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**THE PROS AND CONS OF 'CLOSER COOPERATION'
WITHIN THE EU
ARGUMENTATION AND RECOMMENDATIONS**

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FOREWORD

This study has been written for the project 'Enlargement of the EU to Central and Eastern Europe (CEE)' that the Netherlands Scientific Council for Government Policy (WRR) has on its working programme. One of the central questions in this project is how far the accession of the CEE countries will increase the diversity within the Union. To what extent will reform of the existing institutions be needed to maintain their effectiveness, legitimacy and cohesion?

In preparation for a report to the government on these issues, which will be published later, the WRR commissioned a number of studies and assessments on developments in Central Europe on the one hand and in the European Union on the other hand. The present study is the first of these background studies; the others will be published over the months to come.

The authors are dr. Eric Philippart, senior researcher at the Belgian National Fund for Scientific Research (FNRS – Université Libre de Bruxelles) and professor at the College of Europe (Bruges), and Monika Sie Dhian Ho, member of the scientific staff of the Council. They studied the various strategies to manage diversity and maintain the Union's capacity to act after enlargement, as well as the potential consequences of these strategies for the EU system of governance. This first product of their research addresses more specifically the opportunities and risks of closer cooperation between Member States of the Union as a way to overcome blockages in EU decision-making. Their thorough evaluation of the pros and cons of closer cooperation provides clarity into the debates which are being held in the context of the Intergovernmental Conference of 2000 and which will continue thereafter, since the issue of flexibility or differentiation in the integration process will remain on the agenda for the time to come.

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INTRODUCTION*

The provisions on ‘closer cooperation’ are the main conceptual and procedural innovation introduced by the Treaty of Amsterdam. Since May 1999, Member States who are willing and able to further cooperation among themselves may make use of the institutions, procedures and mechanisms laid down by the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). General clauses set out in Title VII of the TEU (Articles 43 to 45) define the objectives, scope and procedures of eligible closer cooperation. These clauses are supplemented by specific criteria and procedures relating to the TEC (Article 11) and to TEU Title VI on police and judicial cooperation in criminal matters (Article 40).

The ambition of this report is to provide decision-makers with a number of policy recommendations on the question of the revision of closer cooperation (which elements should be preserved, amended or added), as well as its degree of urgency. The policy recommendations are deduced from the answers given to three questions: Does the Union need TEU Title VII closer cooperation? Do the provisions on closer cooperation need to be revised? Do the provisions on closer cooperation need to be revised during the Intergovernmental Conference (IGC) 2000?

The pros and cons of various arguments have been evaluated from an integrationist perspective, assuming that more and more problems cannot be solved without effective EU institutions. These institutions are said to be effective if, first and foremost, they manage to aggregate the interests and preferences of the various Member States, and take collective decisions. The contribution of different instruments and practices to that decision-making capacity has been an important criterion in the evaluation. The capacity to manage diversity and act effectively is however not the only key element for the development of the Union. A number of additional criteria has therefore been taken into account for the evaluation of closer cooperation: democratic legitimacy, cohesion of the Union, solidarity between the Member States, and consideration for the interests of the lighter-weight Member States.

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The report presents, analyses and evaluates the main logical arguments against and in favour of the existing provisions on closer cooperation (section 1), their revision (section 2) and their revision during the IGC 2000 (section 3). Organising the terms of the debate in this way has the advantage of simplicity and greater readability. The answers to these three questions lead to a number of policy recommendations exposed in the last section (section 4).

1 DOES THE UNION NEED TEU TITLE VII CLOSER COOPERATION?

1.1 Arguments against closer cooperation

1.1.1 Existing instruments are sufficient to manage EU's diversity

Argument: The capacity of existing techniques of diversity management in the Union should not be underestimated. Their potential has not been fully exploited yet. Blockages of negotiations can be overcome by resorting more quickly and systematically to actual voting ('suppressing diversity') instead of searching endlessly for consensus. Side-payments or linkages can be used to buy off Member States stalling a process ('trading off' diversity). Gridlock might be avoided by resorting more to, among other things, aid programmes, exchange, benchmarking and peer review which accelerate catch-up and convergence (diminishing diversity). Diverging interests can be dealt with through various forms of 'flexible' arrangements granting transition periods or permanent exemptions to Member States, i.e. by varying their participation in those regimes and policies ('accommodating' diversity). Another effective way to accommodate diversity is recourse to lighter regulatory forms like minimum standards, mutual recognition and outline legislation, all techniques extensively used for the completion of the internal market. Finally, problems of integration can be solved by the development of cooperation outside the EU framework, on a formal or informal *ad hoc* basis ('circumventing' diversity). In sum, closer cooperation is dispensable, one of the proofs being that it has, as yet, never been used.

Evaluation: The EU's institutional potential has indeed not been fully exploited so far. The management of an enlarged Union will most certainly require resorting to various mixes of instruments suppressing, trading-off, diminishing, accommodating or circumventing diversity. The capacity of these instruments is nevertheless not unlimited and we can already foresee that more extensive use of some of them could have negative effects. For instance, resorting systematically to Qualified Majority Voting (QMV) in a system with limited capacity to offer (financial) compensations might quickly become too brutal for those who are regularly outvoted. What has been sometimes described as a Rotarian atmosphere presiding over Community decision-making will further deteriorate, with the multiplication of decisions 'pre-cooked' in bilateral contacts, informal cores and ruthless practices. Other combinations of diminishing and/or trading-off instruments can of course be envisaged to avoid the recourse to QMV. Soft law, benchmarking and policy transfer contributing to

diminish diversity have indeed a genuine potential. Yet the degree of convergence they produce is uncertain and their pace usually slow. As to instruments trading off diversity, their effectiveness has other limitations. Package dealing depends very much on the willingness of the dissenting Member States to put their diversity in brackets and the other Member States to buy and/or trade it off. In times of budgetary restriction, the likeliness of large unconditional side-payments decreases. These side-payments may then be replaced by package deals with few direct financial consequences. Besides the fact that this type of package deals is usually more difficult to construct, package dealing in general presents the disadvantage of being rather messy, not addressing the source of the problem and having a limited cohesive potential. Resorting time and again to ad hoc flexible arrangements or case-by-case opt-outs in order to accommodate diversity will harm the transparency and readability of EU activities. Circumventing diversity by cooperating outside the EU framework can be effective to put pressure on dissenting Member States, swiftly develop new cooperation regimes or provide leadership. Yet it comes with the practical difficulties of extra-EU cooperation, the political problems generated by *directoires* and the risk of a multiplication of parallel regimes duplicating or emptying existing EU/EC policies. It could be one of the most divisive options for EU/EC integrative ambitions (see 1.2.6). This quick review shows that it would be presumptuous to claim that the existing toolbox will suffice to deal with diversity in a Union of 30 members.

As to the non-use of the provisions on closer cooperation, the fact can be explained by different causes. A first explanation could be that, closer cooperation being an instrument of last resort, one should not expect to see it used right away. The immediate objection is of course that, in the Union, there is no shortage of long-pending proposals which would certainly meet the last resort condition. The legislation on a European Company Statute is one of them and has been the subject of a preliminary study of closer cooperation's applicability. This case shows three things. First, the acclimatisation of Member States to new mechanisms invariably requires time and it has been only nine months since the Treaty of Amsterdam entered into force. Hesitation and reluctance to use closer cooperation remain strong. Second, Member States are still willing to go to great lengths to find a compromise and/or wait for the next national election which will remove the 'recalcitrant' government from office. Third, the current design of the mechanism does not allow to deal with contentious issues, since each Member State has the right to veto the authorisation of closer cooperation on the basis of "important and stated reasons of national policy" (the so-called 'emergency brake'). None of these phenomena is actually demonstrating that the principle underlying closer cooperation is dispensable. In conclusion, closer cooperation should be conceived as an addition to rather than a substitute for the existing toolbox for diversity

management. As it stands, it provides an alternative solution for a limited number of immediate and future non controversial situations.

1.1.2 The difficulty of identifying areas requiring closer cooperation demonstrates its uselessness

Argument: A general regime for closer cooperation is useless, the proof being that no policy areas have been or can be identified as requiring closer cooperation.

Evaluation: A fundamental objection to the argument is that the usefulness of a regime is not necessarily reflected by the number of identifiable cases for application. Some regimes are pulled by events, others are developed in the abstract, before they arise (cf. the ‘safety valve’ or ‘just in case’ approach presented below, see 1.2.5). A more direct, and perhaps convincing, answer to the argument is that it is factually incorrect. A list of areas to which closer cooperation could be applied was for instance already circulated in 1996 by the Irish Presidency, referring to education, professional training, youth, culture, public health, tourism, energy, civil protection, trans-European networks, industry, research and technological development (R&TD), development cooperation and social policy (the fight against social exclusion). Since then practitioners and academics have, in addition, pointed at corporate legislation, energy (fiscal regimes to encourage or deter the use of specific energies), environment, international trade in services as well as various EMU-linked cooperations (prudential rules, corporate taxes, regulation of financial markets and stock exchanges, etc.). For the third pillar, exchange of information and the harmonisation of extradition and hot pursuit rules have also been evoked as possible cases for closer cooperation.

