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CLOSER OR ENHANCED COOPERATION: AMSTERDAM OR NICE

*Daniel T. Murphy**

The concepts of closer cooperation and flexibility are fairly recent additions to European law and policy. These notions essentially refer to the policies and procedures within the Union whereby some member states undertake certain obligations, or participate with some other member states in certain agreed upon activities, while other member states do not participate, or participate on a different scale or on a different timetable. Explicit reference to the concept of "closer cooperation" in the European Union's constitutive documents, or authorization of it, is recent. Provisions regarding "closer cooperation" appear for the first time in the 1997 Amsterdam Treaty ("AT").¹ But only three

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¹ TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter AT]. The AT consists of a series of amendments to the TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) (also known as the MAASTRICHT TREATY) [hereinafter TEU] and to THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by, among other agreements, the SINGLE EUROPEAN ACT, 1987, O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 (1987) [hereinafter TREATY OF ROME].

Because of the various amendments to the Treaties and the uncoordinated manner in which the Treaties relate to one another, it is often difficult to identify the substance of a specified treaty provision. The following general comments might be helpful. The Treaty on European Union, as signed in Maastricht in 1992, introduced several new areas into European law and affairs. It also incorporated the Treaty of Rome into itself, amended some of its provisions and changed its name to the Treaty Establishing the European Community. For clarity, throughout this article the term "TEU" is used to refer to the Treaty on European Union; the term "TEC" is used to refer to the Treaty of Rome as included within, amended and renamed by the TEU. In turn, the AT consists of amendments to both the TEU and the TEC. The term "Community" is used to refer to the entity created by the Treaty of Rome, as amended. The term "Union" is used to refer to the broader set of relationships and obligations created by the TEU, the TEC and the AT. The term "Maastricht Treaty" is used when referring to the Treaty on European Union, and its provisions, in the form agreed to in 1992.

After adoption of the Maastricht Treaty in 1992, the Union was often described as an architecture of three pillars, as a means of distinguishing among its parts. *See generally* ANTHONY ARNULL ET AL., WYATT & DASHWOOD'S EUROPEAN UNION LAW 169-87 (4th ed. 2000) [hereinafter WYATT & DASHWOOD]. At the outset of the Maastricht Treaty some Common Provisions are set out. *See* TEU tit. I. The Treaty of Rome is then restated, amended and renamed as the first pillar of the Union architecture. *See* TEU tit. II. The second pillar consisted

years later these provisions were augmented and restated in a modified form in the Union's most recent constitutive document, the Treaty of Nice,² which was agreed to by the fifteen member states of the Union on December 11, 2000 at the conclusion of the Nice Summit.³

of provisions regarding the common foreign and security policy (the CFSP). See TEU tit. V. The third pillar consisted of provisions dealing with visa, asylum and immigration matters and provisions dealing with police and judicial cooperation in criminal matters. See TEU tit. VI. The Maastricht Treaty concludes with some Final Provisions. See TEU tit. VII.

The AT consists separately of amendments to the TEU and to the TEC. Part One of the AT contains the substantive amendments to the Treaties. Article 1 of Part One (1999 O.J. (C 340) 7-24) contains the amendments to those parts of the TEU other than the TEC. Article 2 of Part One (1999 O.J. (C 340) 24-50) contains the amendments to the TEC. Following the AT in the Official Journal are Consolidated Versions of the TEU (other than the TEC) including the changes made by the AT (1999 O.J. (C 340) 145-172) and of the TEC also including the AT changes (1999 O.J. (C 340) 173-306).

Throughout this article it is necessary to distinguish the AT's amendments to the TEU (other than the TEC) from its amendments to the TEC. To do so the term "AT Article _____" is used when referring to amendments to the TEU (other than the TEC) and "TEC Article _____" is used to refer to the amendments to the TEC. The text of the AT articles referred to are found in the Consolidated Version of the TEU and the text of the TEC articles are found in the Consolidated Version of the TEC. Unless otherwise indicated, references in this article are to the text of the provisions in the Consolidated Versions.

The AT provided that the provisions of the entire TEU, including the TEC as amended, should be renumbered. AT art. 12 (1999 O.J. (C 340) 73; Annex, Tables of Equivalences Referred to in Article 12 of the Treaty of Amsterdam (1997 O.J. (C 340) 85-91). This renumbering was to be done after the text of the AT was agreed to; thus the provisions of the text of the AT itself were also renumbered. Since the AT separately amends the TEU (other than the TEC) and the TEC, this renumbering is confusing. The renumbering of the TEU (other than the TEC) results in articles 1 through 53 of the Consolidated Version of the TEU. Then the renumbering begins again as articles 1 through 314 in the Consolidated version of the TEC. As adopted, the provisions of in the AT amending the TEU (other than the TEC) were designated by letter, not number. The renumbering changed the letters to numbers. Throughout this Article, references are to the treaty provisions as renumbered. Where helpful, the old letter or number reference is also given.

² TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, February 26, 2001, O.J. (C 80) 1 (2001) [hereinafter TREATY OF NICE].

³ See Robin Oakley, *EU Deal Paves Expansion Path*, CNN.COM, Dec. 11, 2000, at <http://www.cnn.com/2000/WORLD/europe/12/11/nice.agree/index.html>. In fact, the time between the Amsterdam and Nice treaties was less than two years, as the AT did not become effective until May 1, 1999. By its terms, the AT became effective on the first day of the second month after the last instrument of ratification was deposited. AT art. 14(2). The substantive provisions of the Treaty of Nice were agreed to at the conclusion of the Nice Summit. During the following two months the final text of the treaty was prepared. The member states then signed the final text in February, 2001. See Associated Press, *EU Ministers Sign Treaty of Nice*, CNN.COM, Feb.

The Treaty of Nice became effective as an amendment to the TEU on February 1, 2003, upon the ratification by all fifteen member states, according to their respective constitutional or administrative procedures.⁴ In June 2001, the Treaty of Nice was rejected by the citizens of the Republic of Ireland, voting in a referendum as provided in the Irish Constitution; but in a second referendum, held in October 2002, the Irish voters approved the Treaty.⁵ The inclusion of cooperation provisions in the Treaty of Nice in a form different from those of the AT provides an opportunity to consider these less familiar aspects of European Union law and policy as contained in both instruments.

I. THEORY OF CLOSER COOPERATION OR FLEXIBILITY

Closer cooperation allows some member states to commit themselves to an agreed-upon activity while other member states choose not to participate in it. It also allows a variation in the degree of participation or the timing of participation. Closer cooperation, as the term is used in the AT, is the language of the treaty establishing procedures whereby member states are authorized to engage in some forms of differentiated activity.⁶ Enhanced cooperation is the term used in the English version of the Treaty of Nice with respect to those same types of provisions.⁷ The term "flexibility" includes closer cooperation or enhanced cooperation, but it is also used to refer to the broader issues surrounding the accommodation of difference or diversity of obligation within the Union and its constitutional structure and governance.⁸

26, 2001, at <http://www.cnn.com/2001/WORLD/europe/02/16/nice.treaty/>.

⁴ By its terms, the Treaty of Nice became effective on the first day of the second month after the last member state's instrument of ratification was deposited. TREATY OF NICE art. 12.2. The last instrument of ratification, that of the Republic of Ireland, was deposited on December 18, 2002. Hence the Treaty of Nice is effective as of February 1, 2003. See *EU-Final Barrier to Implementation of Nice Treaty Lifted*, EUROPEAN REP., Dec. 21, 2002, available at 2002 WL 104382172.

⁵ See Audrey Magee, *Ireland's Voters Reject Europe's Eastward Spread*, TIMES (London), June 9, 2001, at News 6; David Lister, *Defeat Leads to Damage Limitation in Brussels*, TIMES (London), June 9, 2001, at News 6. Denis Staunton, *EU heaves collective sigh of relief at news*, IRISH TIMES, October 21, 2002, at News 5. In Ireland, approval of the Treaty of Nice by a popular referendum was required since the treaty necessitated amendments to the Irish Constitution. TREATY OF NICE, WHITE PAPER (2001), point 2.9.

⁶ In fact, one of the titles within the AT is captioned "Provisions on Closer Cooperation." AT tit. VII.

⁷ See TREATY OF NICE pt. One, 6.

⁸ See, e.g., CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? (Grainne de Burca & Joanne Scott eds., 2000) [hereinafter CONSTITUTIONAL CHANGE];

Use of the closer cooperation procedures afforded by the AT would result in or achieve some degree of flexibility of differentiated action and commitment within the Union.

The signing of the Maastricht Treaty in 1992 and the Intergovernmental Conference ("IGC") which led up to it provided the impetus for extensive discussion of flexibility and examination of its implications. That debate intensified in the mid-1990s up to and after the adoption of the AT. However, seminal articulation of the concept was considerably earlier.⁹

EUROPEAN INTEGRATION AFTER AMSTERDAM: INSTITUTIONAL DYNAMICS AND PROSPECTS FOR DEMOCRACY (Karlheinz Neunreither & Antje Wiener eds., 2000); FLEXIBILITY IN CONSTITUTIONS: FORMS OF CLOSER COOPERATION IN FEDERAL AND NON FEDERAL SETTINGS (Annette Schrauwen ed., 2002) [hereinafter FLEXIBILITY IN CONSTITUTIONS]. It has been suggested that it might have been more appropriate to have used the term "flexibility" rather than "closer cooperation" in the AT. See generally Giorgio Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?*, 35 COMMON MKT. L. REV. 855 (1998). The term flexibility would, in a single, relatively understandable word, suggest that the member states were to be allowed some measure of freedom to take steps toward integration not taken by others. See *id.* at 855-56 (Professor Gaja suggests that the term "closer cooperation" was chosen because of its neutrality. While perhaps not as precise as "flexibility," the term "closer cooperation" avoids the political emotion surrounding such alternative terms as "two-tier Europe," "variable geometry" or perhaps most evocative of all, "*Europe a la carte*." See *id.* Professor Jo Shaw notes that the change in terminology from flexibility to closer cooperation is symptomatic of a trend "towards deleting or at least largely concealing the rich, if contradictory, ideological heritage brought into play by flexibility." Jo Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EUR. L.J. 63, 69 (1998) [hereinafter *Challenges of Flexibility*]. See also Alexander C.G. Stubb, *A Categorization of Differentiated Integration*, 34 J. COMMON. MKT. STUD. 283 (1996) [hereinafter *Differentiated Integration*] (noting general ignorance of political leaders' visions in European Parliament debate on multi-speed Europe).

⁹ See, e.g., Claus-Dieter Ehlermann, *European Community: How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"*, 82 MICH. L. REV. 1274 (1984) [hereinafter *How Flexible is Community Law*]. Mr. Ehlermann ascribes the origin of the flexibility concept to Willy Brandt, who opened the "two speed" debate. Chancellor Brandt noted in 1974 that "the Community might progress faster if its economically stronger Member States were allowed to develop more quickly." *Id.* at 1274. See also *European Union: Report by Mr. Leo Tindemans, Prime Minister of Belgium to the European Council*, 1976 BULL. E. COMM. Supp. 1 [hereinafter *Tindemans Report*]. In discussing economic and monetary policy, Prime Minister Tindemans noted that those states which are able to progress in this area must press ahead. *Id.* at 20-21. Those with reasons for not doing so which the Council deems valid will not do so, but will be given aid from the others to enable them to catch up. *Id.*; see Eberhard Grabitz & Bernd Langeheine, *Legal Problems Related to a Proposed "Two-Tier System" of Integration within the European Community*, 18 COMMON MKT. L. REV. 33 (1981).

For bibliographies of works dealing with flexibility, see CONSTITUTIONAL CHANGE, *supra* note 8; WYATT & DASHWOOD, *supra* note 1, at 163; Shaw, *Challenges of Flexibility*, *supra* note 8, at 64-65 n.5-10; Jose M. de Arezila, *Enhanced Cooperations in the Treaty of Amsterdam*:

Uniformity is a fundamental touchstone of Union philosophy. Although a member state retains the ultimate, but practically speaking, unlikely, option of withdrawing from the Union, it does not as a member have the luxury of selective application of Union law.¹⁰ Uniform and unanimous implementation of Community obligations is a bedrock principle of Community law.¹¹ Provisions in the Treaties wherein the member states agree that decisions taken constitute acts of the Union, and agree to accept them and implement them as such, certainly foster this principle of uniformity and solidarity.¹² Moreover, the jurisprudence of the Court of Justice that establishes the principle of the uniform, binding nature of its decisions reinforces this notion.¹³ On the other hand, the concept of flexibility or differentiation has been embedded in the Treaties from the formation of the Community in 1957; uniformity therefore has always been slightly diluted.¹⁴

Some Critical Remarks (Mar. 1998), at <http://jeanmonnetprograms.org/papers/98/98-13.html>; Claus Dieter Ehlermann, *Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty*, 4 EUR. L.J. 246, 270 (1998) [hereinafter *Differentiation, Flexibility*].

¹⁰ See Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. OF EUR. L. 267, 297 (1987); see also Eric Philippart & Monika Sie Dhian Ho, *From Uniformity to Flexibility. The Management of Diversity and its Impact on the EU System of Governance*, in CONSTITUTIONAL CHANGE, *supra* note 8, at 299.

Baroness Thatcher recently argued that the United Kingdom should begin a process of withdrawing from the Union. She advocated a renegotiation of British membership in such a way that Britain could withdraw from some Union policies, such as the common agricultural and fishing policies and the common foreign and security policy. The point was made then that the other member states would not agree to allow the United Kingdom to selectively accept some Union obligations, but not others. See Philip Webster, *Thatcher: Britain must start to quit EU*, TIMES (London), Mar. 18, 2002, at News 1; Martin Fletcher & Gary Duncan, *Member states would never let Britain go*, TIMES (London), Mar. 18, 2002, at News 2.

¹¹ D. LASOK, LAW & INSTITUTIONS OF THE EUROPEAN UNION 38-42 (6th ed. 1994); Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 18 (1998). See generally J.H.H. WEILER, THE CONSTITUTION OF EUROPE 10-63 (1999). *Europe a la carte*, an extreme form of flexibility, is the antithesis of uniformity. It would allow all members to apply Union decisions selectively in all areas. See Fletcher, *supra* note 10, regarding Union reaction to Baroness Thatcher's proposal for selective application of Union law and policies.

¹² See, e.g., TEU arts. 7, 11(2), 43(2); TEC arts. 226-28. See P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 148-62 (Laurence W. Gormley ed., 3d ed. 1998).

¹³ See, e.g., Case 168/85, *Commission v. Italy*, 1986 E.C.R. 2945; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

¹⁴ For an exposition of differentiation in the Treaties, the secondary legislation and the decisions of the Court of Justice, see *How Flexible is Community Law*, *supra* note 9, at 1279-87.

The Treaty of Rome's transitional provisions and its allowance of a separate regional arrangement for the Benelux countries demonstrates this.¹⁵ The different law making instruments created in the Treaty of Rome also contribute to this unsettledness. The Treaty of Rome created two distinct legislative forms, the regulation and the directive.¹⁶ The regulation is a single act, binding upon the member states in the text as adopted, from its effective date.¹⁷ The directive, being a direction to the member states to enact their own national measures with respect to the subject covered,¹⁸ tolerates different formulations and certainly different effective dates. The Treaty provision creating the directive expressly sanctions differences among the national formulations in that the directive "shall leave to the national authorities the choice of form and method."¹⁹ The directive generally sets forth a date by which the national measures are to be effective, and the treaty language does demand uniformity of result.²⁰ Thus any lack of uniformity with respect to directive legislation ought to be modest. Yet the numerous cases dealing with the consequence of a member state's failure to enact a directive by the stated date attest to the Union's willingness to counter the threat to uniformity posed by directives only in an incomplete manner. The cases do find some degree of uniformity and ability to bind despite a member state's failure to enact the necessary legislation.²¹ Also, the Maastricht Treaty's provision authorizing the

¹⁵ See TEC art. 306. For an example of the grant of separate dates for Sweden to accept community policies concerning the Union's fishing quota scheme and to implement various environmental standards, see Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union is Founded, pt. 4, tit. V, ch. 1, § 1, at 112, 1994 O.J. (C 241), 41-42.

¹⁶ See TEC art. 249.

¹⁷ See TEC art. 249; see generally WYATT & DASHWOOD, *supra* note 1, at 84-89; STEPHEN WEATHERILL & PAUL BEAUMONT, EU LAW 150 (3d ed. 1999) [hereinafter EU LAW].

¹⁸ TEC art. 249; see generally WYATT & DASHWOOD, *supra* note 1, at 89-104; EU LAW, *supra* note 17, at 151-52.

¹⁹ TEC art. 249; Case 252/85, *Commission v. France*, 1988 E.R.C. 2243, at 2263 and Case 262/85, *Commission v. Italy*, 1987 E.C.R. 3073, at 3097 (holding that the text of the legislation need not be the same); Case 163/82, *Commission v. Italy*, 1983 E.C.R. 3273, at 3286-87 (holding that the choice of legislative form is left to the member states).

