.

Conclusions: the balance between effectiveness and solidarity

After examining the provisions of the draft Constitutional Treaty, a number of conclusions can be drawn. The introduction of qualified majority voting as a rule in CFSP proved to be impossible due to the strong resistance shown by a number of member governments, and it is doubtful if the rather limited possibilities for majority voting will be used by the member states. So no bold step was taken towards a more communitarised EU foreign policy. However, a major breakthrough was finally approved in the Convention that would have seemed unachievable only two years ago: the introduction of several forms of flexibility in CFSP and – even more strikingly – in ESDP.

New opportunities for flexibility probably represent one of the most impressive innovations for CFSP and ESDP in the draft Constitutional Treaty. The member states now possess a range of options that enable them to go ahead without waiting for all partners to follow. Pre-determined forms

²⁰ Conclusions of the Meeting of the Heads of State and Government of Germany, France, Luxembourg and Belgium on European Defence.



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of flexibility can be used to create improved and thus more credible military capabilities through structured cooperation, to harmonise procurement projects and organise joint research through the European Armaments Agency, and to cooperate more closely in the area of mutual defence. Even where the draft Constitutional Treaty does not provide for specific arrangements in pre-determined areas, the clause on enhanced cooperation offers sufficiently broad possibilities for flexibility in other fields. The draft Constitutional Treaty has also streamlined the procedure on enhanced cooperation to provide more freedom of manoeuvre.

Although decisions on military missions will be guided by unanimity, constructive abstention offers at least a modest range of flexibility. For the implementation of crisis management missions, groups of countries can form "coalitions of the able and the willing", making it less attractive for reluctant member countries to block decisions.

But some weaknesses still exist, certain provisions require more streamlining, precision and clarification. The articles on closer cooperation in mutual defence in the different chapters of the draft Constitutional Treaty need to be worded more consistently; the provisions on structured cooperation regarding capability criteria and the verification of their fulfilment need to be clarified. As regards enhanced cooperation, explicit reference should be made to the decision-making procedures to be applied for it to be initiated. Another pending issue concerns the link between forms of cooperation existing outside the EU and those within the Treaty framework, as in the case of OCCAR or the Lol process with the EU Agency for Armaments, Research and Military Capabilities. These points could be improved at the coming IGC, but this should not lead to a fundamental unpacking and rewriting of the provisions of the draft Constitutional Treaty. The IGC should preserve and respect the provisions approved by the Convention. If this cannot be assured, the draft Constitutional Treaty should remain unchanged. In that case, it is to be hoped that the member states will be able to use pragmatism and innovation to cope with a certain openness or ambiguity within the legal framework of the constitution, thus translating flexibility into an EU reality.