1.1.3 Closer cooperation will push the Union in uncharted and potentially dangerous waters

Argument: Closer cooperation is characterised by fundamental ambiguities. The objectives of Member States backing closer cooperation are diverse and, for some, contradictory. Official and honourable justifications hide other agendas. Furthermore and perhaps more importantly the consequences of closer cooperation for the EU system of governance are unpredictable but possibly very dangerous.

Evaluation: It is true that the debate about flexibility is replete with terminological and semantic confusion. It is also exact that, during the 1996-7 IGC, closer cooperation was promoted on the basis of very different agendas (Stubb 1999). Some might still cherish it as a potential tool for consolidating a 'hegemonic core' or making sure that the rich Member States will not have 'to pay for the others'. Meanwhile, to have a hidden agenda is one thing, to be able to implement it through closer cooperation is another. That is to say, one must study if closer cooperation would lend itself to such purposes. The establishment of a hegemonic core is doubtful (see below 1.1.4). On the question of the club of the 'selfish rich', much will depend on the negotiations around actual closer cooperation endeavours (see below 1.1.5).

As to the evaluation of the consequences of the usage of closer cooperation for the EU system of governance, the task is relatively difficult but not impossible. When the potential impact of the reweighting of voting rights in the Council or the extension of QMV has to be assessed, the analysis can build on the knowledge we have of previous changes in these domains. Closer cooperation having, on the contrary, been introduced only recently, there is no or little historical record. It is however not an entirely new tool in the EU panoply for diversity management. A large part of it is a codification and rationalisation of pre-existing instruments. In that respect, its evaluation can draw upon the lessons learned from other forms of flexibility within the Union. Referring to the ambition of willing and able Member States to move ahead, closer cooperation corresponds to a – more positive – philosophy which departs from flexibility associated with opt-outs for the unable and unwilling Member States. It is, by comparison, more centripetal than most flexible arrangements used by the EU so far. Its extensive use would nevertheless push the Union further in the direction of a multi-speed and variable geometry Europe, made of a core of activities in which all Member States participate, supplemented by various functional groupings in which participation is optional.

The impact on decision-making capacity, democratic legitimacy, cohesion of the Union, solidarity between Member States and consideration for the interests of lighter-weight Member States are examined *infra* (see Philippart & Sie Dhian Ho 2000). Suffice to say here that a lot will depend on the format of closer cooperation projects (the Treaties only set a general principle and stipulate a number of basic obligations, rights and interdictions; the detailed and specific policy arrangements will have to be negotiated each time an authorisation is requested). If the projects are conceived in a fairly open way and accompanied by adequate bridging mechanisms between the 'ins' and 'outs', this form of flexibility might make a substantial contribution to the problem-solving capacity and

integrative dynamics of the EU system. If not, the closer cooperation risks to become a source of frustration, fracture and fragmentation.

1.1.4 Closer cooperation will lead to the development of a hegemonic core

Argument: Repeated use of closer cooperation will lead to the constitution of a hegemonic core within the Union, transforming the large majority of Member States into decision takers.

Evaluation: A core Europe is unlikely to emerge from the repeated use of closer cooperation. First of all, it is not clear whether this instrument would be used to push through rather narrowly delineated projects (for instance, the creation of a European Company Statute) or more substantial policy packages (for instance, an entire code on employment, working conditions and social protection). In any case, future reinforced cooperations are expected to remain of an incremental nature and follow a sectoral logic. The fact that some Member States would participate in all instances of cooperation would therefore not necessarily put a world between them and the other Member States, or mean they share a common strategic vision on the *finalités politiques* of the Union, two defining conditions of a political core.

One could also point to the fact that, as a consequence of the obligation for closer cooperation to involve ‘at least a majority of Member States’, the only group of countries likely to be part of all cooperations (i.e. the six founding Member States) would have to cooperate with other Member States. In the present configuration and even more after enlargement, this means substantial heterogeneity for the group cooperating more closely and difficulty for it to act as a unitary hegemon.

What could happen nonetheless is that the settings provided by closer cooperation are used as a place to ‘pre-cook’ decisions which have to be formally taken in the Council of Ministers. The Euro-11 informal Council for instance could be seen as a precursor of what could emerge from closer cooperation. Its members represent more than the qualified majority in the Council and already have the opportunity to act like a caucus. Supposing that the group has a taste for hegemonic behaviour and is indeed pre-cooking decisions on Euro flanking policies, it would still have to cope with the caucuses of other important areas of the Union, such as defence. The existence of different caucuses overlapping to varying degrees is a positive element for the Union. Cross-cutting cleavages are indeed less threatening for the system than a repeated clash between the same groups. This also protects to some extent the Union from the emergence of a hegemon or *directoire*. The foregoing does not imply that closer

cooperation will be above or beyond politics and power games. It could certainly affect the balance of power within the Union and the division of labour among Member States, but not along a hegemonic pattern.

1.1.5 Closer cooperation will contribute to a 'club of the selfish rich' within the Union

Argumentation: Closer cooperation would contribute to the creation of a 'club of the selfish rich Member States', excluding the Member States which are willing but unable to cooperate more closely.

Evaluation: The absence of any reference to bridging mechanisms in the provisions (i.e. helping non participating Member States to catch up with the front-runners) is a clear indication that the unable should rely on self-help rather than assistance if they wish to join closer cooperation. This absence does not preclude however that solidarity measures can be agreed upon when closer cooperation proposals are actually on the negotiation table. Thanks to the right of veto in the procedure triggering closer cooperation, the unable are indeed in a position to exchange the authorisation of closer cooperation against some form of assistance – provided of course that the willing are resourceful, very eager to move ahead and cannot proceed through extra-EU cooperation (on consensus and cohesion within the EU, see below 1.1.6).

It must also be noted that, in many cases, the dividing line between participating and non-participating Member States will be a question of like-mindedness, not of resources (cf. the example of the European Company Statute or EMU-linked regulatory harmonisation). The fact that limited financial means will often not be an obstacle to participation should reassure the economically weaker about the nature of the 'clubs' founded through closer cooperation.

1.1.6 Closer cooperation will undermine EU consensual politics

Argument: Closer cooperation is dangerous because it undermines EC/EU decision-making norms which are essential for the development of a stable Union. Willing and able Member States will not have to wait for policy-windows any more, neither offer dissenting Member States package-deals or side-payments, nor strive at lengths to reach consensus on EC/EU collective action.

Evaluation: Generally speaking, closer cooperation is neither supposed to become the standard way to do business within the Union, nor a substitute for EU-wide cooperation. It has been very explicitly designed as an instrument of last resort, as a tool to overcome major, exceptional and enduring obstacles. The development of the *acquis* must remain an EC/EU collective endeavour. This being said, one must admit that the existence of closer cooperation is likely to affect decision-making in sectors relying on consensus and package dealing. Is that a bad thing? As already mentioned (see above 1.1.1), package dealing often produces sub-optimal policy outcomes. It could also be argued that the current practice in the Council is over-consensual or unduly paralysing (to come back to our example, the idea of a European Company Statute has been proposed in the 1970s). In some cases, using closer cooperation as a negotiating lever would put an additional pressure on opponents. As Schengen has shown, the threat of being excluded from the benefits of closer cooperation and/or the perspective of being exposed to negative policy externalities can contribute to speed up the adoption of collective decisions. In other cases, when a collective decision proves impossible, closer cooperation offers the possibility of another type of consensual outcome, by which Member States agree that the majority should not be obstructed and the minority not constrained (see below 1.2.2). In that context and from a problem-solving perspective, closer cooperation is a welcome option. Its indirect impact on convergence programmes for weaker Member States, often approved as part of package deals, is certainly more worrying.

In conclusion, while the introduction of the new device is likely to affect the decision-making practices in policy areas where the Treaties authorise closer cooperation and in related areas, its impact will not be necessarily negative or increase antagonisms as far as the relationship between willing and unwilling Member States is concerned. Its consequences for the able-unable relationship and, by consequence, for the cohesion of the Union, are potentially more problematic. This concern could however be addressed on a case-by-case basis (see 1.1.5).

1.1.7 Closer cooperation will harm the *acquis*

Argument: Closer cooperation is dangerous because it will affect the *acquis* in a negative way.

Evaluation: A first and straight answer to this argument is that, in many areas, closer cooperation would build on very limited *acquis*, if any (cf. the example of the European Company Statute). Put differently, there is little possibility to affect negatively a quasi non-existent *acquis*. In the other cases, the *acquis* is protected by the very strict wording of the enabling conditions written in the Treaties which stipulate that closer cooperation ‘does

not affect' the *acquis*. The close involvement of the supranational institutions in closer cooperation is a further substantial guarantee. The Commission, through its proposals in the first pillar and its opinions in the third pillar, has the means to take preventive action against any possible damaging measures for the *acquis*. The European Court of Justice may in addition be called upon to judge whether the enabling conditions have been respected. In such a context, the risk to the *acquis* has probably been exaggerated.

A more hazardous, yet still very speculative, consequence could result from the symbolic meaning of the constitutional enshrinement of flexibility in the Treaties. Closer cooperation has broken a major taboo or opened Pandora's box in the domain of the development of the *acquis* and this precedent could shake the foundations of the orthodoxy presiding over the adoption of the *acquis* by new Member States. In other words, it could be an invitation to abandon or relax the principle of the integrity of the *acquis* and envisage regressive flexibility. Especially in the context of strong political pressure in favour of a rapid enlargement to CEE or even Balkan countries which might not be able to adopt and implement parts of the *acquis*, this downward extrapolation of the flexibility logic could potentially form a big threat to the Community method.