²⁰ TEC art. 249 states that the directive is "binding, as to the result to be achieved, upon each Member State. . . ."

²¹ See, e.g., Case 106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion, SA*, 1990 E.C.R. I-4135 (holding that domestic law of a state not enacting a directive by the stated date is deemed to be changed so as to conform to the directive); Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337 (holding that some directives, although unenacted by the

Court to impose damages against a state which fails to fulfill its obligations is an effort to enforce uniformity, but the ambiguity is tolerated inasmuch as there has not been a serious effort to reduce the incidence of differentiation by eliminating the directive as a legislative instrument.²²

Uniformity of commitment or obligation among the member states has several advantages. Clarity of obligation is one. The solidarity and identity among the member states resulting from that clarity is another. The member states, persons residing within them, and the outside world, have no doubt as to the Union's position or commitment on an issue. Also, the uniformity of obligation and the mutuality of interest flowing from it fosters integration among the member states.

The concept of flexibility within Union affairs is destabilizing in many respects. It is completely at cross purposes with the notions of uniformity and solidarity. Second, while the notion of uniformity is clear, there is no definition of flexibility. Flexibility undercuts uniformity, thereby blurring the Union's position on, or commitment to, an issue. It poses a risk to the integration process accomplished through such uniformity,²³ and threatens the integrity of the Union's legal order.²⁴ One disadvantage of uniformity, however, is that it tends to slow the progress toward integration. While the Union's position might be clear, it can go no farther or evolve no faster than qualified majority voting, to say nothing of unanimous voting, allows. Moreover, enlargement of the Union membership increases the Union's heterogeneity, which in turn decreases the likelihood of effective governance by unanimity or even qualified majority voting.²⁵

stated date, can be considered to be directly applicable and directly effective).

²² TEC art. 228. See also Joined Cases C-6 & 9/90, *Andrea Francovich & Daniela Bonifaci et al. v. Italian Republic*, 1991 E.C.R. I-5357 (noting that inherent in the Treaties is the principle that member states must compensate individuals for damages caused by their failure to fulfill their Community legal obligations).

²³ Jo Shaw, *European Union Legal Studies in Crisis? Towards a New Dynamic*, 16 OXFORD J. LEG. STUD. 231, 239 (1996).

²⁴ Stephen Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 13, 22 (David O'Keefe & Patrick M. Twomey eds., 1994) [hereinafter *Beyond Preemption?*].

²⁵ Early discussion of flexibility assumed that use of qualified majority voting in Community decision making would reduce the need to resort to flexibility. Ehlermann, *How Flexible is Community Law*, *supra* note 9, at 1274. Qualified majority voting would allow effective decision making in a larger number of cases, thereby preserving uniformity despite heterogeneity, and in turn the increased number of effective decisions taken would intensify integration. Other early discussion of flexibility would limit resort to flexibility only in areas of decision making that require unanimity. Ehlermann, *How Flexible is Community Law*, *supra* note 9, at

Flexibility is a fulcrum by which it is thought that uniformity and solidarity can be balanced with the aspirations of some member states to intensify integration among themselves and better manage an enlarged Union.²⁶

While the concept of uniformity is fairly clear, not only does flexibility blur the Union's position, but also the concept of flexibility is itself unclear. One can readily distinguish at least three different understandings of flexibility. The mildest and least disturbing to uniformity is "two speed" or "multi speed" flexibility. In this variant, some member states commit to a position by a defined time, with the understanding that the others will follow later or will catch up.²⁷ In this variant, uniformity is only minimally disturbed, because at some point all of the member states will have reached the agreed upon position. There is uniform agreement as to the ultimate position, and the only question is the timetable for arriving at that position. The transitional allowances in the Treaties are precisely this form of flexibility.²⁸

At the other extreme is the view of flexibility leading to *Europe a la carte*. Under this view, member states can determine which Union obligations they wish to undertake or in which initiatives they would like to participate, with only a minimum of a common base which all members must accept.²⁹ This

1276 (discussing Bernd Lageheine, *Abgestufte Integration*, 18 EUR. 227, 254-55 (1983)). As time passed, flexibility and qualified majority voting were not viewed as alternative, inconsistent means of facilitating effective Union action. The IGC leading to the Treaty of Nice had as two of its agenda items increased use of qualified voting and reform of closer cooperation to make it more useable. See *infra* notes 185-86, and 197-98 and accompanying text.

²⁶ See Anne Marie Lansdaal, *Differentiation or Enhanced Cooperation: Formalizing Flexibility*, in FLEXIBILITY IN CONSTITUTIONS, *supra* note 8, at 49.

²⁷ See *Differentiated Integration*, *supra* note 8, at 287.

²⁸ Chancellor Brandt did not view flexibility so narrowly. See *supra* note 9. Other early persuasive discussion of the concept did, however. Prime Minister Tindemans noted that a member state should be allowed not to accept the same obligations as the others for reasons acceptable to the Council, but the understanding was that ultimately, and with assistance from the other members, the non-complying state would catch up. *Tindemans Report*, *supra* note 9, at 21.

Article 7 of the TEC is another example of this modest form of flexibility. Article 7 articulates the Single European Act's goal, that the internal market be established by December 31, 1992. TEC art 7a. In drawing up proposals necessary to achieve the single internal market, the Commission was directed to take into account the greater burden its proposals would place on some member states because of the difference in their state of economic development; and it was authorized to make appropriate allowances for those differences. If the allowances took the form of derogation from an obligation, such derogation was to be temporary. TEC art. 7c. See Alexander C.G. Stubb, *The 1996 Intergovernmental Conference on the Management of Flexible Integration*, 4 J. EUR. PUB. POL'Y 37, 44 (1997).

²⁹ *Differentiated Integration*, *supra* note 8, at 288. See *supra* note 10 regarding Baroness

approach clearly carries with it the possibility of significant deterioration of uniformity and a serious blurring of the identity of the Union. Taken to the extreme, this view undercuts the whole notion of unity even in areas of exclusive Community competence. The member states are deemed to have ceded their sovereign decision making rights in certain areas to the Union institutions.³⁰ Any thought that a member state can select for itself those commitments it chooses is antithetical to the notion of exclusive Community competence. Even if areas of exclusive competence were deemed to be the residual common core in which uniformity must not be disturbed, Union solidarity and effectiveness could be seriously eroded if member states were free to decide whether or not to accept any other measure. This is not the view of flexibility contemplated in the AT and the Treaty of Nice.

Between these two poles is the view of flexibility which allows completely different participation with respect to some ill-defined class of measures. Under this view, there is a clear difference of commitment among the member states, not merely a difference in the time necessary to reach a uniformly agreed upon position. This is the form of flexibility, referred to as "variable geometry," that is incorporated into the AT and the Treaty of Nice. One of the distinctions between the closer cooperation formulations in these two treaties is the different delineation of the ambit of areas of permissible cooperation or variable geometry.³¹

Uniformity results in clarity of position. While the member states may vote, under either the unanimity or qualified majority procedures, from the perspective of their own national interest, the measure, if adopted, is that of the Union. National agendas or views with respect to that measure cease to be overriding. In contrast, flexibility leads to less clarity in the Union's position.

Thatcher's suggestion that the United Kingdom attempt to re-negotiate its treaty commitments along the lines of *Europe a la carte*.

³⁰ See Opinion 1/94, Opinion Pursuant to Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267 (the WTO case); Case 22/70, *Commission v. Council*, 1971 E.C.R. 263 (the E.R.T.A. case).

³¹ See Lansdaal, *supra* note 26, at 50-51; *Differentiated Integration*, *supra* note 8, at 287. The difference in formulations is accomplished both by treaty provisions authorizing closer cooperation within certain Treaty spheres and, at least as importantly, by the various substantive qualifications which a proposed closer cooperation measure must meet. See *infra* notes 137, 147-64, 232-36 and accompanying text. One way of distinguishing variable geometry from *Europe a la carte* is that in the latter, member states might be able to determine unilaterally which Union obligations they will accept, whereas under variable geometry the member states collectively grant a given member state the right to determine whether or not to participate in a Union-based initiative.

It is also a means by which the various, and perhaps inconsistent, national agendas continue to dominate the issue.

Flexibility is a pragmatic tool whereby the political, social, and other agendas of the member states can be accommodated. Understandably, there is not one such agenda among the member states; there may be several agendas, some of which are inconsistent.³² Several of these disparate agendas can be accomplished through flexibility. The more prevalent justification for the use of flexibility is that while certain member states are reluctant to participate in some measures fostering integration, others wish to pursue that same measure.³³ Multilateral treaties, or other agreements which sanction such less than unanimous action, support the momentum for integration. Conversely, a unanimity requirement which allows a proposed measure to be completely thwarted, frustrates, or at least decelerates, the drive for integration.

An advantage of flexibility under this description is the fact that it allows for different political or social judgments by the member states.³⁴ A different justification asserts that flexibility is a means of compensating for the "inadequacy" or "incapacity" of a member state. A state which is not capable of undertaking the commitment entailed in participation in a Union initiative at a given time need not hold back other members who are capable and wish to proceed.³⁵

³² See Neil Walker, *Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe*, in CONSTITUTIONAL CHANGE, *supra* note 8, at 9, 10-12.

³³ See Gaja, *supra* note 8, at 858.

³⁴ The current differences among the member states regarding monetary union and the different positions taken under the Maastricht Treaty with respect to the Union's social provisions demonstrate this idea. See *infra* notes 39-47 and accompanying text.

³⁵ See Gaja, *supra* note 8, at 858. This "incapacity" characterization has been cited with respect to Greece's initial decision not to participate in the monetary union. It was thought that Greece could not meet the necessary economic convergence criteria within the established time frame. *Id.* Thus, other members who wished to participate were able to agree on the timetable and procedures for monetary union without waiting for Greece. Ultimately Greece did meet the criteria and joined the euro-zone in January 2001, two years later than the January 1999 date when the euro became an effective currency among the other eleven participating member states. The euro was established as an effective currency on January 1, 1999 among Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Spain, and Portugal. See Timetable, <http://europa.cv.int/curo/html/rubrique-cadre5.html?pay=calcudrier5.html> (last modified Sept. 3, 2001). Denmark, Sweden, and the United Kingdom remain outside the euro-zone and do not participate in Union institutional discussions or votes on matters relating to the monetary union. This inability of member states to engage in an action at the same time, or to the same degree, is the situation Prime Minister Tindemans argued justified flexibility. He did

While some member states view flexibility as advantageous for the above described reasons, others view the same consequences of flexibility as desirable for a different reason. A less monolithic, more diffuse Union is inherently a less powerful entity.³⁶ The more instances there are of flexibility in action, that is instances where fewer than all of the member states agree to adopt and implement certain initiatives, the more likely it will be that member states seek solutions to issues of mutual concern outside the usual Union decision-making framework.³⁷ In turn, the more instances there are of extra-Union activity by the member states, the less powerful and cohesive the Union becomes.

II. FLEXIBILITY WITHIN THE MAASTRICHT TREATY

The AT's "codification" of flexibility in the freestanding closer cooperation procedures marks a remarkable shift in approach and emphasis within the Union. The Maastricht Treaty did not highlight flexibility by creating separate, freestanding provisions for closer cooperation. Rather, it contained two extremely important functional examples of this concept, each following a different model of allowance. Indeed, these examples of flexibility in the Maastricht Treaty fueled the later debate over closer cooperation.³⁸

The monetary union established in Title VI of the Treaty of Rome, as amended by the Maastricht Treaty,³⁹ sets forth the timetable and sequence for establishing monetary union.⁴⁰ The monetary union provisions are contained within the first pillar of the Union's architecture, that of the Community, and are thus binding on all member states.⁴¹ Indeed, the language of Title VI reads

not view a different political agenda as warranting differences. *See Tindemans Report, supra* note 9.

³⁶ See Walker, *supra* note 32, at 10-11.

³⁷ Helmut Kortenberg, *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 833, 835 (1998) (flexibility is seen by others as desirable because it decreases members' resort to extra-Union agreements).

³⁸ See *supra* notes 8 and 9.

³⁹ MAASTRICHT TREATY, Title II, European Economic Community, arts. 102(a)-109(m); together with the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, 1992 O.J. (C 224) 104; and the Protocol on the Statute of the European Monetary Institute, 1992 O.J. (C 224) 115.

⁴⁰ See, e.g., MAASTRICHT TREATY arts. 109(e) and 109(j); Protocol on the Transition to the Third Stage of Economic and Monetary Union, 1992 O.J. (C 224) 123.

⁴¹ It is true that, by their terms, these provisions do allow the Council to determine whether or not a member state should be granted a derogation from the obligations of the monetary union.

as though all member states were participating. But by separate protocols attached to the Maastricht Treaty, the United Kingdom and Denmark were allowed not to be bound by these provisions until they separately agreed to accept them.⁴² At one level, the monetary union provisions bound all member states, but on a separate level, all of the member states agreed that the United Kingdom and Denmark would not be bound by these provisions unless they separately agreed. Hence, uniformity and solidarity were preserved on one level. Also, all of the member states agreed in the protocols that the United Kingdom and Denmark would not be bound unless they separately opted in.⁴³

A different form of flexibility was employed in the Maastricht Treaty with respect to social policy. In the Social Policy Protocol attached to the Maastricht Treaty,⁴⁴ eleven of the then twelve Union members (all but the United Kingdom) agreed to be bound by the terms of the Social Policy Agreement.⁴⁵ In this variant of flexible action there was no pretense of unanimity as there was with respect to the monetary union provisions. There, all member states agreed to be bound by Title VI, and subsequently all member states separately agreed that the United Kingdom and Denmark would not be bound. The Social Policy Protocol and Agreement, in contrast, were clearly agreements only among the eleven signatories.⁴⁶ In one area of commonality,

See MAASTRICHT TREATY art. 109(k)(1). This derogation provision is intended to allow the Council to exempt from the monetary union member states which do not meet the strict convergence criteria for participation. It is not intended as a means whereby states meeting the criteria could request to opt out. It also follows from Prime Minister Tindemans's notion of flexibility. *See Tindemans Report, supra* note 9; J.A. Usher, *Flexibility and Enhanced Cooperation, in THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS* 253, 253, 256 (Ton Heukels et al. eds., 1998) [hereinafter *THE EUROPEAN UNION AFTER AMSTERDAM*].

⁴² MAASTRICHT TREATY, Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, Feb. 7, 1992 O.J. (C 191) 87; MAASTRICHT TREATY, Protocol on Certain Provisions Relating to Denmark, Feb. 7, 1992 O.J. (C 191) 89.

⁴³ Presumably the United Kingdom and Denmark would have voted against the monetary union title had they not been accorded the separate rights stated in the protocols. Thus the Union was able to move forward on monetary union only if it allowed these states not to be bound.

⁴⁴ MAASTRICHT TREATY, Protocol on Social Policy, 1992 O. J.(C 191) 90.

⁴⁵ MAASTRICHT TREATY, Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, 1992 O.J. (C 191) 91 [hereinafter *Agreement on Social Policy*].

⁴⁶ In the Social Policy Agreement the eleven signatories committed to work toward improvement of various aspects of the work environment. MAASTRICHT TREATY, Protocol on Social Policy, 1992 O.J. (C 191) 90. The Treaty of Rome, which of course is binding on all member states, contained similar provisions. TREATY OF ROME arts. 117-22. The Social Policy Protocol gave the eleven states the right to use Community institutions and procedures to give effect to the Social Policy Agreement. MAASTRICHT TREATY, Protocol on Social Policy, 1992

the monetary union provisions and the social policy provisions clearly provided that decisions taken within the Council of the Union with respect to those matters would be taken without the vote of the non-participants.⁴⁷

III. FLEXIBILITY AND THE AMSTERDAM TREATY

A. Background

From the time of its negotiation and signing, it was clearly understood by the member states that the TEU was an incomplete work. The TEU itself explicitly provided that an IGC be convened to review and reassess the provisions of the TEU with the aim of improving their effectiveness.⁴⁸ One of the main purposes of the IGC leading up to the AT was to consider potential reforms of the Union's institutional structure, including the size of the Commission and increased use of qualified majority voting, in contemplation of the anticipated significant enlargement of the Union's membership in the near future.⁴⁹ The IGC was held over a sixteen month period, culminating with

O.J. (C 191) 90. This led to considerable confusion; it was not clear whether in a given instance the Commission was acting within the framework of the Treaty of Rome, binding all twelve members and subject to the jurisdiction of the Court of Justice, or under the Social Policy Agreement. See Catherine Barnard, *Flexibility and Social Policy*, in CONSTITUTIONAL CHANGE, *supra* note 8, at 201. The Social Policy Protocol and Agreement were short lived, however. With the change of government in the United Kingdom from the conservative government of John Major, which was in power at the time the Maastricht Treaty was negotiated, to the labour government of Tony Blair, British opposition to the Social Policy Agreement softened. The 1997 AT transferred the provisions of the Social Policy Agreement and Protocol into Title II of the TEU, the title containing the TEC. Hence these provisions are now binding on all fifteen member states.