1.1.8 Closer cooperation will affect negatively the role of the Commission

Argument: Closer cooperation is dangerous because it affects negatively the neutrality of the Commission. The Commission will have to take side and act in favour of a group of Member States (by submitting a proposal or giving a positive opinion on a proposal) against another group (the unable and/or unwilling Member States). This will damage the impartiality the Commission needs to fulfil its role as a mediator and referee in the Union decision-making process.

Evaluation: The Commission is not (or not only) an honest broker between the Member States and institutions. The first mission of the Commission is to bring forward what is, according to its views, necessary for the Union. The Commission embraces causes and in the process forms alliances with governments which defend the same causes. Governments, suspicious of the Commission and its policy lines, might mistakenly interpret these alliances as the Commission 'taking side' with some Member States. In such a context, if the same group of Member States is behind most closer cooperation requests, closer cooperation might indeed reinforce the impression that the Commission is favouring some Member States to the detriment of the others. It is the Commission responsibility to set out to demonstrate as

much as possible its impartiality, knowing that some governments will never be convinced. This argument should not lead to refrain from using closer cooperation.

1.1.9 Closer cooperation leads to a less transparent and readable Union

Argument: With the development of closer cooperations, the structure and activities of the Union will become less transparent and readable for its citizens as well as for third countries.

Evaluation: The Union, like most political systems, relies on two types of legitimacy. Transparency and readability of its institutions, together with other democratic and legal characteristics, are a first and major source of legitimacy for the system. Put differently, the basis of the acceptance of a system is its capacity to organise the ‘government by the people’, have a strong parliament and institutions open to public scrutiny. This ‘input-legitimacy’ is seen as vital by the proponents of a state-like evolution for the Union. A second and no less important source of legitimacy stems from what the system achieves, the benefits it brings to its members (a ‘government for the people’). For tenants of intergovernmental and/or regulatory conceptions of the EU, the production of ‘output-legitimacy’ has the absolute priority.

From this double perspective on legitimacy, it could be said that the use of closer cooperation would certainly not contribute to the transparency and readability of the current structures of the EU, already extremely complex and often denounced as opaque. Nonetheless, if closer cooperation is the key to more effective policies, it would contribute to boost EU output-legitimacy. The (limited) loss of input-legitimacy could therefore be more than compensated by a gain in effectiveness and efficiency. The importance of the trade-off has to be assessed on a case-by-case basis, the damage done in terms of input-legitimacy being ideally kept to a minimum (insofar as the European project is not an intergovernmental enterprise).

As far as the third countries are concerned, it seems obvious that closer cooperation is not going to contribute to an already poor understanding of the Union. While this might have been an asset in a limited number of international negotiations, the lack of readability has more often brought disappointments, misunderstandings or tensions with the EU’s main partners. Consequently, proposals to start closer cooperation should be carefully studied to see if gains outweigh this particular cost.

1.2 Arguments in favour of closer cooperation

1.2.1 The post-enlargement Union will need a new form of subsidiarity

Argument: In their 1995 study for the WRR Helen and William Wallace were warning that "... there is a tension between Europe the region and Europe the collective power, which can perhaps not be reconciled easily within a single cooperative framework." With the opening of the Union to almost all countries in Europe, there will be a need for sub-systems to cooperate more closely.

Evaluation: The next two or three waves of enlargement will change dramatically the nature of the Union. Never was the group of candidate countries so large nor so different from the incumbent Member States. By comparison with the previous enlargements of the Union, the Central and Eastern European countries have to bridge much wider gaps. The transformation of their political, economic, judicial and administrative systems is still in a consolidation phase, while their civil societies have to be (re)built almost from scratch. At the same time the requirements for accession to the EU have reached new summits as a consequence of the very substantial development of the *acquis* over the last decade. Considering, on the one hand, the magnitude of the catch-up required and, on the other hand, the high political pressure for swift enlargement, the remaining diversity at the moment of accession is expected to be substantial. These substantial (objective) differences linked to the level of socio-economic development, institutional capacity or the geo-economic situation could well be coupled with an increase in subjective or political heterogeneity. The CEE countries have indeed just regained their national sovereignty and autonomy, and in many cases lack a political culture of compromise building.

The Union will therefore soon be faced with all the risks of dilution, blockages of decision-making and paralysis of the integration process that come with its conversion into an organisation for the entire European sub-continent. Some integrative endeavours which would be considered now as EC/EU-wide will, after the enlargement, only be appealing to sub-systems within the EU (regionally and/or functionally defined). Harmonization which might be functional for incumbent Member States (e.g. high standards for water management) will be dysfunctional for several new Member States (e.g. because their population density is much lower or the cost of these measures is unaffordable). Enlargement should not prevent current Member States from harvesting the benefits of an institutional structure they have been building for decades. They should not be obliged to create new structures to pursue objectives written in the European Treaties. If no consensus can be

found for EC/EU-wide action, a group of Member States should therefore be authorised to make use of the institutions, procedures and mechanisms laid down by the Treaties, to cooperate more closely among themselves. A new type of subsidiarity is needed, under which some Member States stick to national solutions whereas others choose to adopt regional ones – that is, solutions jointly pursued by eight or more Member States participating in a given project. Closer cooperation can meet this need, introducing what Bribosia and Tuytschaever see as a form of “differentiated subsidiarity” (Bribosia 1998; Tuytschaever 1999). This possibility is one of the most solid arguments in favour of closer cooperation.

Significant development of the *acquis* through flexible arrangement can also be obtained through the so-called ‘predetermined flexibility’ method which consists of establishing a policy via protocols detailing in advance all aspects of the flexibility arrangement for that particular area (option used for instance in the case of the European Monetary Union). This technique implies however the convening of an IGC, the negotiation of new articles and/or Protocols attached to the Treaties and a long round of national ratifications. Closer cooperation requires none of these and, in that respect, offers a much lighter procedure for differentiated subsidiarity.

1.2.2 Closer cooperation provides a useful intermediary solution between unanimity and QMV

Argument: If decision-making is stalled in an area ruled by unanimity, closer cooperation can overcome the blockage. In those areas or issues run by QMV, where actual voting is unacceptable because of the sensitive nature of the specific issues involved, closer cooperation could be a less brutal alternative.

Evaluation: Closer cooperation can indeed in some cases be a useful back-up option, both in policy areas run by unanimity decision-making and in areas where QMV is the rule. In areas run by unanimity, closer cooperation is a way to overcome blockages caused by irreconcilable divergence of views. The flip side of this argument is that the existence of closer cooperation undermines the case for QMV extension. In policy areas where unanimity is paralysing and for which decision-makers see no alternative system but QMV, the pressure to introduce QMV is of course very strong. That pressure will be potentially diffused by any other option, closer cooperation in this instance, equally able to overcome blockages created by unanimity (see 2.1.2).

In those cases where QMV is the general rule, recourse to closer cooperation for specific sensitive (sub-)policy areas could be less ‘traumatic’ than the use of QMV. Being repeatedly outvoted in sensitive (sub-)areas might be particularly harsh for new CEE Member States, not least because of the special symbolic value of a recently recaptured sovereignty. Moreover, it is unlikely that much additional resources will be made available after enlargement to ‘smoothen’ the use of QMV, by providing the outvoted Member States with catch-up funds and compensation for their adjustment costs. This being said, closer cooperation should only be considered as a decision-making alternative in those cases where closer cooperations side-effects – legal fragmentation and legal insecurity – are not prohibitive (e.g. excluding its use in various areas linked with the internal market).

1.2.3 The Union needs safe ‘policy laboratories’

Argument: Closer cooperation can function as a ‘laboratory’ for the EU. Member States which are willing and able to do so can ‘experiment with’ new policies and regimes which could eventually be of interest for the entire Union. The other Member States can wait and see for the first results, before deciding to join the experiment or not.

Evaluation: The main (successful) laboratories – the European Monetary System and Schengen – have been initially established outside the Union. Even if the EU managed eventually to secure their incorporation, it would have been safer to conduct these experiments within the Union framework for reasons indicated below (see 1.2.6). Considering the fact that such experiments could develop into EU-wide regimes, some sort of endorsement is needed. The mandate required for a ‘laboratory’ does not obviously need to be as strong as in the case of the designation of an official ‘nursery’ or a ‘vanguard’ group *stricto sensu*. It does not indeed pre-commit non-participating Member States to accept the result of the experiments. In that respect, unanimity is not an imperative and the legitimacy of the laboratory seems to be sufficiently established by an authorisation to proceed given by a qualified majority of the Member States. The participation of a majority of Member States to closer cooperation brings with it extra-legitimacy which is non negligible. It might therefore be preferable not to go below such a threshold. This threshold might furthermore not be an insurmountable obstacle. Evidence tends to show that, for most policy areas potentially concerned, it should not be a problem for the current Union. If the future might be more uncertain, the next enlargement will bring several new Members willing to go further in terms of integration.