⁴⁷ Agreement on Social Policy, *supra* note 45. See EU LAW, *supra* note 17, at 752; Gaja, *supra* note 8, at 856.

⁴⁸ MAASTRICHT TREATY art. N(2). See generally REVIEWING MAASTRICHT: ISSUES FOR THE 1996 IGC (Alan Dashwood ed., 1996).

⁴⁹ See Sally Langrish, *The Treaty of Amsterdam: Selected Highlights*, 23 EUR. L. REV. 3, 4 (1998); Manin, *supra* note 11, at 2-3; MICHEL PETITE, THE TREATY OF AMSTERDAM, intro., point 2 (Jean Monet Center, Working Paper, No. 2, 1998) www.jeanmonnetprogram.org/papers/98/98-2-.html; see generally LEGAL ISSUES OF THE AMSTERDAM TREATY (David O'Keefe & Patrick Twomey eds., 1999) [hereinafter LEGAL ISSUES OF THE AMSTERDAM TREATY].

Indeed, in December 2002, the fifteen member states agreed to admit ten new members (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia) as of May 1, 2004. Copenhagen European Council, *Presidency Conclusions B* point 3 (Dec. 13, 2002), available at <http://uc.eu.int/newsroom/makeFrame.asp?MAX=&BID=76&DID=73774&LANG=1&File=/pressData/cn/cc/73774.pdf&Picture=O>.

the agreement on the text of the AT in June, 1997. The IGC was guided by the work of a Reflection Group which met during the period leading up to the IGC.⁵⁰

The Maastricht Treaty employed the principle of flexibility in order to make progress in two extremely important areas: the monetary union and social policy. With these results in mind, during the run up to the Amsterdam IGC, pressure to broaden use of the concept intensified. A majority of the member states, while accepting the orthodox view that solidarity and unanimity were necessary for an enlarged Union to survive, pressed for consideration of a variety of contentious measures, including significant extension in the use of qualified majority voting and co-decision in the legislative process, and incorporation of the Schengen *acquis* on visas and border checks into the TEU. It was also apparent that the United Kingdom opposed these measures. The traditional principle of uniformity would have assured that Britain could thwart adoption of these desired reforms.⁵¹ Thus, some member states concluded that success of the IGC depended on the negotiation of a scheme of flexibility whereby some member states could proceed with measures, both without the participation of the United Kingdom and without its ability to veto the effort. A controversial Franco-German proposal was put forth in September 1994 suggesting that a "hard core" of member states press ahead with measures to, among other things, strengthen Union federal democracy, deepen Franco-German integration and expand the

⁵⁰ The IGC formally began in Turin, Italy in March, 1996. See BULL. E.U. 3-1996, at II.4. It culminated with agreement on the substance of the draft text of the AT in June, 1997, see BULL. E.U. 6-1997, at I.2. In preparation for the IGC, the European Council called for the formation of the Reflection Group comprised of prominent citizens of the member states. This Group was to consider the range of issues and to begin to frame the agenda for the IGC. It issued its report to the Madrid meeting of the European Council held in December, 1995. The Reflection Group noted that the goal of the IGC should be to focus on revisions of the TEU in three broad areas: (i) making Europe more relevant to its citizens; (ii) enabling the Union to work better and preparing it for enlargement; and (iii) giving the Union greater capacity for external action. *Reflection Group's Report*, Dec. 5, 1995, <http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html> [hereinafter *Reflection Group Report*]. At the opening of the IGC at the March, 1996 meeting of the European Council in Turin, the Reflection Group's agenda was essentially adopted for the IGC. It was noted that the agreed agenda should center around the three themes: (i) bringing the Union closer to its citizens; (ii) making the institutions more efficient and democratic; and (iii) strengthening the Union's external relations capabilities. See BULL. E.U. 3-1996, at II.3. For a history of the IGC, see Langrish, *supra* note 49, at 3-4; Manin, *supra* note 11, at 2-4; Petite, *supra* note 49, at Introduction.

⁵¹ See THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY 186-87 (ANDREW DUFF ED., 1997) [hereinafter AT: TEXT AND COMMENTARY].

Union toward the East.⁵² The United Kingdom countered with the view that the Union should develop in ways acceptable to all member states.⁵³

While the British and the Franco-German approaches clearly clashed, both did embrace flexibility.⁵⁴ It thus was clear from 1994 that the issue of flexibility would have to be squarely confronted in the IGC. Virtually all of the member states accepted the principle of differentiated integration as necessary, and most accepted the correlative notion that no member state should have a veto.⁵⁵ In the face of this preponderant view, Britain conceded that other states could be allowed to go forward, but only with Britain's agreement.⁵⁶

The Reflection Group, confronted with very definite views on the issue of flexibility from most of the member states, recognized that it had to deal directly with the issue in its Report. The Report acknowledged that both the Union's success in achieving an ever closer Union, which is clearly set forth as a goal in the TEU's statement of the Union's purposes,⁵⁷ and achievement of the first of the themes set for the IGC, that of making the Union "more

⁵² *Id.* at 188; Ehlermann, *supra* note 9, at 249; Shaw, *supra* note 8, at 67. This position, forceful as it is of integration, was evocative of Chancellor Brandt's view of flexibility expressed 20 years earlier.

⁵³ AT: TEXT AND COMMENTARY, *supra* note 51, at 188.

⁵⁴ Prime Minister Major insisted that "the way the Union develops must be acceptable to all member states, and that no member state should be excluded from an area of policy in which it wants and is qualified to participate." But he noted that "conformity can never be seen as an automatic principle." *Id.* Professor Shaw notes that the British position was designed to afford maximum flexibility for the United Kingdom while ensuring that it not be left behind, as it would in the Franco-German model of a "hard core" of member states willing to proceed much further down the road toward extensive cooperation and integration. Shaw, *supra* note 8, at 67. In her view, one of the key differences between the Franco-German and the British positions was that the emphasis in the British position was on the "discipline of integration," whereas in the Franco-German position the emphasis is on the "freedom" of the participating member states. Shaw, *supra* note 8, at 67.

A number of states benefitting from Union subsidies were suspicious of flexibility, as they felt it would dilute their influence. They also believed, like the United Kingdom, that flexibility presented the member states with a false choice. Each member state would have to agree to participate or risk marginalization. Kortenber, *supra* note 37, at 844.

⁵⁵ AT: TEXT AND COMMENTARY, *supra* note 51, at 189-90.

⁵⁶ *Id.* This position is essentially the approach followed in the Maastricht Treaty's monetary union title and protocol, wherein all member states agree that the United Kingdom and Denmark need not participate.

⁵⁷ TEU pmbl., art. 3.

relevant to its citizens,"⁵⁸ depended on meeting the demands of its citizens.⁵⁹ The Report viewed increased availability of flexibility as a demand of the citizens of the Union.

The Reflection Group's approach to the issue was both cautious and ambiguous. It attempted to balance the need for solidarity and flexibility, and it espoused the need for both. The Reflection Group noted that the *acquis communautaire*, or common core, developed under Title II of the TEU, must not be jeopardized.⁶⁰ It then suggested that flexibility which would enable new stages of integration to take place should be accommodated, so long as it could be accomplished without compromise to the *acquis* as a whole. It also urged that maintenance of the *acquis* not be used as a device to prevent necessary adjustments from being made to respond to new situations.⁶¹ The Report rather boldly asserted that if an objective could not be met in the normal fashion, that should not prevent "those who wish and even need to make the Union progress from doing so subject to clear limits."⁶² However, the Report's articulation of those clear limits showed a much more cautious stance. For example, in its view, flexibility should be allowed only as a last resort, any differences in obligation should be only temporary, and member states unable to participate in a particular measure should be provided assistance in order that they might develop the requisite capability.⁶³

⁵⁸ See *Reflection Group Report*, *supra* note 50, at The 1996 Conference.

⁵⁹ *Reflection Group Report*, *supra* note 50, ¶ 13.

⁶⁰ *Id.* ¶ 14.

⁶¹ *Id.* ¶ 13.

⁶² *Id.* ¶ 14.

⁶³ *Id.* ¶ 15. The Report acknowledged that while there was not unanimity among its members, a large majority agreed that six guiding principles should govern the use of flexibility:

- (i) flexibility should be allowed only when it serves the Union's objectives and when all other solutions have been ruled out;
- (ii) differences in obligation should be temporary;
- (iii) no member state meeting the necessary conditions should be excluded from participation in the measure;
- (iv) assistance should be provided to member states that are unable to participate in a cooperation measure to enable them to develop the requisite capability for participation;
- (v) when a cooperation measure necessitates an adjustment in the *acquis*, a common basis must be preserved to prevent a retreat from common principles and objectives;
- (vi) the single institutional framework must be respected.

The European Council, with the Reflection Group's Report in hand, took a more aggressive position regarding flexibility when it established the final agenda for the IGC. In its view, cooperation measures need not be taken only as a last resort, nor need they be only temporary in nature. Rather, a view of flexibility more along the lines of the "variable geometry" was envisioned.⁶⁴ Despite the extensive, emotionally charged debate over the issue of flexibility among the member states and the Union institutions during the several years prior to, and during, the IGC,⁶⁵ minimal attention was given to consideration of these principles during the actual negotiation of the AT text.⁶⁶ Understandably, inclusion of flexibility in the treaty is both lauded and decried.⁶⁷

The AT embraces the concept of flexibility in a variety of ways by authorizing specific types of differentiated action. The AT partially follows the approach of the Maastricht Treaty, but the AT breaks dramatically from the form and substance of the Maastricht Treaty model in the inclusion of Title VII of the TEU. Title VII is a set of free standing provisions for closer cooperation in areas of the Treaties which do not have separate, specific provisions

⁶⁴ The Presidency, reporting on the Turin, Italy meeting of the European Council in March, 1996, stated that the IGC should examine "whether and how to introduce rules either of a general nature or in specific areas in order to enable a certain number of Member States to develop a strengthened cooperation, open to all, compatible with Union's objectives, while preserving the *acquis communautaire*, avoiding discrimination and distortions of competition and respecting the single institutional framework." Turin European Council, *Presidency Conclusions 2* (Mar. 29, 1996), available at <http://europa.CV.int/en/record/turin.html> [hereinafter European Council's Position]; see Schrauwen, *Flexibility in the Treaty of Nice*, in FLEXIBILITY IN CONSTITUTIONS, *supra* note 8, at 61.

⁶⁵ For a detailed chronology of the positions of the member states and Union institutions, and their evolution during the period leading up to the negotiation of the text at Amsterdam, see AT: TEXT AND COMMENTARY, *supra* note 51, at 185-94; Franklin Dehousse, *The IGC Process and Results*, in LEGAL ISSUES OF THE AMSTERDAM TREATY, *supra* note 49, at 93.

⁶⁶ It is reported that the free standing provisions on flexibility as set forth in the AT were given a scant seven minutes of discussion on the morning of the final day of the negotiation of the text of the Treaty in Amsterdam during June 1997. AT: TEXT AND COMMENTARY, *supra* note 51, at 195.

⁶⁷ See WYATT & DASHWOOD, *supra* note 1, at 163 (referring to flexibility as a new organizing principle within the Treaties). Professor Weatherill describes the flexibility provisions as being of "major potential significance." Stephen Weatherill, "If I Wanted You to Understand I Would Have Explained it Better": *What Is the Purpose of the Provisions on Closer Cooperation Introduced by the Treaty of Amsterdam*, in LEGAL ISSUES OF THE AMSTERDAM TREATY, *supra* note 49, at 21 [hereinafter "If I wanted You to Understand . . ."]. On the other hand, Philip Allot opines that "[t]he Amsterdam Treaty will mean the co-existence of dozens of different legal and economic sub-systems . . . a sort of nightmare resurrection of the Holy Roman Empire. . ." Shaw, *supra* note 8, at 64.

allowing for such cooperation. Moreover, many of the AT's provisions on closer cooperation are included within the text of the AT itself, whereas in the Maastricht Treaty the authorizations of flexible action were located in protocol, not text. This shift, however, does not alter the binding character of the provisions. The flexibility concepts regarding the monetary union and the provisions of the various social protocols were certainly binding according to their terms; however, inclusion of closer cooperation provisions in the text of the AT treaty demonstrates a degree of confidence in or comfort with the flexibility among the member states that the side agreements do not share.⁶⁸

The AT contains a variety of forms of authorized closer cooperation, and these authorizations are spread across all three pillars of the treaty structure. The AT leaves virtually undisturbed the flexibility concepts regarding the monetary union as set forth in the first pillar of the Maastricht Treaty through protocols. On the other hand, the flexibility concepts surrounding the social chapter, which were built into the third pillar through the Social Protocol and the Social Agreement,⁶⁹ are eliminated. These social provisions, which are "communitarized" by their restatement in the AT as part of the first pillar,⁷⁰ include a substantial part of the Social Protocol's substance.⁷¹ The "optout" flexibility for the United Kingdom and Denmark with respect to these measures is eliminated. These social provisions are now embedded in the institutional structure of the first pillar. The usual rule, that decisions taken are binding upon all members, even those which may have voted against the decision under qualified majority voting, applies; consequently, these provisions are moved from differentiation into the traditional notion of Union uniformity.

As previously noted, the AT includes the concept of flexibility or closer cooperation in each of the three pillars of the treaty architecture. For simplicity it may be more straightforward to consider the pillars in reverse order: third, second and first.

⁶⁸ Whether it is comfort with or confidence in the concept, on the one hand, or the use of a pragmatic device whereby some members could avoid a veto and could press ahead with certain integration measures, of course, could be debated. Since the reforms contemplated by the AT were in the form of amendments to the TEU and the TEC, unanimous approval and ratification of the treaty was required.

⁶⁹ See *supra* notes 44-47 and accompanying text.

⁷⁰ AT arts. 136-43.

⁷¹ Compare AT arts. 117-120, with Social Agreement, *supra* note 45, arts. 1-7.

B. Closer Cooperation Within the Third Pillar: Police and Judicial Cooperation in Criminal Matters

Within the third pillar, the AT specifies a set of provisions regarding police and judicial cooperation in criminal matters.⁷² One of the other significant changes effected by the AT is the transfer of the Union's visa, asylum, and immigration policies from the third pillar into the first pillar.⁷³ With that transfer, the police and judicial cooperation in criminal matters provisions which form Title VI of the AT are all that remain of the third pillar. These criminal cooperation provisions are more specific than their analog in the Maastricht Treaty.⁷⁴ Flexibility is drafted into the provisions of Title VI of the AT both in a modest way and in a very significant way. Essentially, these provisions authorize the Council, by unanimous vote and on a recommendation from a member state or the Commission, to: adopt common positions or framework decisions for approximation of national laws with respect to matters that would provide a high degree of security to the citizens of the Union in the fields of police or judicial cooperation in criminal matters and which combat racism or xenophobia; and to establish conventions dealing with such matters, the adoption of which the Council will recommend to the member states.⁷⁵ All actions taken by the Council within this Title are taken by unanimous vote, and bind all member states, with two minor exceptions.⁷⁶

Though the terms cooperation and closer cooperation are used in some of the substantive provisions, the concept of flexibility is incorporated into these provisions only in one modest way. Jurisdiction is conferred on the Court of Justice to give preliminary rulings on the validity and interpretation of framework decisions, the interpretation of conventions established under this title and the validity and interpretation of measures implementing such

⁷² TEU arts. 29-39.

⁷³ See *infra* notes 108-31 and accompanying text.

⁷⁴ MAASTRICHT TREATY arts. K.1-K.9. The Maastricht Treaty's provisions regarding visa, asylum and immigration policy are included along with cooperation in police and judicial matters in these provisions. Articles K.1-K.9 of the AT, before the renumbering of the treaty provisions, contained the AT's revised visa, asylum and immigration provisions; they have nothing to do with the police and judicial cooperation matters.

⁷⁵ AT arts. 29-31, 34.

⁷⁶ The Council may adopt measures implementing certain decisions taken within Title VI by qualified majority voting. AT art. 34(2)(c). Measures implementing conventions that have been agreed to by the Council and recommended to the member states are adopted by a majority of two thirds of the member states. AT art. 34(2)(d).

conventions.⁷⁷ The Court is also given jurisdiction to rule on disputes between the member states regarding the interpretation or application of the authorized measures, and on disputes between the member states and the Commission regarding the interpretation or application of the relevant conventions.⁷⁸ An aspect of flexibility is built into these provisions as they articulate the Court of Justice's jurisdiction. While the jurisdiction described is conferred on the Court, the same article states that any member state may accept the Court's jurisdiction to issue such preliminary rulings.⁷⁹ Thus, the Court appears not to have jurisdiction to entertain a request for a preliminary ruling on issues arising within Title VI from a member state not accepting this jurisdiction. Also, and more importantly, a judgment of the Court in a request for a preliminary ruling would not be binding on the member state not accepting such jurisdiction, nor would such a judgment form part of the *acquis communautaire*.⁸⁰

The significant inclusion of flexibility in Title VI is in a separate article, Article 40, which authorizes closer cooperation measures with respect to police and judicial cooperation in criminal matters. At first reading, this incorporation of flexibility into Title VI appears to preserve to the member states the opportunity of initiating action in areas in which Union activity is likely to

⁷⁷ AT art. 35(1).