1.2.4 The Union needs a hard core and this core needs an institutional platform

Argument: The Union needs a core group of Member States – a pro-active sub-system endowed with large resources – and closer cooperation could contribute to its constitution. In areas where there is no clear functional spill-over (i.e. ‘a situation where the original goal can be assured only by taking further actions’ – Lindberg) and where preferences of the Member States strongly diverge, the only way to secure new integrative progress is to create a ‘noyau dur’ able to provide a strong leadership.

Evaluation: Sub-systems are part of the EC/EU since its origins (De Schoutheete 1990). A ‘centre de gravité’ made of pro-integrationist Member States could certainly give much needed direction and vigour to the deepening of the Union, especially after enlargement, but a formal core would be counterproductive. Abandoning the formal equality of Member States would unleash a dynamic that could result in a *directoire*. New ways of forging and expressing leadership might well be indispensable to avoid post-enlargement stagnation, but they should remain fluid, diffuse and inclusive. We argued above that it is difficult to see how closer cooperation could be an instrument of ‘hegemonic exclusion’ (see 1.1.4). The repeated use of closer cooperation could however contribute to the emergence of an open group providing valuable impulsion and coherence (Quermonne, Andréani and Dehove 1999).

1.2.5 Proper institution-building requires ‘safety valves’

Argument: Proper institution-building implies that the norms, principles, rules and procedures are not only designed around existing issues. The regime would otherwise be very quickly out of date. Effective institutions should be able to respond to a variety of situations which cannot be foreseen at the time of the drafting of the Treaties and should therefore possess general ‘safety valves’.

Evaluation: This major rule in institutional design is well established in the academic literature. Besides, ‘safety valves’ or open-ended provisions have been long introduced in the Treaties and proved their usefulness (TEC Article 308, ex-235). Closer cooperation clearly belongs to the same category of instruments. Before welcoming it as a valuable contribution to proper institution-building, it needs to be demonstrated that closer cooperation is the right kind of safety valve, considering in particular the magnitude of the post-enlargement era uncertainty. This evaluation will be conducted in the next section.

1.2.6 The Union needs an alternative to extra-EU cooperation

Argument: Cooperation among Member States outside the EC/EU framework has become problematic for the development of the Union. Closer cooperation provides a better alternative to extra-EU cooperation.

Evaluation: Membership of the EC/EU does not exclude the possibility of two or more Member States cooperating outside the EC/EU framework. Member States have, over the last 50 years, entered into bilateral and multilateral cooperations, among themselves as well as with third states. These extra-EU cooperations having proven useful to deal with regional and/or functional issues, there should be good reasons to plead for (intra-EU) closer cooperation as an alternative.

A first and negative reason is the realization that extra-EU closer cooperation possesses serious risks and problems. Following the example of the Schengen experiment, it could lead to the multiplication of parallel and competing regimes, duplicating and emptying out existing EC/EU policies, and contributing to the disintegration of the Community legal order. More over, extra-EU closer cooperation suffers from a lack of transparency, a democratic deficit (no parliamentary involvement) and the absence of independent judicial review. A second and more positive reason is that intra-EU cooperation will bring precious advantages to cooperating States and to the Union. Closer cooperation is *a priori* lowering transaction costs for the cooperating states (they do not have to define new rules and establish new structures, which is substantial). The main advantage for the Union is that, by opening its institutions to European regional and functional subsystems, it is in a better position to work on the coherence of the closer cooperation endeavours with EC/EU policies and rules, this at a relatively modest cost thanks to economies of scale. Closer cooperation is also expected to be more cohesive, since it guarantees the openness to small and medium Member States (contrary to some extra-EU *directoires*). Globally speaking, the concept behind closer cooperation offers therefore indeed in several cases a better and much needed alternative to large and rivalling extra-EU cooperation.

1.3 Conclusions

Considering that it cannot be demonstrated that the existing EU 'toolbox' will suffice to deal with diversity in a Union of 30 members; considering that the non-use of closer cooperation so far is resulting from other reasons than its uselessness; considering that various domains

have been identified as possible areas for the application of closer cooperation; considering that closer cooperation is more centripetal than most other forms of flexibility; considering that the risk of developing a hegemonic core through the use of closer cooperation is reasonably well pre-empted by a number of conditions written in the Treaties; considering that closer cooperation has been explicitly designed as an instrument of last resort and should therefore not become a substitute for EU-wide cooperation; considering that the risk to the *acquis* has probably been exaggerated; considering that closer cooperation should contribute to the output-legitimacy of the EU; considering that closer cooperation is providing a new form of subsidiarity under which some Member States stick to national solutions whereas others choose to adopt sub-continental ones; considering that closer cooperation offers a way to overcome irreconcilable divergence of views in those areas where QMV is not (yet) acceptable; considering that closer cooperation provides safe settings for the 'policy laboratories' needed by the Union; considering that a group engaging in all endeavours of closer cooperation could provide valuable impulsion and coherence; considering that the problem-solving capacity of the Union is *a priori* enhanced by the insertion of 'safety valves' in its institutional structure, able to preserve the integration momentum; and, finally, considering that, for reasons of transparency, coherence and equity, it is in many cases preferable to resort to intra-EU rather than extra-EU cooperation, the EU needs TEU Title VII closer cooperation.

This instrument involves however a number of risks of different magnitude. In order to address the most serious risks identified in section 1, the following things should be done. The proposals for closer cooperation should be conceived in a fairly open way and accompanied, if necessary, by adequate bridging mechanisms between the ins and outs. The Commission should preserve as much as possible its image of impartiality, making clear that it is not 'taking side' with a group of Member States against the others. The negative impact of closer cooperation on the transparency and readability of EC/EU activities should always be minimized and accepted only if the increase in effectiveness and output-legitimacy of the EC/EU is substantial.

2 DO THE PROVISIONS ON CLOSER COOPERATION NEED TO BE REVISED?

2.1 Arguments against the revision

2.1.1 Incremental changes are preferable to Treaty changes

Argument: With its cumbersome and sometimes hazardous IGCS, the reform of the Treaties is arduous, full of unintended consequences and, altogether, dispensable. Lighter (and therefore safer) means are preferable to carry out the necessary adjustments to institutions and decision-making procedures.

Evaluation: All in all, incremental reforms seem indeed to be easier to introduce, safer and able to improve the effectiveness and efficiency of the EU. It is however widely accepted that they are often grossly insufficient to address the main source(s) of many political and managerial problems of the Union. When compared for instance with federal states, the EU displays a number of systemic handicaps or deficits which can only be met by radical reforms. For instance, the number and strength of built-in blocking devices written in the Union system are substantially superior to those in any large federal state (where, for instance, no unit – besides rare cases of constitutional change – can veto a decision single-handedly, or where absolute rather than 2/3 majority is the rule). The EU is also deprived of strong centripetal levers like shared language, taxation and redistributive policies. If those deficits cannot be addressed directly, other radical solutions, like closer cooperation, have to be envisaged. The Union cannot do without Treaty changes.

2.1.2 Other Treaty changes like the extension of QMV must be given priority

Argument: Other Treaty changes, like the extension of QMV, should be given priority over the revision of closer cooperation, since QMV is better for the Union.

Evaluation: QMV is, in some areas, the only functional solution. Extension of QMV and revision of the closer cooperation provisions are not however always mutually exclusive and should even be conceived as parallel strategies. A first reason for that parallelism is that some policy areas, like social policy or social security of workers, might require both: QMV as a general rule, with closer cooperation as a subsidiary option for highly sensitive and specific

sub-areas. There are clear indications there that, where (repeatedly) outvoting a minority of Member States is potentially too 'traumatic', it might be preferable to refrain from resorting to QMV and use closer cooperation instead (see 1.2.2). A second reason why closer cooperation should be revised in parallel to QMV extension is that, in certain cases, there is only a need for sub-systemic cooperation. Using QMV to impose functional/regional endeavours of no interest for a number of Member States could be equally counterproductive. In such situations, differentiated subsidiarity offers a better alternative (see 1.2.1). In order to avoid high political costs in those policy sub-areas where majority voting is either too sensitive, not indispensable or inopportune (not all of them being identifiable now), the Union needs to have the choice between QMV and workable enabling clauses for closer cooperation.

2.1.3 Revising the compromise of Amsterdam will only destroy its precious balance

Argument: Closer cooperation belongs to the category of package deals which should not be reopened. The Amsterdam provisions are the expression of a carefully balanced compromise and any change would destroy this delicate balance. In consequence, closer cooperation should not be amended because it corresponds to a Pareto-optimum (that is, it is impossible to make anyone better off without making someone worse off).

Evaluation: Rather than a delicate balance of the interests of the various parties, the compromise reached in Amsterdam would be more adequately described as a formula favouring very clearly proponents of the status quo. There is room for amendments that could correct this imbalance. As to the feasibility of the revision, suffice to say that governmental preferences are not static. As already mentioned, acclimatisation of Member States to new mechanisms invariably require time. The learning process can also be accelerated by the unfolding of new events like the fall of the Berlin wall or the imminence of planned developments like the enlargement (see 3.2.3).

2.1.4 Relaxing the strict enabling conditions might threaten the basis of the Union

Argument: Relaxing the strict criteria with which closer cooperation must comply, might threaten the basis of the Union or would at least increase the dangers listed above (see 1.1.4 to 1.1.9).

Evaluation: The argument is more valid for certain criteria than for others. Relaxing for instance the last resort criterion would lead to a fundamental departure from the Community method. The willing and able could then be tempted by the easiest option, saving themselves the trouble of having to struggle to find a common solution with the other Member States. A recurrence of this pattern would lead to an erosion of solidarity among Member States, especially if no bridging mechanisms were built between the closer cooperation group and the unable Member States. Another dangerous development would be to relax the condition about the *acquis communautaire* (by stipulating for instance that the *acquis* should not be affected ‘adversely’ or ‘significantly’), considering the legal insecurity this could introduce. On the other hand, the maximalist wording of a number of the criteria can be adjusted without endangering the values discussed in section 1 (for concrete revision proposals, see 2.2.1).

2.1.5 The provisions on closer cooperation have to be put to the test first

Argument: The provisions on closer cooperation have to be put to the test first. A revision should be envisaged on that basis only.

Evaluation: The literature on public policy analysis distinguishes between *ex-ante* and *ex-post* evaluation. A study of the design is sometimes sufficient to identify a number of unsurmountable shortcomings or flaws. In other words, there is no need to throw an ostrich from an aeroplane to know that it cannot fly. The evaluation of several arguments presented in section 1 and in sub-section 2.2 points at a number of constraints which limit dramatically the workability of closer cooperation.

2.2 Arguments in favour of revision

2.2.1 The features of closer cooperation are so defensive that the mechanism is unworkable

Argument: The most common assessment is that the features of closer cooperation are so defensive that the mechanism is unworkable in practice. They put, from the point of view of effectiveness and functionality, a number of highly damageable constraints on the group cooperating more closely. It is above all unacceptable that the activation of closer cooperation can be blocked as a consequence of the veto of a single Member State. The set of enabling conditions imposed on closer cooperation is unduly restrictive. Moreover, the closer

cooperation group has too little or insufficient control of what it can do (compared for instance with the liberty enjoyed by the Schengen group, when it started in 1985).

Evaluation: Besides non-conflicting situations, closer cooperation is certainly not fully operational. The objective of the 1996 IGC, i.e. designing a form a 'structured flexibility' to increase the problem-solving capacity of the Union, has not been met because of a number of constraining features. Some of these features are nevertheless indispensable to protect the achievements and core values of the European Union (see 2.1.4). This applies certainly to the presence and involvement of the supranational institutions in the closer cooperation procedures. They may represent a limitation for the closer cooperation group (compared with the Schengen-model) but are vital to preserve the coherence and democratic legitimacy of the ensemble. Other conditions currently laid down by the Treaties for the establishment of closer cooperation could however be changed without endangering the achievements and values of the EU.

The first change should concern the triggering procedure. The necessity to protect legitimate national interests is the main argument invoked to justify the possibility given to each Member State to veto the activation of closer cooperation. Once the draconian conditions set by the Treaties have been objectively fulfilled and the present and future interests of non participants states are safeguarded, once the Commission has the power for the first pillar to block any project of closer cooperation by not proposing it, once Member States have the possibility to become parties to the cooperation from the outset or at any other time they wish, once expenditure resulting from implementation of the cooperation is borne by the participating Member States, there is however no solid justification left for the maintenance of the veto, except perhaps the question of the absence of solidarity mechanisms. Supposing that this question could be solved (through Treaty revision or not), the veto would then primarily offer the possibility for a Member State to establish illegitimate linkages between the authorisation of closer cooperation and other topics. No progress would have then been achieved by comparison with the current state of affairs in the Union. The activation of closer cooperation by QMV is of course not a guarantee against such practices, but at least would be less costly for the willing and able Member States. They would indeed have, in the worst cases, to buy-off only the votes needed to reach a qualified majority. The most important element in the revision is therefore *a priori* the suppression of the veto over the activation of the process. The authorisation of closer cooperation should be granted by qualified majority. The unanimous decision of the European Council should be replaced by another type of 'emergency brakes'. A Member State would keep the right to suspend the vote for a limited period of time. The Member State would have to refer explicitly to important reasons of

national policy. The Commission would have the obligation to examine these reasons within for instance three months. For the first pillar, the Commission would then decide on the basis of its assessment whether the procedure should resume or not. For the third pillar, the Commission would only give an opinion, the Council having then to decide by QMV if the procedure should resume or not. In the affirmative, the Council would take a final vote on the authorisation by a qualified majority. This amendment would improve dramatically the workability of closer cooperation while preserving a sufficient level of reassurance for Member States likely to decline participation.

A second change concerns the unduly restrictive criteria referring to the interests of non-participant Member States and the distortion of competition. The criterion requiring that closer cooperation “... *does not affect* the competences, rights, obligations, and interests of those Member States which do not participate therein” should be adapted so as to stipulate that closer cooperation does not “*significantly affect* (...) interests of those Member States...”. In the same way, the very restrictive “...*does not constitute* a discrimination or a restriction of trade between Member States and *does not distort* the conditions of competition between the latter” should be changed into “...*does not significantly ...*”. Perhaps more tentatively, the wording of the condition referring to Community policies, actions or programmes could equally be revised. Reopening this issue is however not without risk. If the proposal is rejected by at the end of the IGC 2000 or any subsequent IGC, the Courts could be obliged to interpret the provisions in a very restrictive way. It could indeed be said then that there is no ambiguity about the intention of the Constituents who discussed explicitly the wording of the article and refused to revise it.

2.2.2 A group engaging in closer cooperation needs more control over its size and the pace of its expansion

Argument: The best way to develop quickly and efficiently new regimes is to start with a group of like-minded states. The necessary degree of cohesion often means that the initial group will be small. Member States envisaging the development of closer cooperation have too little control over the initial size of the group and the pace of its expansion. Closer cooperation must be allowed to start on a smaller scale if necessary. Member States must be freer to decide which among non participants can join and when.

Evaluation: On one side, the academic literature offers solid empirical evidence about the negative impact of an all inclusive approach on the development of international regimes.

The best example being the comparison of what the EC and other regional or international organisations have achieved over the same period. A high number of participants can be dysfunctional. Stipulating that closer cooperation is open to all Member States and must concern at least a majority of them will soon be synonymous with large starting groups (cf. the Euro-zone). Closer cooperation would then have reduced the size problem to some extent, but not have solved it. On the other side, openness is a vital element in the development of the EU for reasons mentioned *supra* and this principle should not be modified.

There is however one way to address the problem of the size, which does not affect the openness of the system: the revision of the minimum number of Member States needed to set up closer cooperation. A distinction could indeed be introduced between closer cooperation aiming at developing regimes which could eventually be of interest to the entire Union ('laboratory' closer cooperation) and closer cooperation of smaller ambition, whose object concerns only a group of Member States, for instance on specific environmental problems ('large sub-systemic' closer cooperation). As discussed *supra* (see 1.2.3) it might be preferable to maintain, for reasons of legitimacy, the obligation to involve at least a majority of Member States in any 'laboratory closer cooperation'. Considering the more limited ambition of a 'large sub-systemic' closer cooperation, there is no need for such a majority.

The threshold for 'large sub-systemic' closer cooperation could very well be lowered to some extent. It should not be too low in order to avoid the risk of overloading the Union with management tasks. This form of closer cooperation in particular should also remain an option for the Member States, not an obligation. The underlying idea is the preservation of the interests of the current Member States, which should not be deprived of a cooperative framework for having accepted to accelerate the pace of enlargement on (justified) political ground. Opening such an opportunity to a relatively small number of Member States can be equally beneficial for the EU as suggested by the following comparison with federal systems. Operating in a state system, federal institutions are in a relatively good position to monitor and, if needed, sanction the activities of the federate units, including their 'intergovernmental' relations (i.e. relations developed among themselves). Among other reasons, it does so to maintain or increase the coherence of the activities pursued by different and partially autonomous levels of power. The same objective can be reached through 'mixed' programmes designed or endorsed by the federal level, inviting federate states to join on a voluntary basis and pooling some resources with them. Considering that the Union is poorly equipped for a corrective and coercive approach, the preference should be given to some form of positive engagement preventing the development of cooperations potentially damageable

outside its framework. In that respect there is some analogy between EU's closer cooperation and 'mixed' programmes.

To sum up, the openness of closer cooperation should be preserved. A distinction could be introduced between 'laboratory closer cooperation' and 'large sub-systemic closer cooperation'. The threshold for the latter could be lowered, as proposed by the European Commission, to a third of the Members States.

2.2.3 The second pillar needs 'structural flexibility'

Argument: The Union needs an instrument to curb the multiplication of ad hoc closer cooperation outside the Treaty at the expense of the second pillar structures. 'Structural flexibility' would be particularly useful in the field of defence and for the incorporation of the Western European Union. It would provide a possible framework for the development of a common regime for armaments which is hampered by the current multi-track approach to cooperation combining an extra-EU dimension through ad hoc and institutionalized mechanisms (such as the Organization of Cooperation in armaments and the European Armaments Group, part of the WEU, respectively), with a much weaker intra-EU dimension (the working group for armament policy POLARM).