⁷⁸ AT art. 35(7).

⁷⁹ AT art. 35(2).

⁸⁰ These provisions of Article 35 of the AT are outside the TEC. Thus the Court's general jurisdiction and the member states' general obligation to accept a judgement of the Court are inapplicable. Outside the first pillar, the Court only has such jurisdiction as is expressly provided in treaty provisions. Article 46 of the TEU, as amended by the AT, states the ambit of the Court's jurisdiction. The Court, of course, is authorized to exercise its powers with respect to the TEC. TEU art. 46(a). Outside the TEC, the Court has jurisdiction only with respect to four specified areas, two of which relate to closer cooperation matters. AT arts. 46(b), 46(c). See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 21 (1999); Anthony Arnall, *Taming the Beast? The Treaty of Amsterdam and the Court of Justice*, in *LEGAL ISSUES OF THE AMSTERDAM TREATY*, *supra* note 49, at 109. Within the TEC, the specific jurisdiction of the Court is set forth in Articles 226-45. Outside the TEC, the jurisdiction is stated in specific treaty provisions, for example TEU articles 6(2), 35 and 40. These specific jurisdictional grants are then restated by reference in Article 46.

The *acquis communautaire*, or the "Community Patrimony," includes the law and policy which have accumulated over the life of the Community. The *acquis* includes not just law, the treaties, secondary legislation and judicial decisions, but the policies and procedures accepted by the members as governing their activities are also included. See Stephen Weatherill, *Safeguarding the Acquis Communautaire*, in *THE EUROPEAN UNION AFTER AMSTERDAM*, *supra* note 41, at 153, 154-57.

proceed slowly and modestly.⁸¹ But in reality, promising as this provision might appear, it solves very little. Through Article 40, member states are separately authorized to avail themselves of the institutions and procedures of the Treaties to effect any closer cooperation measure which they desire to undertake in areas within the subject matter of Title VI.⁸² The two substantive restrictions on such cooperation are very easy to satisfy. Any proposed cooperation must respect the powers of the Community and the objectives of Title VI, and it must have as its aim the development of the area of freedom, justice and security more rapidly than might occur via the procedures set forth in the main portion of the Title.⁸³ The difficulty with this authorization, and the reason the provision is ineffective, lies in the procedure required. Generally, action which the Union might take within Title VI requires unanimity.⁸⁴ Member states desiring to engage in a closer cooperation measure within Title VI present their request to the Council. The Council is then to decide by qualified majority whether or not the proposed action can be undertaken by the requesting members.⁸⁵ The Commission is entitled to give its opinion on the matter and the Parliament is to be apprized of the matter. Parliament's advice, however, is not sought with respect to the matter.⁸⁶ This procedure ought to provide significant flexibility and opportunity for member state initiative. However, if any member state declares that for stated reasons of national policy it intends to oppose authorization of the measure, no vote

⁸¹ During the IGC, the third pillar was considered as the ideal area for flexibility and closer cooperation; its use there was thought to provide a model for other Treaty areas. Eric Philippart & Geoffrey Edwards, *The Provisions on Closer Cooperation in the Treaty of Amsterdam: Problems of Flexibility in the European Union*, 37 J. COMMON MKT. STUD. 87, 100 (1999).

⁸² AT art. 40(1). See generally Ehlermann, *supra* note 9, at 266.

⁸³ AT art. 40(1)(b).

⁸⁴ AT art. 34(2). This unanimity requirement is only slightly relaxed by the Treaty of Nice. Under the AT, the Council could approve by qualified majority voting measures required to implement certain decisions taken within Title VI, other than common positions, framework decisions or decisions regarding approximation of laws among the member states. AT art. 34(2)(c). The Treaty of Nice merely allows the Council to approve by qualified majority voting an international agreement dealing with those matters which the AT would have allowed the Council to act on by qualified majority. TREATY OF NICE art. 1.4 (replacing AT art. 24). Otherwise, the AT's unanimity requirement within Title VI remains unchanged.

⁸⁵ AT art. 40(2). Although the qualified majority voting is provided for, the proposal would in fact likely be adopted unanimously. Only the votes of the member states intending to participate in the activity are included for purposes of computing the number of votes necessary for passage. AT art. 44.

⁸⁶ AT arts. 40(2), 44.

will be taken on the proposal.⁸⁷ The request would thus fail. The requesting states can then ask the Council to refer the matter, by a qualified majority vote, to the European Council. But the European Council in deciding whether the measure can be implemented must act by a unanimous vote,⁸⁸ including the concurrence of the objecting state. Thus, any member state not wishing to participate can successfully block the measure, just as it could block a comparable proposal considered under the main portion of Title VI, because of the unanimous voting requirement.

One noteworthy aspect of the closer cooperation authorized by the AT, both in Article 40 and elsewhere throughout the AT, is its character. A measure, if adopted under this provision, is certainly institutional in character. The decision to go forward is that of the Union institution, the Council, even though it would bind only the agreeing states. This is a different form of closer cooperation than that authorized in the social protocols of the Maastricht Treaty, in which the action agreed upon was taken by the agreeing member states directly, and not through the Union institutions.⁸⁹

The institutional character of this cooperation measure is reinforced by the plenary power conferred on the Court of Justice with respect to any such measure.⁹⁰ There is a curious difference between the conferral of jurisdiction with respect to the main workings of Title VI and the jurisdiction conferred on the Court regarding closer cooperation measures taken under Article 40. Article 35 specifically articulates the jurisdiction granted to the Court regarding measures taken under the main portions of Title VI. With regard to the closer cooperation measures taken pursuant to Article 40, however, the Court is granted the plenary powers it has under the TEC.⁹¹ Thus the Court would have jurisdiction to determine not only whether the proper procedure set out in Article 40 was followed, but also whether the substantive criteria for such cooperation were met. The Court could be asked, for example, to rule on

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ This aspect of Article 40, as well as of the other forms of closer cooperation authorized by the AT, conforms to the Reflection Group's and the European Council's notion that the single institutional framework of the Community be respected regardless of the pillar under which the authorizing provisions rest. See *Reflection Group Report, supra* note 50, ¶¶ 13, 15; European Council's position, *supra* note 64.

⁹⁰ AT art. 40(4).

⁹¹ AT art. 40(4) (stating, "[t]he 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. . .").

the validity of the measure in light of whether it does in fact respect the powers of the Community as required by Article 40(10(a)) or whether it meets the general test of proportionality.⁹²

C. Flexibility Within the Second Pillar

The second pillar of the Treaties as restated by the AT consists of the provisions in Title V on the Common Foreign and Security Policy (the CFSP).⁹³ The term 'closer cooperation' does not appear within this Title and it is argued that no closer cooperation is authorized within this Title.⁹⁴ The CFSP procedures actually embrace both a form of flexibility and uniformity.

Title V charges the Union with defining and implementing a foreign policy, having as its objective, among other things, safeguarding the values, interests, independence and integrity of the Union in conformity with the Charter of the

⁹² The following example highlights the difference in the Court's jurisdiction to review a measure passed under the main portion of Title VI from its jurisdiction to review a closer cooperation measure taken with respect to the same issue. Article 35(5) provides that the Court has no jurisdiction to review the validity of operational measures carried out by member states' police agencies or to review member states exercise of their responsibilities regarding the maintenance of law and order or internal security, when these actions are undertaken pursuant to the main part of Title VI. The doctrine of proportionality is an integral part of the Court's general jurisdiction. See TEC art. 5; WYATT & DASHWOOD, *supra* note 1, at 135-37. Article 40(4) gives the Court plenary jurisdiction regarding cooperation measures undertaken within Title VI. The Court thus would have jurisdiction to review the proportionality of an internal security measure taken by some member states as a closer cooperation measure under Article 40, or to determine whether such measure does in fact respect the powers of the European Community. Not only is this jurisdictional grant more generous than the grant of jurisdiction within the main portion of Title VI, it is also more generous than grants of authority in other parts of the TEU outside the TEC. An example is the jurisdiction regarding subsidiarity. TEC art. 5. With regard to subsidiarity, the Court's jurisdiction extends to a determination of whether the procedural requirements have been met, but not to the substantive or political question of whether the measure meets the test of subsidiarity. See Case C-233/94, *Germany v. European Parliament and Council*, 1997 E.C.R. I-2405; Opinion of Advocate General Leger, ¶¶ 87-90; EU LAW, *supra* note 17, at 158-60, 559.

⁹³ AT tit. V arts. 11-28.

⁹⁴ Philippart & Edwards, *supra* note 81, at 98-100. This argument is supported by the fact that in the final rounds of negotiations of the AT, specific closer cooperation provisions for the CFSP, which had been included in drafts of the treaty, were removed. *Id.* But during the negotiation of the AT the member states determined that the desired flexibility within the CFSP could be achieved by "other means," and that the explicit closer cooperation provisions were unnecessary. The "other means" contained in the AT's provisions on the CFSP was the concept of constructive abstention discussed in this section. Ehlermann, *Differentiation, Flexibility*, *supra* note 9, at 264-66; Kortenberg, *supra* note 37, at 853.

United Nations.⁹⁵ The European Council is charged with setting out the principles and general guidelines for this policy, and the Council of Ministers of the Union is charged with taking the decisions necessary to define and implement this common foreign policy in the context of the guidelines developed by the European Council.⁹⁶ To this end, the Council is authorized to adopt joint actions,⁹⁷ which are Union foreign policy positions or policies, and common actions,⁹⁸ which are positions agreed upon by the member states but which are to be implemented by them at the national level.

The decision making procedure within the CFSP is bifurcated. Some measures are to be decided by unanimity, and others by qualified majority voting. Agreement within the Council on some joint actions or common foreign policy positions requires unanimous approval.⁹⁹ However, if the measure for consideration entails a joint action or common position that is based on a common strategy previously adopted by the European Council, or if it is a measure implementing a previously agreed upon joint action or common position, the decision is taken by qualified majority voting.¹⁰⁰

With respect to the first category of decisions (those not based on a prior decision), a member state can abstain from voting. An abstention is said not to count as a vote, and thus, does not destroy unanimity.¹⁰¹ If the abstaining state makes a formal declaration, it is under no obligation to comply with or implement the measure,¹⁰² although it acknowledges that the action agreed upon by the Council is an act of the Union.¹⁰³ This "constructive abstention" rule introduces a moderate form of flexibility. The action agreed upon is an action of less than all of the member states, and the abstaining and declaring

⁹⁵ AT art. 11(1).

⁹⁶ AT art. 13.

⁹⁷ AT art. 14.

⁹⁸ AT art. 15.

⁹⁹ AT art. 23(1).

¹⁰⁰ AT art. 23(2). The reason for the different voting procedures probably is that in the latter category, a prior decision has been taken by unanimity. With that overarching unanimous agreement, there is less need that further decisions also be taken by unanimity.

¹⁰¹ AT art. 23(1). This is consistent with the Treaties' usual rule on the effect of abstentions. Generally speaking, an abstention does not count as a vote; thus an abstention does not break unanimity. TEC art. 205(3). The difference within CFSP is the consequence of the abstention.

¹⁰² AT art. 23(1). An abstaining state not making such a formal declaration is apparently bound by the agreed upon measure.

¹⁰³ The full extent of an abstaining and declaring member state's responsibility is that while not obliged to apply the decision, it "shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision. . . ." *Id.*

state need not participate in it. Thus, solidarity is broken since less than all the members are participating.¹⁰⁴ Although the abstaining state is not bound by the action, it does acknowledge that the act taken is that of the Union; and more importantly, from the perspective of flexibility, it agrees that it will not take a position inconsistent with the agreed upon position and will not act to undermine that position.¹⁰⁵ The introduction of this moderate flexibility is a change from the CFSP procedures contained in the Maastricht Treaty. Under the Maastricht scheme, all CFSP decisions required unanimity. The Treaty did not provide for abstention and its consequences.¹⁰⁶

With respect to the second category of decisions (the qualified majority voting decisions, taken on the basis of a previously adopted joint action or common position on the basis of a common strategy previously adopted by the European Council), unanimity, at least in the negative sense, is enforced. Although a decision on such a matter would be made by qualified majority voting, if a member state, for important and stated reasons of national policy, declares that it intends to oppose the adoption of such a measure, no vote shall be taken. The matter may then be referred to the European Council for decision by unanimity.¹⁰⁷ Thus, with respect to this category of decisions, either the measure is adopted by the unanimous decision of the European Council, or a situation like the Luxembourg Compromise exists, in which no vote is taken. The latter results in a negative form of uniformity, as nothing is done by any of the member states.

The flexibility introduced into the CFSP by the AT is similar to the closer cooperation in criminal matters authorized by Title VI of the AT, in that the decisions are taken by a Union institution, the Council, and not by the member

¹⁰⁴ See FLEXIBILITY IN CONSTITUTIONS, *supra* note 8, at 61, 67; "If I Wanted You to Understand . . .", *supra* note 67, at 22.

¹⁰⁵ *Id.*

¹⁰⁶ MAASTRICHT TREATY art. J.8(2). Under the Maastricht scheme, the general voting rules would have applied. An abstention would not block a unanimous vote, but the abstaining party would be bound by the decision. Thus, it might have been more likely to have thwarted the measure by voting against it. Regarding the CFSP provisions of the Maastricht Treaty and the AT, see *Commentary: Foreign Policy or Trompe l'oeil*, in AT: TEXT AND COMMENTARY, *supra* note 51, at 124; Daniel T. Murphy, *The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam*, 31 VAND. J. TRANSNAT'L. L. 871 (1998); John J. Kavanagh, Note, *Attempting to Run Before Learning to Walk: Problems of the EU's Common Foreign and Security Policy*, 20 B.C. INT'L & COMP. L. REV. 353 (1997).

¹⁰⁷ AT art. 23(2). This voting rule of Article 23(2) is said to be in derogation of the unanimity rule of Article 23(1). This portion of the CFSP's decision making process mirrors that applicable in Article 40. See *supra* notes 87-88 and accompanying text.

states directly. This flexibility differs from that authorized in Title VI in that the Court of Justice has no jurisdiction with respect to Title V and the CFSP.

D. Closer Cooperation and Flexibility Within the First Pillar

1. The Visa, Asylum and Immigration Policies

The AT's most significant introductions of flexibility and closer cooperation can be found in the first pillar, especially in the new visa, asylum and immigration policies, and most prominently in the free standing provisions on closer cooperation. The visa, asylum and immigration policies, together with the provisions on cooperation in criminal matters, comprised the third pillar of the Maastricht Treaty.¹⁰⁸ The AT transfers the visa, asylum and immigration policies into the Community institutional framework of the first pillar as Title IV of the TEC.¹⁰⁹ In a related change, the Schengen *acquis* is incorporated into the first pillar.¹¹⁰

The AT's visa, asylum and immigration policies provide that over time, the territory of the Union membership should become an area of freedom, security and justice.¹¹¹ To accomplish this the Council is charged with adoption of certain measures within five years from the effective date of the Treaty. These measures will, among other things, ensure the free movement of persons within the territory of the Union, and deal with external border controls, asylum, immigration measures and measures designed to prevent and control crime.¹¹² In several subsequent provisions, this charge is made more specific. The Council, within the stated five year period, is to adopt measures: providing for the elimination of internal border controls (national border controls) as to any person, Union citizen or other person, and rules governing visas;¹¹³ measures regarding immigration policies including conditions of entry and residence, procedures for issuing visas, illegal immigration and repatriation of illegal

¹⁰⁸ MAASTRICHT TREATY arts. K.1-K.9.

¹⁰⁹ TEC tit. IV, arts. 61-69.

¹¹⁰ Protocol Integrating the Schengen Acquis into the Framework of the European Union, 1997 O.J. (C 340) 93 [hereinafter *The Schengen Protocol*].

¹¹¹ TEC art. 61.

¹¹² TEC art. 61(a). Since by its terms the AT is effective as of 1 May, 1999, the measures referred to in this article should be adopted by the Council not later than the end of April, 2004.

Id.

¹¹³ TEC art. 61(1)-(2).

immigrants;¹¹⁴ and measures regarding asylum, including standards for qualification as a refugee, procedures for granting refugee status and procedures for determining which member state is responsible for considering an application for asylum from a particular person.¹¹⁵

Under the Maastricht Treaty, the provisions dealing with immigration and asylum matters came within the intergovernmental portions of the Union architecture (the third pillar), and the commitments with respect to them were vaguely stated. Maastricht authorized the Council, at the initiative of the Commission or a member state, to adopt by unanimity joint positions with respect to the matters covered by Title IV.¹¹⁶ Not only does the AT set forth much more precise obligations with respect to these matters, but as a consequence of their transfer into the first pillar, as Title IV of the TEC Treaty, these provisions are now within the purview of the European Court of Justice.¹¹⁷

¹¹⁴ TEC art. 63(3)-(4).

¹¹⁵ TEC, 63(1)-(2).

¹¹⁶ See, e.g., MAASTRICHT TREATY art. K.2. This section is the predecessor of TEC article 62. Throughout the Maastricht Treaty, the initiative was with the member states or perhaps the Commission. Title IV of the TEC, as amended by the AT, much more specifically directs the Council to adopt measures with respect to border control, visa, immigration and asylum policies by May, 2004.

¹¹⁷ The plenary jurisdiction of the Court is circumscribed only in that a review of measures relating to the maintenance of internal security is prohibited. TEC art. 68(2). See generally KAY HAILBRONNER, IMMIGRATION AND ASYLUM LAW AND POLICY OF THE EUROPEAN UNION 35-123 (2000) [hereinafter IMMIGRATION AND ASYLUM LAW].

Title IV itself does not contain any reference to the Schengen Agreement. The Schengen Agreement was an extra-Union agreement in which the thirteen signatories (the fifteen member states less the United Kingdom and Ireland) agreed to take measures designed, among other things, to eliminate internal border controls. The Agreement is in part a product of some member states frustration at the Union's inability to agree on measures to open the internal borders. It is an example of common action taken by member states outside the Union, and it is proffered as an example of the consequence of not building the possibility of flexible action into the Treaties. The Schengen Agreement, with its provisions regarding elimination of internal border controls, certainly relates to areas at the core of the Community, the freedom of movement of goods and persons in particular. The "communitarization" of the Schengen Agreement in the Schengen Protocol removes the anomaly caused by the existence of these very Community-centered provisions outside the Community's legal order. The Schengen Protocol is an example of closer cooperation and flexibility. By its terms, the Schengen Agreement authorizes its 13 signatories to establish closer cooperation among themselves on matters within the scope of the Schengen Agreement, and to use the institutions and legal framework of the Union to effect that cooperation. Schengen Protocol, *supra* note 110, at art. 1. See Kortenber, *supra* note 37, at 835, 844. See generally EU LAW, *supra* note 17, at 660-63; IMMIGRATION AND ASYLUM LAW, *supra* note 117, at 54-56, 70-73.

Under the Maastricht Treaty the position of United Kingdom and Ireland, which have a separate open border relationship and agreement, with respect to common border crossing and other immigration policies was secure. So long as these issues remained within the third pillar, decisions with respect to them required unanimity.¹¹⁸ Thus, either the United Kingdom or Ireland could thwart any measures unacceptable to them. The AT does provide that decisions with respect to some of the matters covered by Title IV are to be taken unanimously, at least for the first five years.¹¹⁹ However, certain

In the Schengen Protocol, the thirteen signatories of the Schengen Agreement agreed that the Schengen *acquis* would be binding on them and that the Council of the Union, acting by unanimity among the 13, would determine the legal basis (within the provisions of the Treaties) for each provision and decision constituting the Schengen *acquis*. The parties further agreed that the Schengen *acquis* was to be regarded as based on Title IV of the TEC. Schengen Protocol, *supra* note 110, at art. 2(1). Thus the 13 Schengen participants agreed that past and future decisions or procedures implementing the Schengen Agreement came within Title IV of the TEC. The importance of any distinction between the regularly adopted TEC Title IV measures and Schengen—attributed Title IV measures is blunted by the agreement of the 13 participants in the Schengen Protocol that the Court of Justice shall exercise its general jurisdiction with respect to actions implementing the commitments of the Schengen Protocol. Schengen Protocol, *supra* note 110, art. 2(1).

The Council, as directed by article 2(1) of the Schengen Protocol, has attributed all of the Schengen *acquis* to various legal bases within Community law. Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, 1999 O.J. (L 176) 1. Whether or not the measures agreed to within the Schengen *acquis* are reviewable after this attribution remains unclear. By one view, these measures, after this attribution, are transformed into secondary Community legislation, like regulations and directives; their compatibility with various treaty provisions is therefore subject to review by the Court of Justice in the same manner as regulations and directives. Kortenbergh, *supra* note 37, at 843. It is also argued that the Schengen Protocol as a protocol to the AT is an element of primary Community law, like the treaty provisions themselves, and that the Council in making the attribution was essentially incorporating the measures taken within the Schengen *acquis* into the Protocol itself. Thus, these measures have a status comparable to the various treaty provisions, and the Court's jurisdiction does not extend to reviewing various treaty provisions for compatibility with one another. See IMMIGRATION AND ASYLUM LAW, *supra* note 117, at 72. Measures adopted within Title IV would clearly be part of the Community's secondary legislation. It seems anomalous that Schengen *acquis* measures attributed by the Council should have a higher standing than subsequent measures adopted by regulation or directive under Title IV that treated the same issues as Schengen-attributed measures.

¹¹⁸ MAASTRICHT TREATY art. K.4(3).

¹¹⁹ TEC art. 67(1). At the end of five years, the Council, acting unanimously, will determine what portion of the issues covered by Title IV would be decided by qualified majority voting. TEC art. 67(2). Obviously, the United Kingdom or Ireland could, by voting against such

measures regarding issuance of visas were to be decided by qualified majority voting from the effective dates of the AT, or five years thereafter.¹²⁰

The working of Title IV of the TEC is similar in form to the monetary union provisions of the Maastricht Treaty in that it applies formally to all member states. Moreover, since it is within the first pillar, it is within the institutional, rather than the intergovernmental, framework. Consequently, the United Kingdom and Ireland could preserve their separate and different policies regarding immigration and visa matters only by a separate set of understandings. Again, on the model of Maastricht's monetary union structure, all of the member states agreed in two Protocols¹²¹ to grant the United Kingdom and Ireland separate rights regarding the subject matter of Title IV. But unlike the monetary union provisions of the Maastricht Treaty, express reference is made in the text of Title IV to the Protocols.¹²² By the terms of the Protocol on Application, the United Kingdom and Ireland are permitted to exercise such controls as they deem appropriate regarding entry of all persons into their territories, and the separate understanding between the United Kingdom and Ireland regarding movement of persons between their territories is acknowledged.¹²³ Applying the principle of reciprocity, the other member states reserve the right to exercise such controls as they deem appropriate to persons seeking entry into their territories from the United Kingdom or Ireland.¹²⁴

The Protocol on Position establishes the procedures for implementation of Title IV without participation of the United Kingdom or Ireland. Like the monetary union provisions, the United Kingdom and Ireland are not entitled to participate in the Council's adoption of measures implementing Title IV. Furthermore, such measures as are adopted by the other members are not binding upon the United Kingdom or Ireland.¹²⁵ This difference is reinforced by a provision that Title IV decisions shall not "affect the *acquis communautaire* nor form a part of Community law as they apply to the United

proposals, thwart the transfer of any Title IV decisions into the qualified majority voting scheme.

¹²⁰ TEC art. 67(3)-(4).

¹²¹ Protocol on Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland, 1997 O.J. (C 340) 97 [hereinafter Protocol on Application], and Protocol on the Position of the United Kingdom and Ireland, 1997 O.J. (C 340) 99 [hereinafter Protocol on Position].

¹²² TEC art. 69.

¹²³ Protocol on Application, *supra* note 121, at arts. 1-2.

¹²⁴ *Id.* at art. 3.

¹²⁵ Protocol on Position, *supra* note 121, at arts. 1-2.

Kingdom or Ireland.”¹²⁶ Thus, solidarity within the Union and its policies is broken and the United Kingdom and Ireland are free to have policies (visa, asylum, etc.) different from the common position of the other members. Correspondingly, the others are free to have separate policies regarding persons seeking to enter their territories from the United Kingdom or Ireland. Not only is a difference in practice authorized, but the Protocol on Position acknowledges that a different regime of law exists for the United Kingdom and Ireland than that which exists for the other member states as among themselves.

The United Kingdom and Ireland are each given the opportunity to “opt in” to any proposed measure considered under Title IV. They are each afforded the right, within three months of the presentation of any proposed measure to the Council, of notifying the Presidency that it desires to participate in the adoption of such measure and is prepared to implement it upon its adoption.¹²⁷

The Unions’s initiative in the sphere of visa, asylum, and immigration is thrice fractured. Twelve member states are bound by the provision of Title IV, the United Kingdom and Ireland have separate obligations and procedures, and Denmark has its own different set of obligations. Denmark was granted rights regarding visa and immigration matters substantially similar to those of the United Kingdom and Ireland.¹²⁸ Again, all of the member states agreed by protocol that measures taken under Title IV do not apply to Denmark, and do not constitute part of the *acquis communautaire* with respect to it.¹²⁹ Denmark is not given an “opt in” right as is afforded the United Kingdom and Ireland. Instead it is given an opportunity to decide within 6 months of its adoption whether it will implement a measure adopted with Title IV which “build[s] upon the Schengen *acquis*.”¹³⁰ If it determines to implement such a measure, the obligation between Denmark and the other participating member states is not one of Union law, but rather is an obligation of international law.¹³¹

¹²⁶ *Id.* at art. 2.

¹²⁷ *Id.* at art. 3. If either state so notifies the Presidency, the rules regarding voting on the measure are revised to include its votes in the computation of the votes necessary for adoption. *Id.*

¹²⁸ See Protocol on the Position of Denmark, 1997 O.J. (C 340) 101, art. 4.

¹²⁹ See *id.* art. 2. Denmark is a signatory to the Schengen Agreement, and, under the Schengen Protocol, it agrees to accept and apply the Schengen *acquis* which has Union legal status attributed to it. See *supra* note 117.

¹³⁰ See Protocol on the Position of Denmark, 1997 O.J. (C 340), art. 5.

¹³¹ See *id.*

The degree of differentiation authorized by this Protocol exceeds that allowed to the United Kingdom and Ireland. Apparently Denmark will decide whether or not a Title IV measure builds on the Schengen *acquis*. If it decides that it does, then it is free to adopt a comparable national measure.¹³² In adopting a national measure, it is not participating in the Union measure; its measure separately exists as an obligation grounded in principles of international law, and so does not contribute to the *acquis communautaire*. Finally, there is no reciprocity provision; there is no agreement that the member states participating in a particular Title IV measure will extend it to Denmark in exchange for the international law commitment which Denmark would make to them.

2. Free Standing Closer Cooperation Provisions

The AT's major innovation regarding flexibility is the free standing or enabling closer cooperation provisions contained as Title VII of the TEU,¹³³ which are included in the "common provisions" of the Treaty. The "common provisions" are not thought to be within any of the three pillars, as they treat matters which are not specific to any of the pillars.¹³⁴ Since the closer cooperation provisions are not tied to any subject matter, it is appropriate that they be contained within these "common provisions." The broad, flexible powers contained in Title VII are, however, severely qualified by a provision placed by the AT in the first pillar.¹³⁵ The placement of these closer cooperation provisions is thus bifurcated, some are within the common provisions of the TEU as Title VII (Articles 43-45), and another is within the first pillar as Article 11 of the TEC. However, Article 11 of the TEC does not only apply to closer cooperation within the first pillar. Despite its placement within the TEC, its effect is coextensive with the provisions of Title VII of the TEU.¹³⁶

The essence of the closer cooperation provisions is set out within Title VII in Article 43.¹³⁷ The other two articles of Title VII are not so significant.

¹³² See *id.*

¹³³ AT tit. VII, arts. 43-45.

¹³⁴ See Shaw, *Challenges of Flexibility*, *supra* note 8, at 69-70.

¹³⁵ TEC art. 11.

¹³⁶ See *infra* notes 153-56 and accompanying text.

¹³⁷ AT art. 43 (The Consolidated Version of this Article in the TEU reads as follows:

1. Member states which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and the Treaty establishing the European Community

Article 44 sets forth the manner by which the number of votes necessary for passage of closer cooperation measures are to be determined and the financing of such measures.¹³⁸ Article 45 obliges the Council of Ministers and the Commission to inform the Parliament of the closer cooperation activities undertaken within Title VII.¹³⁹

Article 43 assumes that the member states have the right to engage in closer cooperation; it does not confer this right on them. Rather, it merely notes that the member states intending to establish such closer cooperation "may make use of the institutions, procedures and mechanisms laid down in this Treaty . . ."¹⁴⁰ so long as the eight conditions set out are met. This language acknowledges the reality that cooperation among the member states can take place outside the Union context.¹⁴¹ The Schengen Agreement was a particularly visible example of this alternative to closer cooperation measures taken within the Union. It was an agreement among less than all of the Union members dealing with issues of articulated Union concern, but it was outside

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 the 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 the 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 11 of the Treaty establishing the European Community and Article 40 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).

¹³⁸ AT art. 44.

¹³⁹ AT art. 45.

¹⁴⁰ AT art. 45.

¹⁴¹ See Philippart & Edwards, *supra* note 81, at 90.

the Union.¹⁴² Article 43 would minimize the need to resort to extra Union agreements by inviting the member states to use the institutions and procedures of the Union to facilitate operation and governance of agreements between the Member States so long as the eight qualifications are met.

Article 43 also seems to be intergovernmental in character. It invites member states to use Union institutions and procedures to effect cooperation. There is no language comparable to that in Article 40(2) of the AT to the effect that the cooperation is to be effected through the Council.¹⁴³ The member states participating in the activity under Article 43 mutually agree to implement the proposed measure, and the non-participating states agree not to impede its implementation.¹⁴⁴ Moreover, the non-participating states can participate in the discussion of the measure within the Council, but they do not vote on its adoption.¹⁴⁵

The freedom of the member states to engage in bilateral or multilateral relationships in areas outside the objectives of the Treaties is not open to doubt.¹⁴⁶ However, Article 43 does not speak to these matters. Its focus is on the use of Treaty-based institutions for collaborative action within the areas of Union concern. Measures undertaken within the ambit of Title VII must be "aimed at furthering the objectives of the Union . . . and serving its interests";¹⁴⁷ but at the same time such measures must not affect the *acquis*.¹⁴⁸ Such measures must also be of concern to "at least a majority of the Member States."¹⁴⁹ The language of Article 43, together with its placement in the "common provisions" of the Treaties, creates the inference that closer cooperation can be undertaken pursuant to it with respect to any issue of concern to the Union.

The first of Article 43's substantive restrictions reinforces this point. Article 43(1)(a) provides that the cooperation undertaken under it must further the aims of the Union and serve its interests. Thus, it seems that cooperation

¹⁴² See *supra* note 117.

¹⁴³ Article 44 does provide, however, that for purposes of the adoption of measures necessary to implement closer cooperation decisions taken under Article 43, the relevant institutional provisions of the TEU and the TEC shall apply.

¹⁴⁴ AT art. 43(2).

¹⁴⁵ AT art. 44(1). This is an advance from the provision in the Maastricht Treaty which precluded non-participants from the discussion as well as the voting. See *supra* note 125 and accompanying text.

¹⁴⁶ See *supra* note 117 and accompanying text.

¹⁴⁷ AT art. 43(1)(a).

¹⁴⁸ See AT art. 43(1)(e).

¹⁴⁹ AT art. 43(1)(d).

can be undertaken under Article 43 with respect to any matter furthering the Union's interest unless there is a prohibition on such cooperation elsewhere in the Treaties or unless there are specific treaty provisions governing cooperation in that area.¹⁵⁰

Moreover, Article 43(1)(a) provides that closer cooperation undertaken pursuant to Article 43 must further the interests of the Union, not the Community. Thus, cooperation across the full range of the TEU appears to be contemplated, not just cooperation in fields encompassed by the TEC. For example, no closer cooperation provision is contained in TEU Title V, the CFSP, but there is nothing in the language of Article 43 precluding use of Community institutions, for closer cooperation in that area.

One of the most important qualification on the cooperation which can be undertaken within Title VII is Article 43's requirement that such measures can be taken only as a last resort, when the objectives of the Treaties cannot be attained through the usual Union procedures.¹⁵¹ It seems, then, that member states, recognizing that there may be objections by others to a given initiative, for example to certain worker benefits such as leave as leave of absence or insurance, could not resort to Title VII before first attempting to have measures adopted in the usual course, and presumably having failed to garner the requisite votes.¹⁵²

Article 43 qualifies both the substance and the procedures of Title VII closer cooperation action by making a reference to Article 11 of the TEC. It notes that the cooperation undertaken within Title VII must comply with the criteria set forth in TEC Article 11, and it sanctions only such closer cooperation as is authorized by the Council acting pursuant to that section.¹⁵³

¹⁵⁰ An example is cooperation in the area of police or judicial cooperation in criminal matters, which is explicitly regulated by AT Title VI.

¹⁵¹ AT art. 43(1)(c).

¹⁵² It is true that the language of Article 43(1) does not authorize Title VII closer cooperation action only after the members have tried and failed to adopt the measure in the normal course. But it seems that some effort to pass the measure under the normal procedures must be undertaken and it must be clear that such an effort will fail. Otherwise, it cannot be demonstrated that the objectives of the Treaties "could not be attained . . ." *Id.* (emphasis added). To read the section otherwise would allow it to be utilized in hypothetical and speculative cases. Moreover, such premature use would undermine the Union's usual decision making procedures. Closer cooperation is thought to be a "regime of exception rather than the norm." Philippart & Edwards, *supra* note 81, at 90. The Last Resort concept was one of the Reflection Group's suggested guidelines. See *Reflection Group Report*, *supra* note 50, ¶ 15; See Philippart & Edwards, *supra* note 81, at 93.