Evaluation: The argument is certainly defensible, especially for armaments cooperation. On the other hand, for some, the second pillar is already highly flexible. Any addition could well be counter-productive in terms of the objectives of visibility, continuity and coherence. It is, in particular, very difficult to divide external policy on big issues. The use of a single institutional framework to conduct non-EU actions of foreign policy could also be a potential source of confusion with third countries non necessarily aware of the subtleties of the European game or ready to accept it. This would be particularly problematic for neutral and nonaligned Member States. Finally, the CFSP might gain little credibility from hosting a number of variable *Directoires*. Valid arguments in favour of and against the extension of closer cooperation to the second pillar tend to balance each other. The possible benefits of closer cooperation in armaments could however slightly tilt the balance in favour of the extension.

2.2.4 Exaggerated transparency will impede closer cooperation's efficiency

Argument: Closer cooperation will suffer from an overdose of transparency. The fact that the closer cooperation deliberations are open to non-participating Member States deprives the group of the confidentiality and intimacy needed for its proper development (cf. Deubner 1999).

Evaluation: The transparency of closer cooperation might indeed affect to some extent its efficiency. While the 'pre-ins' – that is, Member States willing to join closer cooperation but temporarily unable to do so – are likely to adopt a more co-operative attitude, they might be tempted to slow down the process in order to facilitate their accession. The 'outs' or unwilling might try to derail closer cooperation endeavours because of their sectoral interests and/or because they are in principle opposed to the deepening of the European integration. The involvement of non-participating Member States is however justified by the necessity to prevent the formation of exclusive groupings and preserve the coherence of the Union as a whole. It is furthermore legitimated by the fact that closer cooperation might affect the interests of non-participants, their presence providing a relatively cheap early warning system at that level. The involvement of the pre-ins is possibly even more legitimate considering that they are committed to the objectives of closer cooperation and will eventually live by its rules. Without this openness, closer cooperation would be a much less safe mechanism for the Union. The potential loss of efficiency should therefore be considered as a price worth paying. The right to participate to deliberations should not be suppressed or amended.

2.2.5 Solidarity mechanisms must be inserted in the provisions on closer cooperation

Argument: The provisions on closer cooperation make no reference to any solidarity mechanism. In order to preserve the cohesion of the Union, a commitment to solidarity should be inserted in the Treaties.

Evaluation: The absence of reference to solidarity mechanisms in the Treaty of Amsterdam has indeed contributed to the impression that closer cooperation is a tool of exclusion. If self-help should not be ruled out, it should not be (indirectly) presented as the only 'catching-up' approach either. A general commitment to assist, where and when appropriate, the Member States which are willing but unable to participate in closer cooperation should be taken. This would better guarantee the cohesion of the Union and remove the most valid

raison d'être of the so-called 'emergency brakes' (see above 1.1.5). This major concession made to the 'unable' should therefore go hand in hand with the relinquishment of the possibility of vetoing the authorisation of closer cooperation.

2.2.6 The status of the *acquis* of closer cooperation needs to be clarified

Argument: The provisions on closer cooperation give no indication on the status of the closer cooperation's *acquis*. Either this *acquis* is not part of the Union's *acquis* and a majority of Member States willing to develop the *acquis* of the Union is not fully aware that it makes a much bigger concession than a classical opt-out (the United Kingdom and Denmark got, for instance, the right to choose not to join the third phase of the monetary Union, but accepted in return that this phase will be an integral part of the Union's *acquis*). Or closer cooperation's *acquis* is part of the Union's *acquis* and some Member States will authorize closer cooperation without being fully aware of the consequences of their vote (i.e. that they give a kind of mandate to the group forging ahead, or at least that they accept the idea of the 'nursery'). Filing that omission would therefore be an important element of clarification.

Evaluation: There is indubitably an ambiguity over the status of closer cooperation's *acquis*. The question does not however need to be addressed immediately. It could even be argued that this ambiguity plays a constructive role, allowing the Union to move forward and wait for better circumstances to take the final decision. The question will become more urgent as soon as the first authorisation of closer cooperation will be given (supposing that this will happen before the accession of the last candidate for membership of the Union). The Union will indeed have to clarify whether candidate Member States have to adopt the *acquis* of closer cooperation or not.

2.2.7 The treaties should specify how and when closer cooperation comes to an end

Argument: The treaties do not specify how and when closer cooperation comes to an end. It is preferable to agree on the procedures now rather than having to improvise on the basis of the specifics of the first case.

Evaluation: Largely technical and formal, this aspect could nevertheless pose a number of problems linked with the question of the status of closer cooperation's *acquis*. If the accession of the last non-participating Member State is considered as putting automatically

an end to closer cooperation, the solution for the incorporation of an *acquis* fully endorsed by all should be rather straight and simple. Other approaches to the question might prove to be more problematic. Once a group cooperating more closely represents a qualified majority in the Council, it might want to pursue its activities in the normal EC/EU framework. Provided of course that the policy area is not ruled by unanimity, this group could use its voting power to dissolve itself and decide to transform the *acquis* of the closer cooperation into 'plain' EC/EU *acquis*. Such considerations are for the moment highly speculative. It would however be useful to discuss the question and define the modalities of these possible transfers.

2.3 Conclusions

Considering that Treaty change is the only way to deal with some of the systemic problems of the Union; considering that the current compromise is clearly biased in favour of the proponents of the status quo; considering that the mechanism can be made more effective without endangering the basis of the Union, especially in the case of 'sub-systemic' closer cooperation; considering that the current provisions are not sufficiently attractive to discourage the use of extra-EU cooperation; considering that structural flexibility could be beneficial for parts of the second pillar; considering that the insertion of a general commitment to solidarity in the provisions would better guarantee the cohesion of the Union and remove the most valid *raison d'être* of the 'emergency brakes'; and, finally, considering that the status of the *cc acquis* will have to be clarified as soon as the first authorisation of *cc* will be given, the provisions for closer cooperation need to be revised.

In order to protect the democratic legitimacy and cohesion of the Union, the solidarity between the Member States as well as the interests of the lighter-weight Member States, the following features of the actual mechanism should be preserved: instrument of 'last resort'; presence and involvement of the supranational institutions; principle of the open-door; involvement of non-participating Member States. Moreover, the revision of closer cooperation should not distract the Union from the necessary extension of the scope of QMV.

3 DO THE PROVISIONS ON CLOSER COOPERATION NEED TO BE REVISED NOW?

3.1 Arguments against the immediate revision of the clauses on closer cooperation

3.1.1 The revision of closer cooperation will jeopardize the timetable of the enlargement

Argument: The revision of the provisions on closer cooperation will jeopardize the timetable of the enlargement. Putting this point on the agenda will slow down or possibly stall the IGC 2000. The impossibility to conclude the IGC before the end of the year 2000 will have a damaging knock-on effect on enlargement.

Evaluation: This argument is rather weak for four reasons. Primo, there is a tendency to (fore)see each IGC through the lenses of the previous one. The anti-Maastricht backlash was largely interpreted as the result of a deficit of information over the 1991 IGC and a particular effort of transparency was made in 1996-7. Similarly, the criticisms over the number of points dealt in Amsterdam is leading today to overfocus on the question of the length of the IGC's agenda. If the simultaneous negotiation of several dozen items may indeed have led to sub-optimal results, the view that putting more than three topics on the agenda would be damageable is going to another extreme. Secundo, closer cooperation is no longer a new concept. Having been already debated and studied extensively, its renegotiation could *a priori* be much faster than its initial negotiation. Tertio, the validity of the argument rests on the assumption that an entire IGC can be blocked. Past record indicates that, for various reasons, this probability is very small. Quatro, as no firm date has been set for the first accession and the most difficult chapters of the *acquis* have yet to be opened, it is impossible at this stage to say if a delay of a couple of months for the conclusion of the IGC would make any difference for the enlargement timetable.

3.1.2 There is no practical need to rush the revision of closer cooperation

Argument: The Union of 15 can develop without a workable closer cooperation. This mechanism is not going to be necessary either to cope with the first wave of accession. The frontrunners among the candidate Member States are indeed catching up quickly and have approximately 10 more years to complete the 'absorption' of the *acquis* (5 years before their

actual accession to be followed by minimum 5 years of transition periods). An imperative need for extra capacity of diversity management will only arise when the Union will be confronted with the second round of enlargement, that is not before 2010. It is therefore possible to organise in the meantime another negotiation on the Treaties, allowing to spread the agenda of radical institutional changes over two IGC s (cf. Attali 1999).

Evaluation: A number of arguments presented in favour of closer cooperation and its revision tend to challenge the first proposition. As to the second, it is very difficult, if not impossible at this stage, to demonstrate that the first round of enlargement will not require the use of closer cooperation. The idea of a succession of IGC s – for instance in 2000 and 2005 – is tenable but represents a gamble the Union does not have to take.

3.1.3 The radical reform of the institutions in the immediate run-up to the enlargement is unfair

Argument: The radical reform of the institutions in the immediate run-up to the first enlargement is illegitimate, improper and/or politically counterproductive. The future Member States – or at least the frontrunners – have a right to have a say in the redefinition of institutions they are about to adopt. By changing the rules just prior to their accession, the Union would send the wrong message to all candidate Member States, reinforcing their fear of exclusion. Incidentally, it would steal the perspective (or break the indirect promise) of participation to the big EU institutional redesign made to the most advanced candidates (cf. Protocol on the institutions with the prospects of enlargement of the EU, annexed to the Treaty of Amsterdam).

Evaluation: The right to participate to the Treaties reform is one of the most important benefits attached to (full) membership. Keeping a clear demarcation between the ‘ins’ and the ‘outs’, together with the full acceptance of an *acquis* established by others, has clearly played a key part in the attraction exerted by the Union on its periphery. On that ground and others, reforming the Treaties should remain an exclusively intra-EU process. As to the ‘suspicious’ timing of the reform, it is a long-established feature of the Community methodology. Most previous enlargements have been also preceded by a raft of policy and/or institutional changes. Some have generated more frustration and impression of EU diktat than others. What would be in fact illegitimate and counterproductive is the introduction of last minute discriminatory rules targeting applicant Member States. If new solutions are not seen as reasonably fair and balanced, if they create ‘structural losers’, they will indeed almost

certainly lead to blockages aimed at starting a renegotiation immediately after accession. In conclusion, the radical reform of the institutions in the immediate run-up to the enlargement is not in itself illegitimate or unethical. Provided that the reforms are sufficiently 'fair', they can be designed prior to the first accessions without being counterproductive. As to the 'broken promise', it is true that the decision to hold an IGC before the accession of the most advanced candidates can be disappointing, but a relatively minor one. The perspective of a participation in this negotiation is of course not what motivates their huge efforts of adjustment to speed up their accession.

3.2 Arguments in favour of the immediate revision of the clauses on closer cooperation

3.2.1 The IGC 2000 is most probably the last conference before EU membership exceeds twenty

Argument: The Member States have the legal obligation to convene an intergovernmental conference "in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions" at least one year before the membership of the EU exceeds twenty (Protocol on the institutions with the prospects of enlargement of the EU, annexed to the Treaty of Amsterdam). The number of candidates likely to be part of the first round of enlargement is now over five. Insofar as these accessions are likely to take place between 2003 and 2005, the IGC 2000 is most probably the only conference which can be convened before the EU reaches 21 Member States.

Evaluation: From a political point of view, this argument is legalistic and resting on a partially arbitrary definition of the determinant threshold. The EU leaders have indeed put that obligation upon themselves. If they reckon that the timetable envisaged in Amsterdam has indeed been telescoped by events, the IGC 2000 is giving them the opportunity to revise the obligation and the calendar. Furthermore, they have not demonstrated why it would be impossible or significantly more damaging for the Union to convene a conference before it reaches 22 or 23 rather than 21 members. Because of these two weaknesses, the protocol is politically and intellectually speaking not a very convincing basis to argue in favour of the immediate revision of the treaties.

3.2.2 Widening the agenda of the IGC 2000 will facilitate its successful conclusion

Argument: The result of an IGC depends, among other things, on the possibility for Member States to exchange concessions and build a package-deal. An agenda consisting of the three so-called ‘left-overs’ of Amsterdam (size and composition of the Commission, weighting of votes in the Council and extension of QMV in the Council) limits too drastically the possible configurations of mutual concessions. In that respect, closer cooperation is providing a useful addition to the agenda defined by the Cologne European Council of June 1999.

Evaluation: The first part of the proposition is a view widely endorsed in the academic literature. Enlarging the agenda will not however automatically facilitate the negotiation (for instance, if a Member State favours the status quo on all issues at stake, the addition of topics for which it has no interest will not help). In the present case, it is difficult to see how closer cooperation could contribute to reach a compromise on the question of the Commissioners and the weighting of votes in the Council. It could, on the contrary, be part of a solution on the extension of QMV. This argument should therefore be considered as potentially valid.

3.2.3 The IGC 2000 offers a unique window of opportunity for the revision of closer cooperation

Argument: During the 1996-7 IGC, the concept of closer cooperation was mainly opposed by two groups of governments: one worried by the perspective of further (unwanted) European integration; the other by the perspective of being unable to join the *avant-garde* or excluded by it. Three years later, the mechanism introduced in Amsterdam seems at least officially better accepted in a very large majority of Member States. Following a change of government or thanks to an evolution of their public opinion, reluctant Member States are less unwilling (Denmark, Greece, Sweden and the United Kingdom). After their inclusion in the Euro-zone and the Schengen area, the opponents of the other group have been partially reassured about their capacity to join any closer cooperation if they wish so (Spain, Portugal and, to a lesser extent, Greece). The perspective of the accession of less developed Member States is another factor of reassurance for them. All in all, the IGC 2000 should therefore offer a unique window of opportunity for the revision of closer cooperation.

Evaluation: It is difficult to say exactly how deep the acceptance of closer cooperation is today. As long as the triggering procedure and the enabling conditions remain what they are, there is indeed no need for a government to manifest publicly its opposition to a principle

whose application is so constrained. Reservations about the mechanism seem however to have diminished, especially in many line or technical Ministries, but they certainly have not evaporated. One could therefore agree that there is a window of opportunity for closer cooperation's revision, yet not a big one. The options to force a breakthrough on the issue are indeed equally difficult: proponents of the revision manage either to convince intellectually the other governments of the intrinsic merits of closer cooperation, or to find a trade-off able to convince the opponents to come back on the very good deal they got in Amsterdam. The window of opportunity is not only rather narrow, it is also relatively volatile. For instance, Greece might be reassured by the fact that it is poised to become a full member of the Schengen area later in 2000 and of the Euro-zone early 2001, however this still has to take place. Its government might also be less anxious to be circumvented, for instance, on Turkey related issues, considering recent bilateral rapprochement and multilateral development. These progresses remain however very fragile. In the UK, the Euro-sceptic surge led by the conservative party during the 1999 European elections and the perspective of the next general election in 2002 are putting the Labour government in a defensive position vis-à-vis all new integrationist developments. One cannot be totally sure that the tensions resulting from the participation of the Freedom party to the Austrian government will have no knock-on effect on the IGC.

If the Member States do not revise closer cooperation during the IGC 2000, there is *a priori* very little short or medium term alternative to do so. If current Member States cannot be reassured over the issue of exclusion, it is hard to see how, even in a well functioning Union, this could be achieved before long with new and less developed Member States. If the next enlargement brings in additional problems and protracted blockages, antagonism will raise and solidarity will decrease. It would then be even more difficult to believe that a Union producing less cohesion but within which Treaty changes require unanimity, could agree on radical reforms anymore. There is therefore a real urgency to act now.

3.2.4 Transforming closer cooperation into a workable device is a precondition for any enlargement

Argument: "Substantial progress towards reinforcing the institutions" is a precondition for any enlargement (declaration by Belgium, France and Italy on the Protocol on the institutions with the prospects of enlargement of the EU – annexed to the ToA). Insofar as closer cooperation is an indispensable element of the reinforcement of the institutions, its revision must take place before the first accession.

Evaluation: In the absolute, preventive action is always desirable. It becomes indispensable when the development envisaged does not enjoy a strong support. Though EU decision-makers usually do not go beyond questioning the pace of enlargement, public opinions in a majority of Member States express their opposition to the process altogether. With such a background, all efforts must be made to avoid disruption, in the interest of the Union but also to avoid a backlash against future Member States. The option of reforming the Union substantially before the first accession is not only preferable, but most probably also easier. Having to find a satisfactory solution for 15 or for 20 Member States is rarely indifferent. In the present case, it cannot be said that none of the five frontrunners envisaged at the time of Amsterdam (Hungary, Czech Republic, Slovenia, Poland and Estonia) will bring new forms of problematic diversity in the Union. From an integrationist point of view, members of this group could well affect negatively the course and pace of the reforms of the Union, if involved in the IGC (be it because of a strict interpretation of their national sovereignty, a willingness to come back on aspects of the accession deal, etc.). As far as closer cooperation is concerned, their participation would almost certainly complicate significantly the situation for reasons mentioned *supra*. In terms of risk management and feasibility, the attempt to revise closer cooperation should take place before the first accession.

3.3 Conclusions

Considering that it is unlikely that the revision of closer cooperation could alter significantly the enlargement timetable; considering that it is very difficult at this stage to demonstrate that the first round of enlargement will not require the use of closer cooperation; considering that it is legitimate and not necessarily counter-productive for the current Member States to proceed with a radical reform of the institutions of the Union in the immediate run-up to the first round of enlargement; considering that the widening of the agenda of the IGC 2000 to closer cooperation might facilitate to some extent its successful conclusion; considering that the IGC 2000 offers a unique (although narrow and volatile) window of opportunity for the revision of closer cooperation; and, finally, considering that it is preferable (in terms of risk management) and easier to revise closer cooperation before the first accessions, the revision of the provisions on closer cooperation should be on the agenda of the IGC 2000.

4 RECOMMENDATIONS

The arguments, evaluations and intermediary conclusions presented in the previous sections lead to a number of general and specific recommendations. The general recommendations can be summarised as follows:

1. the Union needs a safe and workable mechanism allowing Member States to develop closer cooperation inside the institutional framework laid down by the Treaties, if it is to solve in a satisfactory manner a number of difficult problems linked with its growing diversity;
2. the workability of the current mechanism needs to be substantially improved;
3. the risks resulting from this improvement must be minimized by preserving a number of indispensable safeguards already written in the Treaties;
4. this improvement should not distract the Union from the necessary extension of the scope of qualified majority voting;
5. the interest of the Union is to revise the mechanism for closer cooperation as soon as possible.