¹⁵³ See AT art. 43(1)(h). This provision also qualifies any closer cooperation to be

On one level, Article 11 does lay down substantive rules and procedures for closer cooperation in areas of Community concern. The Article is contained within the TEC and the substantive qualifications to closer cooperation for the most part relate to the Community, not the Union.¹⁵⁴ However, the incorporation of Article 11 into AT Article 43 extends its application to all closer cooperation sanctioned by Article 43.¹⁵⁵ In turn, all closer cooperation within the TEC sanctioned by Article 11 is also qualified by AT Article 43.¹⁵⁶ Article 11 narrows the ambit of any possible closer cooperation, radically increases the role of the Union institutions, and makes passage of any such measure dubious.

Article 11 significantly affects the possibility of engaging in closer cooperation under Title VII in two respects. It adds its own substantive constraints to such action, and it sets forth the decision making process to be used for such measures. Article 11 imposes five constraints on cooperation

undertaken regarding police and judicial cooperation in criminal matter by restricting them to measures complying with AT Article 40. Thus, all closer cooperation measures undertaken within the ambit of Title VII of the AT are separately restricted by either TEC Article 11 or AT Article 40.

¹⁵⁴ TEC Article 11(1) reads as follows:

[m]ember States which intend to establish closer co-operation between themselves may be authorized, subject to Articles 43 and 44 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;
- (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.

TEC art. 11(1).

¹⁵⁵ AT art. 43(1)(h) (providing that Member States are authorized to use the institutions, procedures and mechanisms of the TEU and the TEC, provided that such cooperation "complies with the specific additional criteria laid down in Article 11 of the Treaty establishing the European Community and Article 40 of this Treaty, depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein").

¹⁵⁶ TEC art. 11(1) states that member states intending to engage in closer cooperation may be authorized "subject to Article 43 and 44 of the Treaty on European Union . . ." to make use of Community institutions, procedures, etc.

activity, in addition to the eight stated in Article 43.¹⁵⁷ Some of the Article 11 constraints may not in and of themselves impose significant additional hurdles, but some are inconsistent with the requirements of Article 43. Cumulatively, these thirteen substantive constraints virtually doom any closer cooperation measures.

Closer cooperation in areas falling within the Community's exclusive competence is prohibited.¹⁵⁸ Compliance with this requirement is difficult since the concept of exclusive competence is itself unclear and there is no straightforward delineation of the areas of the Community's exclusive competence.¹⁵⁹ However, assuming that a proposed closer cooperation measure does fall within the Union's exclusive competence, like a proposed agreement among some of the members to alter agricultural subsidies, this prohibition in Article 11 probably does not broaden the ambit of proscribed closer cooperation action. The concept of exclusive Community competence means, at least, that the member states are prohibited from taking inconsistent action in areas covered by the Treaties after the Community has acted in those areas.¹⁶⁰ There is no reason that some of the member states collectively should be allowed to do something under the notion of flexibility or closer cooperation which individually none of them are free to do. Closer cooperation in any matter coming close to the exclusive zone would likely already be prohibited by AT Article 43(1)(e)'s caution that any closer cooperation not affect the *acquis* or measures adopted under other provisions of the Treaties.

Article 11 requires that any closer cooperation not affect Community policies or programs, not concern Union citizenship, not discriminate between nationals of member states or constitute a discrimination or restriction of trade

¹⁵⁷ See AT art. 43; TEC art. 11(1), *supra* note 137.

¹⁵⁸ TEC art. 11(1)(a).

¹⁵⁹ See *supra* note 30; PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 117-18, 124-28 (1998); Marise Cremona, *External Relations and External Competence: The Emergence of an Integrated Policy*, in *THE EVOLUTION OF EULAW* 137, 152-66 (Paul Craig & Gráinne de Búrca eds., 1999); Toth, *A Legal Analysis of Subsidiarity*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY*, *supra* note 24, at 37, 39-41.

¹⁶⁰ The ERTA case, *Case 22/70, Commission v. Council*, 1971 E.C. R. 263, 276, indicates much more broadly that the existence of community power in an area, as conferred by the Treaties, excludes the possibility of concurrent member state action. See Weatherill, *Beyond Preemption?*, *supra* note 24, at 13-14. Cf. Josephine Steiner, *Subsidiarity Under the Maastricht Treaty*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY*, *supra* note 24, at 49, 57-58 (arguing more conservatively that exclusivity is only triggered after the Community has acted in an area, and that exclusivity only precludes member state action that is inconsistent with Community action).

among the member states.¹⁶¹ Arguably these strictures do not raise the threshold of prohibited conduct beyond that prohibited by Article 43's requirement that closer cooperation further the objectives of the Union, respect the principles of the Treaties and not affect the *acquis*.¹⁶² However, it is difficult to conceive of areas of potential closer cooperation within the Community sphere that do not affect Community policies and the *acquis*.¹⁶³ At the same time, any such cooperation must remain within the limits of the powers conferred on the Community by the TEC.¹⁶⁴ Wining through these qualifications, it becomes difficult to imagine a measure that does not affect Community policies¹⁶⁵ or the *acquis*,¹⁶⁶ but at the same time remains within the limits of the power conferred on the Community by the TEC.

Article 11 of the TEC dramatically institutionalizes permitted cooperation. Article 43 of the AT appears to grant the member states the right to initiate and agree upon a closer cooperation measure. The institutional involvement is almost incidental; voting on the measure is done by qualified majority voting within the Council. Article 11 alters the intergovernmental nature of the cooperation and reduces the role of the member states. Within Title VII of the AT, the Commission is assigned virtually no role. However, under Article 11 of the TEC, a member state desiring to pursue a cooperation initiative must

¹⁶¹ TEC art. 11(1)(b), (c), (e).

¹⁶² AT art. 43(1)(a)-(c).

¹⁶³ The *acquis* includes Community policies. See *supra* note 80. These prohibitions on cooperation measures affecting Community policies and the *acquis* are much more restrictive than the forms of flexibility suggested by the Reflection Group at the time of the IGC. The Reflection Group noted that flexibility should be allowed if it did not compromise the *acquis* as a whole. See *Reflection Group Report*, *supra* note 50, ¶ 13, 14. Some suggested areas in which cooperation might be possible include culture, tourism, youth, education and professional training, taxation and movement of capital. See Philippart & Edwards, *supra* note 81, at 96; see also Shaw, *Challenges of Flexibility*, *supra* note 8, at 74. Professor Weatherill notes generally that closer cooperation is more likely in areas not "hemmed in" by a substantial body of Community law, as these are the areas less likely to be affected by Community policies. Stephen Weatherill, *Finding Space for Closer Cooperation in the Field of Culture*, in CONSTITUTIONAL CHANGE, *supra* note 8, at 237, 243. But he argues that culture is "hemmed in" by various contiguous Community policy areas and thus is not a likely candidate for closer cooperation. *Id.* at 244-53. He concludes that, in fact, the ambit of permissible closer cooperation is so narrow that very little cooperation is allowable. It is difficult to find areas that are not "hemmed in" or affected to extant Community policies and activity. *Id.* at 253-57; see also Philippart & Edwards, *supra* note 81, at 96.

¹⁶⁴ TEC art. 11(1)(d).

¹⁶⁵ TEC art. 11(b).

¹⁶⁶ AT art. 43(1)(c).

notify the Commission. The Commission then is authorized to submit a proposal to the Council with respect to the matter.¹⁶⁷ However, it is not obliged to bring forward a proposal.¹⁶⁸ If it does not, its only further responsibility is to advise the requesting member state of its reasons for not doing so.¹⁶⁹ As under Article 43 of the AT, Article 11 of the TEC provides that the Council must vote to approve the measure by qualified majority. But the Council must have before it a proposal from the Commission.¹⁷⁰ Closer cooperation procedures under Article 11 follow the Commission's usual prerogative of initiative. Through this refinement of the proposal procedure, closer cooperation decisions have become institutionalized such that the member states have no right of initiative, and the distinction between these decisions and regular Community action is decidedly blurred.

The comparable provisions in Title VI of the AT regarding police and judicial cooperation in criminal matters, while similar to Article 11 of the TEC in some respects, are also strikingly different, and less institutional in character. Under Article 40 of the AT, a member state may put forth to the Council a proposal for cooperation. The Council will vote on the measure by qualified majority after giving the Commission the opportunity to present its views and after advising the Parliament.¹⁷¹ The Commission has no right of initiative. The Commission's role, with respect to a request of a member state after the cooperation measure is agreed upon, likewise differs between Article 11 of the TEC and Article 40 of the AT.¹⁷²

Article 11 is contained within the TEC, and thus, the first pillar of the Union's architecture. Consequently, it is subject to the general jurisdiction of

¹⁶⁷ TEC art. 11(2).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ AT art. 40(2).

¹⁷² Under Article 11, the Commission apparently has the prerogative of deciding whether a state not initially participating in the closer cooperation measure can participate at a later time, and can determine the terms of such participation. A state desiring to become a party to a cooperation measure is to notify both the Council and the Commission of its intention. The Commission is given three months within which to give an opinion on the request, and then it is given an additional four months to decide on the request and its terms. TEC art. 11(3). In contrast, a member state desiring to participate in an agreed upon cooperation measure in the area of police and judicial cooperation in criminal matters is to notify the Council and the Commission. The Commission is given three months to make a recommendation regarding that participation, including any specific arrangements. Then the Council is to decide within four months on the member state's request. AT art. 40(3).

the Court of Justice.¹⁷³ Title VII of the AT, including Article 43, is contained within the TEU's "common provisions." Title VII does not contain any reference to jurisdiction of the Court. However, the AT in its "Final Provisions" augments the Maastricht Treaty's provision which stated the Treaty areas that were subject to the Court's jurisdiction. Article L of the Maastricht Treaty was amended by Article 46 of the AT to extend the Court's jurisdiction to both Title VI and Title VII of the AT.¹⁷⁴ However, both Titles are not subject to the same jurisdiction. Article 46(c) provides that the Court's jurisdiction is extended to Title VII under the conditions provided for in TEC Article 11. Since Article 11 is part of the first pillar, which is subject to the Court's plenary jurisdiction, it is fair to conclude that Title VII is subject to the same plenary jurisdiction. Thus, both direct actions and preliminary reference cases are possible, as is substantive review of closer cooperation decisions. However, Article 43 does not contain any form of an "opt in" provision like Article 35 does for Title VI. The Court's preliminary reference jurisdiction regarding police and judicial cooperation in criminal matters is limited by AT Article 35 to member states specifically accepting that jurisdiction.¹⁷⁵ Insofar as Article 46(b) extends the Court's jurisdiction into the closer cooperation provisions of the police and judicial cooperation areas of Title VI, it does so "under the conditions provided for by Article 35."¹⁷⁶ Thus, it appears that while closer cooperation undertaken with the general authorization of Article 43 of the AT and Article 11 of the TEC is subject to the Court's plenary jurisdiction, closer cooperation undertaken within Title VI is subject to the Court's direct jurisdiction. The Court's preliminary reference jurisdiction in such closer cooperation matters is limited to questions from those member states explicitly accepting the Court's jurisdiction.

Within Article 11, the voting rules are significantly modified from the usual Community procedures. They are, however, comparable to those applicable for cooperation within the area of police and judicial cooperation in criminal matters as stated in Title VI of the AT and to certain of those applicable within the CFSP. The vote within the Council on the proposed cooperation measure is by qualified majority.¹⁷⁷ However, if a member state declares within the Council that for stated reasons of national policy it intends to oppose the grant

¹⁷³ AT art. 46(a); *see supra* note 80.

¹⁷⁴ AT art. 46(b), (c).

¹⁷⁵ AT art. 35(2), (3).

¹⁷⁶ AT art. 46(b).

¹⁷⁷ TEC art. 11(2).

of authority for cooperation, a vote shall not be taken on the matter.¹⁷⁸ Thus, any member state can thwart a proposed cooperation measure. Additionally, non-participating states agree not to impede its implementation if it is adopted.¹⁷⁹ This provision in Article 11 allows for differentiation in action and obligation. Some member states would be allowed to engage in certain activities which others oppose, or at least in which they choose not to participate. Yet Article 43 is entirely modified by Article 11, and the nod to differentiation afforded by Article 43 is undercut by Article 11. Article 11 imposes uniformity and solidarity, at least of a negative type, inasmuch as an objecting member state can prevent an action from being undertaken.

It appears that the authorization of general or free standing closer cooperation, measured under Article 43 of the AT and Article 11 of the TEC, is elusive at best. It is difficult to conjure up instances in which such cooperation would be both authorized and then withstand scrutiny of the Court. Assuming that a measure were approved by the Council, that is that the measure was adopted under qualified majority voting and that no state exercised its right to block a vote, the question of whether the measure would pass review by the Court is problematic. The substantive restrictions on closer cooperation contained in AT Article 43 and TEC Article 11 are cumulative. Individually, some of them are not significant hurdles, but others seem insurmountable. In order to be effective under Article 43, the closer cooperation measure must be taken only as a "last resort."¹⁸⁰ Even more problematic are the almost mutually exclusive requirements in Article 11 that the measure not affect Community policies and the *acquis*, etc., and that it simultaneously be within the limits of the powers conferred upon the Community.¹⁸¹ Finally, as required by Article 11, the measure must not discriminate between nationals of member states.¹⁸²

¹⁷⁸ *Id.*

¹⁷⁹ AT art. 43(2).

¹⁸⁰ AT art. 43(c).

¹⁸¹ TEC art. 11(b), (d).

¹⁸² The whole point of closer cooperation is to allow some member states to engage in activities in which other states are unable or are unwilling to participate. To the extent that a closer cooperation measure contains provisions applicable to the citizens of the participating states, it almost inevitably discriminates against the citizens of the non-participating states in which a different rule or level of benefit would apply.

IV. ENHANCED COOPERATION WITHIN THE NICE TREATY

The AT specifically provided that an IGC be held to decide upon further amendments to the Treaties which would be necessary in anticipation of the next enlargement.¹⁸³ Many of these same difficult issues were to have been dealt with during the negotiation of the AT but were not then resolved.¹⁸⁴ The issues initially set for consideration at the IGC leading to the Treaty of Nice were the “Amsterdam leftovers”: the revision of the size and composition of the Commission, a change in the weighting of Member State votes for qualified voting purposes, and the extension of the use of qualified majority voting.¹⁸⁵ The IGC, which culminated in agreement on the text of the Treaty of Nice in December 2000, was formally convened in February 2000,¹⁸⁶ and closer cooperation was not initially listed as a subject for further review during the IGC.

A number of facets of closer cooperation, as structured in the AT, make it an unclear, uneven and unworkable scheme. The substantive requirements vary considerably from the very modest requirement within Title VI that closer

¹⁸³ Protocol on the Institutions with the Prospect of Enlargement of the European Union, 1997 O.J. (C 340) 111. It was believed that negotiations could be concluded by the end of 2002 with as many as ten nations, principally in eastern Europe. These states could formally join the Union in 2004 at the time of the next election of the Parliament. Laeken European Council Presidency Conclusions, BULL. E.U. 12-2001, at 10-11; Enlargement, BULL. E.U. 11-2001, at 77; *Editorial*, 38 COMMON MKT. L. REV. 1309 (2001). Indeed, at the Copenhagen Summit, December, 2002 it was announced that negotiations had been completed with ten countries and that they would become member states on May 1, 2004. The ten are: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. Presidency Conclusions, Copenhagen European Council, 12-13 December, 2002, BULL. E.U. 12-2002, at I3.3.

¹⁸⁴ See *Reflection Group Report*, *supra* note 50, ¶¶ 9, 81-84, 99-106, 113-18; Lamberto Dini, *Forward*, in AT: TEXT AND COMMENTARY, *supra* note 51, at xxvii; Langrish, *supra* note 49, at 18.

¹⁸⁵ Helsinki European Council Presidency Conclusions, BULL. E.U. 12-1999, at 9.