The specific recommendations concern exclusively the revisions which should be on the agenda of the IGC 2000. They focus mainly on procedural and material elements of the provisions on 'closer cooperation', proposing amendments and additions. Features not discussed below are considered as sufficiently operational or indispensable safety devices. The same and straight recommendation applies to all of these: the formulation agreed in Amsterdam should be preserved. Eight specific recommendations can be deduced from our analysis of the pros and cons of closer cooperation:

6. *Recommendation on the triggering procedure.* The authorisation of closer cooperation should be granted by qualified majority. No single Member State should have the possibility to veto the activation. The unanimous decision of the European Council should be replaced by another type of 'emergency brake'. A Member State would keep the right to suspend the vote for a limited period of time. The Member State would have to refer explicitly to important reasons of national policy. The Commission would have the obligation to examine these reasons within for instance three months. For the first pillar, the Commission would then decide on the basis of its assessment whether the procedure should resume or not. For the third pillar, the Commission would only give an opinion, the Council having then to decide by QMV if the procedure should resume or not. In the affirmative, the Council would take a final vote on the authorisation by a qualified majority. This amendment would improve dramatically the workability of closer

cooperation while preserving a sufficient level of reassurance for Member States likely to decline participation.

7. *Recommendation on the minimum number of Member States needed to set up closer cooperation.* Generally speaking, as far as the final number of members of the Union is not known, percentages are preferable to absolute figures. A 'laboratory' closer cooperation – i.e. aiming at developing regimes which could eventually be of interest to the entire Union – should concern at least a majority of Member States, to reinforce its legitimacy. Considering the more limited ambition of a 'large sub-systemic' closer cooperation – i.e. focusing on a topic interesting only a group of Member States –, for instance on specific environmental problems, there is no need for such a majority. The threshold for such closer cooperation could be lowered, as proposed by the European Commission, to a third of the Member States. If need be, cooperations initially intended and started as 'large sub-systemic closer cooperation' could be upgraded to 'laboratory closer cooperation'. Member States participating in a closer cooperation whose membership is over the majority threshold should have the possibility of requesting an upgrading vote to be taken by a qualified majority in the Council.
8. *Recommendation on the coordination between different groups cooperating more closely.* There is no specific provision on the coordination among groups engaged in a closer cooperation. The horizontal coordination of sectoral policies at EC/EU level is a function performed by the General Affairs Council (GAC) and the Coreper. If the memberships of the groups cooperating more closely are not identical, there will be no equivalent for the GAC and the Coreper. This question is certainly not urgent and *a priori* relatively minor for different reasons: closer cooperation is not meant to be used extensively; the fact that some Member States are likely to participate to all closer cooperation should help to prevent major problems of coordination; and, last but not least, the Commission will be necessarily closely involved in all cases of closer cooperation. The problem might however be aggravated by lowering the minimum number of Member States needed to set up closer cooperation. It might indeed lead to cases where there is little or even no membership overlapping. The solution could be to simply rely on the Commission and consider that this question is part of its general mission with regard to coordination, cohesion and coherence within the Union. If the Member States reckon that the solution needs to be formalized, it does not have to be defined in the Treaties.
9. *Recommendation on the material conditions constraining the authorisation and use of closer cooperation.* The maximalist wording of a number of enabling conditions is unduly restrictive at least when referring to the interests of non-participant Members States and the distortion of competition. The Treaties should only stipulate that closer cooperation

cannot affect 'significantly' the interests of non-participants and distort the conditions of competition, or 'prejudice' Community policies, actions or programmes. The revision of the condition regarding the *acquis communautaire*, stipulating for instance that closer cooperation cannot affect the latter 'adversely', might be more problematic.

10. *Recommendation on the extension of closer cooperation to the second pillar.* There are many valid arguments both in favour of and against the extension of closer cooperation to the second pillar. The possible benefits of closer cooperation in armaments could however be seen as a decisive argument in favour of the extension.
11. *Recommendation on the inclusion of solidarity mechanisms in the provisions on closer cooperation.* The absence of reference to solidarity mechanisms in the Treaty of Amsterdam has contributed to the impression that closer cooperation is a tool of exclusion. Self-help should not be ruled out, but should not be (indirectly) presented as the only 'catching-up' approach either. A general commitment to help, where and when appropriate, the Member States which are willing but unable to participate in closer cooperation should be inserted in the Treaties.
12. *Recommendation on the definition of the status of the acquis resulting from closer cooperation.* The provisions on closer cooperation give no indication on the status of the closer cooperation's *acquis*. Coming back on that omission would be an important element of clarification for reasons exposed *supra* (see section 2.2.6), even if the current ambiguity should be seen as playing a constructive role. The question will however become more urgent as soon as the first authorisation of closer cooperation will be given. The Union will indeed have to indicate then to candidate Member States if the *acquis* of closer cooperation is part of what they have to accept or not.
13. *Recommendation on how and when to put an end to a closer cooperation.* The Treaties do not specify how and when closer cooperation comes to an end. Largely technical and formal, this aspect could pose a number of problems linked with the question of the status of the closer cooperation's *acquis* (see 2.2.6). Such considerations are for the moment highly speculative. It would however be useful to discuss the question and define the modalities of these possible transfers.

5 ANNEX: PROVISIONS ON CLOSER COOPERATION IN THE TEU AND TEC

Treaty on European Union - Title VII. Provisions on closer cooperation

Article 43

1. Member States which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by the Treaty and the Treaty establishing the European Community provided that the cooperation:
 - (a) is aimed at furthering the objectives of the Union and at protecting and serving its interests;
 - (b) respects the principles of the said Treaties and the single institutional framework of the Union;
 - (c) is only used as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
 - (d) concerns at least a majority of Member States;
 - (e) does not affect the "*acquis communautaire*" and the measures adopted under the other provisions of the said Treaties;
 - (f) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
 - (g) is open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework;
 - (h) complies with the specific additional criteria laid down in Article 5a of the Treaty establishing the European Community and Article K.12 of this Treaty, depending on the area concerned and is authorised by the Council in accordance with the procedures laid down therein.
2. Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the cooperation in which they participate. Member States not participating in such cooperation shall not impede the implementation thereof by the participating Member States.

Article 44

1. For the purposes of the adoption of the acts and decisions necessary for the implementation of the cooperation referred to in Article K.15, the relevant institutional provisions of this Treaty and of the Treaty establishing the European

Community shall apply. However, while all members of the Council shall be able to take part in the deliberations, only those representing participating Member States shall take part in the adoption of decisions. The qualified majority shall be defined as the same proportion of the weighted votes of the Council members concerned as laid down in Article 148(2) of the Treaty establishing the European Community.

Unanimity shall be constituted by only those Council members concerned.

2. Expenditure resulting from implementation of the cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless the Council, acting unanimously, decides otherwise.

Article 45

The Council and the Commission shall regularly inform the European Parliament of the development of closer cooperation established on the basis of this Title.

Treaty establishing the European Community

Article 11

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles K.15 and K.16 of the Treaty on European Union, to make use of the institutions, procedures and mechanisms laid down by this Treaty, provided that the cooperation proposed:
 - (a) does not concern areas which fall within the exclusive competence of the Community;
 - (b) does not affect Community policies, actions or programmes;
 - (c) does not concern the citizenship of the Union or discriminate between nationals of Member States;
 - (d) remains within the limits of the powers conferred upon the Community by this Treaty; and
 - (e) does not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter.
2. The authorisation referred to in paragraph 1 shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that

the matter be referred to the Council, meeting in the composition of the Heads of State and Government, for decision by unanimity.

Member States which intend to establish closer cooperation as referred to in paragraph 1 may address a request to the Commission, which may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

3. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification. Within four months of the date of that notification, the Commission shall decide on it and on such specific arrangements as it may deem necessary.
4. The acts and decisions necessary for the implementation of cooperation activities shall be subject to all the relevant provisions of this Treaty, save as otherwise provided for in this Article and in Articles K.15 and K.16 of the Treaty on European Union.
5. This Article is without prejudice to the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

Treaty on European Union - Title VI. Provisions on police and judicial cooperation in criminal matters

Article 40

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles K.15 and K.16, to make use of the institutions, procedures and mechanisms laid down by the Treaties provided that the cooperation proposed:
 - (a) respects the powers of the European Community, and the objectives laid down by this Title;
 - (b) has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice.
2. The authorisation referred to in paragraph 1 shall be granted by the Council, acting by a qualified majority at the request of the Member States concerned and after inviting

the Commission to present its opinion; the request shall also be forwarded to the European Parliament.

If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.

The votes of the members of the Council shall be weighted in accordance with article 148(2) of the Treaty establishing the European Community. For their adoption, decisions shall require at least 62 votes in favour, cast by at least 10 members.

3. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification, possibly accompanied by a recommendation for such specific arrangements as it may deem necessary for that Member State to become a party to the cooperation in question. Within four months of the date of that notification, the Council shall decide on the request and on such specific arrangements as it may deem necessary. The decision shall be deemed to be taken unless the Council, acting by a qualified majority, decides to hold it in abeyance; in this case, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this paragraph, the Council shall act under the conditions set out in Article K.16.
4. The provisions of Articles K.1 to K.13 shall apply to the closer cooperation provided for by this Article, save as otherwise provided for in this Article and in Articles K.15 and K.16.

The provisions of the Treaty establishing the European Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply to paragraphs 1, 2 and 3.

5. This Article is without prejudice to the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

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