¹⁸⁶ The opening meeting took place on February 14, 2000. BULL. E.U. 12-2000, at 9. For a discussion of the background of the Nice IGC and the chronology of the negotiations, see generally BRITISH MANAGEMENT DATA FOUNDATION, THE TREATY OF NICE IN PERSPECTIVE (2001); Kieran St. C Bradley, *Institutional Design in the Treaty of Nice*, 38 COMMON MKT. L. REV. 1095; Markus G. Puder, *Salade Nicoise from Amsterdam Left-Overs: Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 COLUM. J. EUR. L. 53 (2002); XENAPHON A. YATAGANAS, THE TREATY OF NICE: THE SHARING OF POWER AND THE INSTITUTIONAL BALANCE IN THE EUROPEAN UNION—A CONTINENTAL PERSPECTIVE (Jean Monnet Center, Working Paper No. 1, 2001) <http://www.jeanmonnetprogram.org/papers/01/010101.htm>.

cooperation further the aims of the Union,¹⁸⁷ to the cumulative, inconsistent and seemingly insurmountable requirements of AT Article 43 and TEC Article 11.¹⁸⁸ The Commission's role in the cooperation decision-making processes varies from none, in the opt-out scheme of the visas, asylum and immigration provisions within AT Articles 61-68,¹⁸⁹ to the right to give its opinion before a decision is taken in the police and judicial cooperation matters of Title VI,¹⁹⁰ to control of the initiative as provided in AT Article 43 and TEC Article 11.¹⁹¹ Non-participating states in the visas, asylum and immigration policy areas of the AT (the United Kingdom, Ireland and Denmark) cannot block a measure which the others decide to undertake. Likewise, a non-participating and disagreeing member cannot block the flexibility afforded by the constructive abstention provisions of CFSP within the second pillar.¹⁹² Yet, within the police and judicial cooperation area of Title VI and the free-standing closer cooperation provisions of AT Article 43 and TEC Article 11, a non-participant can prevent the Council from voting on a measure, thereby completely blocking it. For these, and no doubt other reasons, no use has been made of the AT's closer cooperation provisions.¹⁹³

Because of the failure to utilize the AT's closer cooperation provisions, the decision of the European Council during its meeting in June, 2000 in Fiera, Portugal to add a review of closer cooperation to the agenda of the IGC was probably not a difficult one, and it was supported by the Commission and

¹⁸⁷ AT art. 40.

¹⁸⁸ See *supra* notes 151-64 and accompanying text.

¹⁸⁹ In the main portions of the visas, asylum and immigration sections, the Council makes decisions unanimously, upon a proposal from the Commission or a member state. TEC art. 67.

¹⁹⁰ AT art. 40(2); see *supra* note 74 and accompanying text.

¹⁹¹ See *supra* notes 167-72 and accompanying text.

¹⁹² See *supra* notes 101-05 and accompanying text.

¹⁹³ See Conference of the Representatives of the Governments of the Member States, Presidency, Report to the Fiera European Council, June 14, 2000, CONFER 4750/00, at <http://db.consilium.eu.int/cigdocs/EN/04750en.pdf> [hereinafter Presidency Report]. Hereinafter Preparatory documents of the IGC will be cited to their CONFER number]. The Union's Website, Europa, contains webpage titled, *General Information: Conduct of the IGC*, http://europa.eu.int/comm/archives/igc2000/geninfo/index_en.htm [hereinafter *General Information: Conduct of the IGC*]. This document gives the chronology of the preparatory meetings and refers to preparatory documents by CONFER number; and it contains a link to each of the referenced documents.

The Bulletin of the European Union from the signing of the AT in 1997 through early 2002 does not record the adoption or consideration any closer cooperation measures. In contrast, the flexibility built into the opt out provisions of the visas, asylum and immigration policies and the constructive veto within CFSP have allowed significant differentiated activity to take place in those spheres.

many member states.¹⁹⁴ At the direction of the 2000 Presidency of the Council, Portugal for the first half of the year and France for the second,¹⁹⁵ a series of discussions were held with respect to closer cooperation.¹⁹⁶ The European Council in June, 2000 agreed that closer cooperation was to be added to the agenda for the IGC¹⁹⁷ but ambivalence toward the concept remained obvious. The issues regarding closer cooperation were framed so that the principle was viewed from several perspectives. The European Council noted that closer cooperation must be reviewed "while respecting the need for coherence and solidarity in an enlarged Union."¹⁹⁸ Yet it was acknowledged that a reform of closer cooperation, which made it more useful, might decrease the temptation to resort to action outside the Union.¹⁹⁹ Discussion also emphasized the importance of viewing closer cooperation as a means of integration, not segregation, among the member states.²⁰⁰ Implementation of closer coopera

¹⁹⁴ See Conference of the Representatives of the Governments of the Member States, Presidency Report, *supra* note 193; Conference of the Representatives of the Governments of the Member States, Commission Opinion in accordance with Article 48 of the Treaty on European Union on the Calling of a Conference of Representatives of the Governments of the Member States to Amend the Treaties, Feb. 1, 2000, CONFER 4701/00, at <http://db.consilium.eu.int/cigdocs/EN/04701en.pdf> [hereinafter Opinion on Convening of the IGC]; Conference of the Representatives of the Governments of the Member States, Letter from Gunter Pleuger, Representative of the Government of the Federal Republic of Germany to Francisco Seixas da Costa, Chair of the Intergovernmental Conference Group of Ministers Representatives, Mar. 30, 2000, CONFER 4733/00, at <http://db.consilium.eu.int/cigdocs/EN/04733en.pdf>.

¹⁹⁵ Portugal held the Presidency for the first half of 2000, with France holding the office for the second half of the year.

¹⁹⁶ See *General Information: Conduct of the IGC*, *supra* note 193.

¹⁹⁷ See Feira European Council, BULL. E.U. 6-2000, at 9; Conference of the Representatives of the Governments of the Member States, Presidency, Note to the Sixth Ministerial Meeting of the Intergovernmental Conference, July 5, 2000, CONFER 4755/00, at <http://db.consilium.eu.int/cigdocs/EN/14755en.pdf> [hereinafter Note to Ministerial Meeting]; Yatagamas, *supra* note 186. Mr. Yatagamas notes that closer cooperation was first discussed at an informal meeting of the IGC representatives in mid-April, 2000, and that initial opposition to inclusion of closer cooperation on the agenda from the smaller states softened, allowing it to be added to the IGC agenda at the Fiera Summit.

¹⁹⁸ Intergovernmental Conference, BULL. E.U. 6-2000, at 41.

¹⁹⁹ See Conference of the Representatives of the Governments of the Member States, Note to Ministerial Meeting, *supra* note 197; Opinion on Convening of the IGC, *supra* note 194, at 41. The Schengen Agreement is cited in both documents as the example of multilateral action by member states taken outside the Union, with the implication that such arrangements were not helpful to the Union. *Id.*

²⁰⁰ See Conference of the Representatives of the Governments of the Member States, Presidency Note to IGC Ministerial Conclave, Oct. 5, 2000, CONFER 4780/00, at <http://db.consilium.eu.int/cigdocs/EN/478063en.pdf>. This focus on integration is the crux of the change

tion was considered, both from the perspective of its substantive requirements and its procedures, and from the perspective of its breadth of application. Concerns about the breadth of application largely centered on the issue of extending application of cooperation to CFSP and on the question of whether the procedures for cooperation should differ from sector to sector²⁰¹ as they do in the AT.

On the basis of the discussions regarding closer cooperation held at the ministerial meetings within the IGC from July through October, 2000, the Presidency put forth a draft of provisions regarding closer cooperation to be included within the Treaty of Nice.²⁰² These provisions were refined at IGC ministerial meetings held at the end of October and November, and a revised draft of the provisions was circulated toward the end of November.²⁰³ On the eve of the Nice Summit, the Presidency put forth a complete draft of the Treaty of Nice, including the cooperation provisions.²⁰⁴ The cooperation provisions were amended somewhat during the Nice Summit sessions,²⁰⁵ and the final text of the Treaty of Nice was agreed to at the conclusion of the Summit on December 10.²⁰⁶ The text underwent linguistic, legal and technical revision during the winter of 2000-2001 and the treaty was signed by the member states on February 26, 2001.²⁰⁷

of the term in the English version of the Treaty of Nice from "closer cooperation" to "enhanced cooperation." Closer cooperation can be said to connote a scheme of horizontal activity among some member states while others do not participate. Enhanced cooperation emphasizes an additional or deeper level of cooperation among some member states, thereby intensifying the integration among the participants. The French version of the Treaty of Nice, however, employs the same term, *les cooperations renforcees*, as is used in the AT.

²⁰¹ See Conference of the Representatives of the Governments of the Member States, Presidency Note, Aug. 30, 2000, CONFER 4766/000, at <http://db.consilium.eu.int/cigdocs/EN/04766en.pdf>.

²⁰² Conference of the Representatives of the Governments of the Member States, Presidency Note, Oct. 18, 2000, CONFER 4786/000, at <http://db.consilium.eu.int/eigdocs/EN/4786en.pdf>.

²⁰³ See Conference of the Representatives of the Governments of the Member States, Presidential Note to ICG Ministerial Conclave, Nov. 17, 2000, CONFER 4803/00, at <http://db.consilium.eu.int/cigdocs/EN/4803en.pdf>.

²⁰⁴ See Conferences des Représentants des Gouvernements des États Membres, *Project de Traite de Nice*, Dec. 6, 2000, CONFER 4816/00, at http://europa.eu.int/comm/archives/igc2000/genifo/confer4816_fr.pdf [hereinafter *Project de Traite de Nice*].

²⁰⁵ Conference of the Representatives of the Governments of the Member States, Revised Summary: Intergovernmental Conference, Nov. 23, 2000; CONFER 4810/00 [hereinafter Revised Summary].

²⁰⁶ See *General Information: Conduct of the IGC*, *supra* note 193, at Progress so Far.

²⁰⁷ See generally THE TREATY OF NICE IN PERSPECTIVE, *supra* note 186; Bradley, *supra* note 186, at 1095; Yataganas, *supra* note 186.

The Treaty of Nice makes no change to the flexibility introduced into the Treaties by the AT's "opt out" provisions for the monetary union or the visa, asylum, and immigration policies within Title IV of the TEU. However, it contains substantive and procedural changes to the closer cooperation provisions within the remaining portions of the Treaties. Structurally, the flexibility provisions in the text approved at Nice consist of a set of general provisions, Clauses A through F, which was to apply generally to enhanced cooperation throughout the Treaties.²⁰⁸ In the text of the Treaty of Nice, as signed in February, 2001, these general principles are contained in a Revised Article 43 to the TEU.²⁰⁹ Next, separate clauses were included governing enhanced cooperation within the various sectors of the Treaties. Clauses G and H, which are included in a Revised Article 11 to the TEC, apply to enhanced cooperation within Community areas;²¹⁰ Clauses I through M, which are included in the second pillar as new Articles 27a through 27e of the TEU, authorize cooperation within CFSP;²¹¹ Clauses N through P, which are included as revised and new Articles 40 through 40b of the TEU, treat enhanced cooperation in the area of police and judicial cooperation in criminal matters.

Provisions were added to the CFSP mechanism which authorize enhanced cooperation measures in that sector of the TEU.²¹² Several of the member states and institutions had argued in favor of adding this flexibility.²¹³ Indeed, the AT sets forth an indirect form of flexibility in this sector. Under the AT's structure of CFSP, the member states voting by qualified majority within the Council could authorize a joint action or the taking of a common position based on a common strategy adopted by the European Council and could authorize measures implementing either a joint action or common position.²¹⁴ An objecting state could indicate its intention to oppose the measure for reasons of national policy; if any state did so, a vote would not be taken on the measure.²¹⁵

²⁰⁸ See *Project de Traite de Nice*, *supra* note 204.

²⁰⁹ See TREATY OF NICE art. 1, § 11.

²¹⁰ See TREATY OF NICE art. 1, § 6(2).

²¹¹ See TREATY OF NICE art. 1, § 9.

²¹² TREATY OF NICE art. 6 (adding arts. 27(a)-27(e) to the TEU); see generally Schrauwen, *supra* note 64, at 67-69.

²¹³ See *supra* note 194.

²¹⁴ AT art. 23(2); see *supra* notes 100, 107 and accompanying text.

²¹⁵ See *supra* notes 100, 107 and accompanying text.

The enhanced cooperation mechanism within the Treaty of Nice blunts that effective veto, but only to a limited extent. Member states are authorized to engage in enhanced cooperation regarding the implementation of a joint action or a common position, so long as the implementing measure does not have military or defense implications.²¹⁶ Enhanced cooperation, however, does not apply to the question of whether or not the Union should take a common position or adopt a joint action. The AT's rule that a vote not be taken if a member state objects to its adoption would still allow a member state to block a vote on that question. Of course, without agreement on a common position or a joint action, there is nothing that might be implemented by an enhanced cooperation measure.

The possibility of enhanced cooperation measures in areas having military and defense implications was included in the draft text put forth by the Presidency. Indeed, that draft would have authorized enhanced cooperation for the implementation of a joint action or common position, as the agreed text does, but also with respect to the taking of "initiatives in the field of security and defense contributing to the acquisition of crisis management capabilities."²¹⁷ This latter provision was removed at the insistence of the United Kingdom. The issue of cooperation in security or defense areas provided deep disagreement during the final negotiations at the Nice Summit. Germany and France argued in favor of development by the Union of a military force independent of NATO, a proposition which the United Kingdom vigorously opposed.²¹⁸

The substantive constraints on enhanced cooperation within the CFSP do not appear significant. The proposed action must respect: (i) the principles, guidelines and consistency of the common foreign and security policy; (ii) the powers of the Community; and (iii) the consistency between all Union policies and its external actions.²¹⁹ However, authorization of any enhanced cooperation measure must also comply with the substantive constraints imposed by the

²¹⁶ TREATY OF NICE art. 6 (adding New Article 27(b) to the TEU); see Bradley, *supra* note 186, at 1116; Yataganas, *supra* note 186, at pt. B, ¶ 6.

²¹⁷ Revised Summary, *supra* note 205.

²¹⁸ Within the IGC, the member states were divided on the issue of whether was appropriate to sanction cooperation in defense or security matters. Conference of the Representatives of the Governments of the Member States, *Note to IGC Ministerial Conclave*, Nov. 17, 2000, CONFER 4803/00, at <http://db.cous./ium.cu.int/cigdocs/EN/4803en.pdf>. In the end, the Presidency endorsed such cooperation and included a provision for it. Yataganas, *supra* note 186, ¶ 6.

²¹⁹ TREATY OF NICE art. 6 (adding Article 27(a) to the TEU).

Revised Articles 43-45 of the TEU.²²⁰ Decisions on implementation of a common position or a joint action can be taken by the Council via qualified majority voting upon the request of a member state.²²¹ The request is forwarded to the Commission and Parliament. The Commission is to give its opinion on, among other things, whether the proposed action is consistent with Union policies.²²² The request is forwarded to Parliament apparently only to inform it of the matter.

Enhanced cooperation policies and procedures within Title VI, the police and judicial cooperation in criminal matters provisions of the third pillar, and the free standing cooperation provisions within Title VII are made more consistent and less stringent, and thus perhaps more useful, than their counterparts within the AT and TEC. This consistency results in a more realistic and perhaps achievable set of substantive criteria, unlike the inconsistent and daunting provisions of AT Article 43 and TEU Article 11. On the other hand, this consistency entails less procedural flexibility and more institutional involvement in some instances.

The Commission's procedural right of initiative under old TEC Article 11 was limited to the free standing closer cooperation provision of Title VII. The Treaty of Nice extends that right of initiative, in a modified form, into the enhanced cooperation procedures for police and judicial cooperation within Title VI. Under the AT, closer cooperation within Title VI was to be agreed upon by the Council, by qualified majority voting upon a request of a member state, after the Commission gave its opinion.²²³ The Treaty of Nice requires that member states desiring to engage in enhanced cooperation in this sphere address a request to the Commission, which in turn may submit a proposal to the Council. If the Commission determines not to bring forth a proposal, it must notify the requesting states of its reasoning. The requesting states then may submit the request directly to the Council.²²⁴ If a proposal is put forth by the Commission, the Council proceeds to vote using qualified majority voting. If the proposal is submitted directly by the member states, the Council still votes using qualified majority voting, but only if the request comes from at least 8 member states, and only after consulting Parliament.²²⁵ The slightly

²²⁰ *Id.* (adding Article 27c). See *infra* notes 229-36 and accompanying text.

²²¹ TREATY OF NICE art. 6 (adding New Article 27(c) to the TEU).

²²² *Id.*

²²³ AT art. 40(2).

²²⁴ TREATY OF NICE art. 9 (adding Article 40a(1) to the TEU).

²²⁵ TREATY OF NICE art. 9 (adding Article 40a(2) to the TEU). At present such a request would have to come from a majority of the member states, 8 out of 15. But after the 2004

different procedure regarding consideration of a proposal coming directly from the members, apparently without the consent of the Commission, does not add much, as any enhanced cooperation measure must involve at least eight member states²²⁶ and Parliament need only be consulted.

The objectives of proposed enhanced cooperation measure within Title VI must remain as stated in the AT; the measure must enable the Union to develop more rapidly into an area of freedom, security and justice.²²⁷ However, the substantive criteria for enhanced cooperation set forth in New Article 43 also apply to cooperation within Title VI.²²⁸ Under the AT, closer cooperation in these criminal matters is not constrained by the requirements of Article 43.

As previously noted, enhanced cooperation within the various pillars is harmonized under the Treaty of Nice. The substantive criteria of New Article 43 are incorporated into the sphere specific provisions for the CFSP, the police and judicial cooperation in criminal matters and Community activities.²²⁹ The Treaty of Nice places all of these substantive criteria in one section, new Article 43. The cumulative substantive criteria of AT Article 43 and TEC Article 11 are consequently replaced.

Thus, the provisions of New Title VII (New Articles 43 through 45) apply throughout the Treaties, and the provisions of New Article 11 apply only to Community based enhanced cooperation undertaken within the context of the TEC. The AT joined the provisions of AT article 43 and TEC Article 11 and made them generally applicable throughout the Treaties unless specifically displaced.²³⁰

The Treaty of Nice contains ten substantive criteria that must be met before any enhanced cooperation measure can be undertaken.²³¹ In the main these

enlargement the request could come from as few as about one third of the members, 8 out of 25. The implication is that a request of less than 8 will simply not be brought forward for a vote. *Id.*

²²⁶ Among the substantive requirements in the general provisions is a rule that any request for consideration of an enhanced cooperation measure must come from at least eight member states. TREATY OF NICE art. 11 (adding New Article 43 to the TEU); *see infra* note 234 and accompanying text.

²²⁷ TREATY OF NICE art. 9 (adding New Article 40 to the TEU).

²²⁸ TREATY OF NICE art. 9 (adding New Article 40a(2)).

²²⁹ TREATY OF NICE arts. 6, 9, 2.1 (New Articles 27a(2), and 40a(2) to the TEU).

²³⁰ *See supra* notes 153-56 and accompanying text.

²³¹ The Treaty of Nice, New Article 43, reads as follows:

[m]ember States which intend to establish enhanced cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and by the Treaty establishing the European Community provided that the proposed cooperation:

criteria do not impose a high threshold and they are internally consistent. The inconsistencies between AT Article 43 and TEC Article are removed.²³² Likewise, the seemingly unsurmountable requirements that any cooperation measure not discriminate among nationals of member states or affect Community policies or programs²³³ are not carried over. It is necessary that the proposed measure not undermine the internal market and that it involve at least eight member states.²³⁴

New Article 43 does not contain the procedures whereby a proposed enhanced cooperation is to be adopted. Instead, those procedures are contained in the sphere of specific provisions. Article 43 does, however,

(a) is aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration;

(b) respects the said Treaties and the single institutional framework of the Union;

(c) respects the *acquis communautaire* and the measures adopted under the other provisions of the said Treaties;

(d) remains within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community;

(e) does not undermine the internal market as defined in Article 14(2) of the Treaty establishing the European Community, or the economic and social cohesion established in accordance with Title XVII of that Treaty;

(f) does not constitute a barrier or discriminate in trade between the member States and does not distort competition between them;

(g) involves a minimum of eight Member States;

(h) respects the competences, rights and obligations of those Member States which do not participate therein;

(i) does not affect the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union;

(j) is open to all the Member States, in accordance with Article 43b.

²³² For example, the dual and inconsistent requirements that the intended cooperation further the interests of the Union, AT art. 43(1)(a), but at the same time not affect the policies of the Union, TEC art. 11(b), are removed.

²³³ TEC art. 11(b)-(c). See *supra* notes 161-64 and accompanying text. The AT's requirement that closer cooperation measures not *affect* the *acquis*, AT art. 43(e), is replaced by a significantly less onerous requirement that the enhanced cooperation measure *respect* the *acquis*. TREATY OF NICE New art. 43(c).

²³⁴ TREATY OF NICE art. 11 (adding New Article 43(e)-(g) to the TEU). The minimum number of participating member states is currently the same under both treaties. The AT requires the participation of a majority of member states (eight out of fifteen). In contemplation of expansion, the Treaty of Nice changes the requirement from a majority to a fixed number, eight. TREATY OF NICE art. 11 (adding New Article 43(g)). After the expansion to 25 members, the Treaty of Nice's participation requirement drops to just over 30 percent.

impose the "last resort" requirement on all enhanced cooperation proposals. New Article 43 applies by cross reference to enhanced cooperation within the CFSP, police and judicial cooperation in criminal matters and Community activities. The notion of "last resort" is somewhat clarified from its old form. As provided in New Article 43, enhanced cooperation may be taken only as a last resort when the Council establishes "that the objectives of such cooperation cannot be obtained within a reasonable period by applying the relevant provisions of the Treaties."²³⁵ This language adds two elements. First, it must appear that the matter cannot be accomplished "in a reasonable time," not that it absolutely cannot be accomplished. Second, the Council must determine that the measure cannot be accomplished under the usual procedures before authorizing an enhanced cooperation measure.²³⁶

Once established, participation in an enhanced cooperation measure is open to all member states.²³⁷ However, as under the AT, the procedures for deciding upon a member state's request to join in a previously agreed upon enhanced cooperation measure vary among the different pillars of the Union. Within the CFSP and the police and judicial cooperation areas, the request to join is made to the Commission and the Council. The Commission is to give an opinion, but the Council decides on the request.²³⁸ A request for later participation in an enhanced cooperation measure undertaken within the TEC is again made to the Council and the Commission, but it is the Commission that decides upon the request.²³⁹

²³⁵ TREATY OF NICE art. 1.12 (New Article 43(a) to the TEU).

²³⁶ This allows the Council to make a judgment that the objectives cannot be accomplished under the normal procedures. Presumably this judgment can be made prospectively, based on a reasonable assessment of the prospect for approval of a measure proposed under the normal procedures.

²³⁷ TREATY OF NICE art. 1.12 (New Article 43(b) to the TEU).

²³⁸ TREATY OF NICE art. 1.6 (New Article 27(e) to the TEU); TREATY OF NICE art. 1.9 (New Article 40b to the TEU).

²³⁹ TREATY OF NICE art. 2.1 (New Article 11a to the TEU). This may be an unintended reference, and it may be that the Council should be substituted for Commission in this provision. Such a change would make the process consistent with that applicable in the CFSP and police and judicial cooperation areas. Moreover the language of the section reads better if the substitution were made. New Article 11a provides that the Commission, after receiving notice of the request has three months to render an opinion on it. Then "[w]ithin four months of the dates of that notification [the notification of request from the requesting state] the *Commission* shall take a decision on it . . ." TREATY OF NICE art. 11a (emphasis added). The comparable provision for the other sectors reads that "the *Council* shall take a decision on the request within four months. . . ." TREATY OF NICE arts. 27e, 40b (emphasis added). It seems odd that a decision regarding the inclusion of additional member states into the enhanced cooperation measure

Under the Treaty of Nice, decisions on all enhanced cooperation matters are taken by the Council under qualified voting majority. The effective national veto contained in old Article 11(2) is eliminated. Arguably, this is one of the most important revisions made to the closer cooperation procedures by the Treaty of Nice. Allowing decisions to be taken by the qualified majority, rather than allowing one of the 15, and soon 25, member states to block the effort, might make resort to the procedures more likely and more effective. However, a member state concerned about the proposed cooperation measure is not left completely without recourse. A state choosing not to participate is not bound by the measure; indeed, the measure can only be directly applicable within the participating states.²⁴⁰

With respect to cooperation within the areas of police and judicial cooperation and the Community polices, an objecting member state has an additional recourse. It can request that the matter be referred to the European Council.²⁴¹ However, the procedures for the next steps after referral are

should be given to the Commission, when the all of the other decisions are taken by the Council. However, old TEC Article 11(3) gives the Commission the prerogative of making this decision even though a comparable decision within the police and judicial cooperation area is to be made by the Council. AT art. 40(3). This inconsistency under the AT is said to have "the look of a compromise cobbled together . . . with insufficient attention to detail." WYATT & DASHWOOD, *supra* note 1, at 167-68. However, the draft clauses presented by the Presidency read in substance like the agreed upon text. The decision with respect to later participation in an enhanced cooperation measure within the Community sphere is to be made by the Commission (Clause H) while the comparable decisions within CFSP and the police and judicial cooperation are made by the Council (Clauses M and P). See Revised Summary, *supra* note 205.

²⁴⁰ TREATY OF NICE art. 1.13 (New Article 44(2) to the TEU. Neither the Treaty of Nice nor the analogous provision in the AT clearly state which states are bound by the agreed upon cooperation measure). TREATY OF NICE art. 1.13 (New Article 44 (1) provides that all member states shall have the right to participate in the discussion of a cooperation measure; but only those states participating in the decision are entitled to vote on the measure. The same right exists in the AT). AT art. 44(1). For qualified voting purposes, the proportions of the vote are to be recalculated according as provided in Article 205(2) of the TEC. The question of a state voting against the measure is not addressed. Of course the issue is clear with respect to a state determined not to participate. Its votes are not included, and it is not bound. But the status of a state, which though opposed on the merits participates in the voting, perhaps in an attempt at defeating the measure under qualified majority, is not stated. Article 44(2) of states that the cooperation measure is binding only on the states participating in it. TREATY OF NICE art. 1.13 (New Article 44(2)). Does this refer to the states participating in the voting, or the states voting in the affirmative and thus willing to participate in the discharge of the measure? Surely the latter is the intent, but the effect of the measure on a state which loses in the qualified majority voting is not clear. The usual rule is that the measure, if adopted, is an act of the Union, and all states, including those which lost in the voting, are bound by it.

²⁴¹ TREATY OF NICE arts. 1.9 (New Article 40a(2) to the TEU), 2.1 (New Article 11(2) to the

vaguely stated. The relevant provisions simply state that after the matter has been raised within the European Council, the Council of Ministers may act on the proposal according to the procedures which would have applied absent such referral.²⁴² The referral request option at the very least slows down the procedure²⁴³ and gives the objecting member state another forum to express its concerns. In all likelihood, however, these are the only consequences of the referral. The provision does not delineate the European Council's role with respect to the referral. Clearly it must consider the matter; the relevant provisions clearly require that much. They state that "after the matter has been raised before the European Council, the Council . . ." ²⁴⁴ may act on the measure. The provisions do not state that the European Council must reach a decision on the referral. They merely state that the Council can proceed to act after the matter has been raised within the European Council.²⁴⁵

That the European Council's responsibility is merely to consider the matter is supported by contrasting these provisions with other treaty provisions. AT Article 40 contained a similar provision with respect to cooperation decisions in the police and judicial cooperation areas. If a member state objected to a proposed measure for stated reasons of national policy, a vote within the Council would not be taken. The Council could, upon a qualified majority vote, request that the matter be referred to the European Council, a procedure virtually the same as that set forth in the first portion of the relevant provisions of the Treaty of Nice. But after the referral the matter was to be decided by the European Council acting by unanimity.²⁴⁶ If in the final negotiations of the

TEU).

²⁴² *Id.*

²⁴³ Bradley, *supra* note 186, at 1116. The procedure has been referred to as an "emergency brake" or a "worn brake pad".

²⁴⁴ TREATY OF NICE arts. 1.9 (New Article 40a(2) to the TEU), 2.1 (New Article 11(2) to the TEU).

²⁴⁵ The decision making process within the European Council remains unclear. *See generally*, EU LAW, *supra* note 17, at 94-99; D. Wyatt & A. Dashwood, EUROPEAN COMMUNITY LAW 20-22 (3d ed. 1992). The authors note that the European Council does not deliberate formally or take votes, its role being a political one. *Id.* at 21.

²⁴⁶ AT art. 40(2). Article 11 of the TEC contained a provision analogous to, but quite different from, this aspect of New Article 11(2), and to AT Article 40(2). As structured in Article 11 of the TEC, an objecting state can block the taking of a vote on a cooperation measure. If it does so the Council, acting on the basis of a qualified majority, may refer the matter to the Council, meeting in the composition of the Heads of State or Government. That body may determine that the measure should be adopted, but only if it does so unanimously, presumably including the vote of the objecting state. The body referred to in this provision is not the European Council, but is a meeting of the Council of Ministers at which the Heads of

Treaty of Nice the member states wished to confer that decision making procedure on the European Council in the relevant provisions of the Treaty of Nice they could have readily done so.

Under the Treaty of Nice the role of the Court of Justice in cooperation matters remains unchanged. New Article 46²⁴⁷ extends the jurisdiction of the Court to the provisions of Title VI, the police and judicial cooperation area, under the conditions of AT Article 35, and to the general provisions of Title VII under the terms of New Articles 11 and 11a, as well as New TEU Article 40. There is no jurisdiction with respect to enhanced cooperation within the CFSP, or to any aspect of the CFSP. Similarly, under the AT, the Court had no jurisdiction over the substance of CFSP decisions. Also, the qualification on preliminary references within the police and judicial cooperation area contained in AT Article 35 is carried forward in the Treaty of Nice.²⁴⁸ Thus, the Court continues to have jurisdiction to review adopted enhanced cooperation measures against both the substantive criteria and stated procedures.

The refinement of the “last resort” concept in New Article 43a is of assistance in this respect. Arguably, inclusion of the notion that it must be “established within the Council . . .”²⁴⁹ that the object of the enhanced cooperation cannot be attained through the usual process, transforms the vague “last resort” concept into a procedural requirement. Although the text does not so provide, the Court could conclude that its role regarding the “last resort” requirement is to determine whether Council has in fact established that the objective of the measure cannot be achieved under the usual processes rather than involving itself in an assessment of what constitutes a “last resort” and whether the measure in question is allowable in view of that vague concept.

The Parliament’s role in the enhanced cooperation process has been upgraded in one significant respect. Its general role of being informed of cooperation measures, and perhaps being consulted with respect to them, remains unchanged. This more modest role is carried over into cooperation within the CFSP, where the Council is to forward any proposal to the Parliament.²⁵⁰ Within the police and judicial cooperation area and the Community area, the Council proceeds to consider the measure after

State or Government are present. Usually this would be a summit meeting of the Council of Ministers, held at least once during each presidency. The European Council would be comprised of this same group plus the president of the Commission. See EU LAW, *supra* note 17, at 97.

²⁴⁷ TREATY OF NICE art. 1.15 (New Article 46 to the TEU).

²⁴⁸ See *supra* notes 77-80 and accompanying text.

²⁴⁹ TREATY OF NICE art. 1.12 (New Article 43a to the TEU).

²⁵⁰ TREATY OF NICE art. 1.6 (New Article 27c to the TEU).

consulting Parliament.²⁵¹ Presumably this means that the Council must simply consult Parliament, but is not obliged to follow its advice. With respect to cooperation within Community matters, however, Parliament is assigned a more significant role. If the measure under consideration is in an area covered by the co-decision procedures, the assent of Parliament is required in order for the measure to be effective.²⁵²

V. CONCLUSION

The Treaty of Nice substantially changes the AT's cooperation procedures in at least three respects; the substantive qualifications are made less onerous and are more harmonized, the national veto is eliminated, and the role of the Commission is made more prominent. The first and second of these changes ought to result in a greater likelihood that the system of flexibility will be used. The last change, the increased role of the Commission, adds a separate dimension to the cooperation process, the effect of which is unknown. Enhanced cooperation throughout most of the Treaties, and many areas of authority (the CFSP being the exception) are now within the control of the Commission.²⁵³ A proposal for a cooperation measure must be presented to the Council by the Commission in much the same manner as in the Community's normal law making process. Thus, the cooperation procedure is completely institutionalized. Any reform introduced into the Treaties by the member states as a means whereby they could accomplish certain goals among themselves despite the unwillingness or inability of other members to

²⁵¹ TREATY OF NICE arts. 1.9 (New Article 40a(2) to the TEU) (New Article 11(2) to the TEU).

²⁵² TREATY OF NICE art 2.1 (New Article 11(2) to the TEU). Presumably this Parliamentary assent is by Parliament's usual voting procedures of a majority of votes cast. The section does not state an order in which the measure is to be considered. Does the Council proceed to consider the measure after Parliament has assented, or the reverse? Presumably the situation is left flexible so that both bodies can consider the matter simultaneously. All that is required is that both the Council and Parliament have approved. This right of Parliament was added in the final negotiations of the text at Nice; it is not contained in the draft put forth by the Presidency. See Revised Summary, *supra* note 205.

²⁵³ Admittedly the Treaty of Nice expands the role previously assigned to the Commission in the AT. Under the AT, proposals for cooperation measures to be undertaken pursuant to AT Article 43 and TEC Article 11 were to be voted on by the Council upon presentation by the Commission. The Treaty of Nice extends the Commission role of initiative to proposals for cooperation throughout the Treaties, except the CFSP. See *supra* notes 167-72 and accompanying text.

participate is now controlled by a Union institution, the Commission.²⁵⁴ In a sense, this may not be a significant change, as one of the requirements for cooperation under the AT was that the measure be in the interest of the Union. But it is not the member states interested in participating that will make this determination, but the Commission. Despite the Treaty of Nice's rather wholesale institutionalization of the cooperation procedure, the Treaty of Nice does reinforce the constitutional stature of the principle of flexibility as introduced by the AT. The traditional concept of uniformity is now constitutionally juxtaposed with principles of flexibility.

²⁵⁴ Of course, under the AT and the Treaty of Nice, cooperation measures are generally effective only if approved by a Union institution, the Council of Ministers. But the Council is the Union institution controlled by the member states. It is comprised of representative of the member states who vote on the instruction of, and in the interest of, their national governments. The Commission by contrast is independent of the member states, and it acts in what it perceived to be in interests of the Union as an entity, not in the interests of the member states. See WYATT & DASHWOOD, *supra* note 1, at 23-32.

