

Expansion of Closer Cooperation as Contra-Indication to the Idea of European Integration: A Critique of Joschka Fischer's Speech and Giuliano Amato's Comment Thereon*

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A. The Starting Point [1] In his speech at the Humboldt University in Berlin, 12 May 2000, Joschka Fischer described the expansion of "reinforced cooperation" as a necessary first stage to Europe's further development. He pointed out that, with the tool of closer cooperation, those states desiring to cooperate more closely than other member states of the European Union could make progress in many areas like environmental protection, the fight against crime, the development of common immigration and asylum policies and on foreign and security policy. As a model for a successful "reinforced cooperation" he mentioned the Economic and Monetary Union and Schengen. Although he did not want the closer cooperation to be misunderstood as the end of integration and consequently the preliminary stage to a divided Union, he further underscored the concept by proclaiming that this step would constitute the formation of a "center of gravity." Such a group of states should conclude a new European framework treaty, would develop their own institutions and establish a government that speaks with one voice within the European Union. This proclaimed "center of gravity" should be the *avant-garde*, some kind of driving force for the completion of political integration. [2] In his comment on Foreign Minister Fischer's speech, Giuliano Amato takes up this thesis and confirms the importance of expansion of reinforced cooperation. Amato states that, in the face of EU enlargement, establishment of a central core of the European Union is undoubtedly necessary to prevent a reduction of the European Union to a mere economic area. He refers to the fact that the six founding Members of the Community have the right and the duty to re-launch the debate and the initiative on the Union's political objectives and that there has always been a sort of "engine" or "vanguard" for the promulgation of European doctrine and policy (especially the so called Paris-Bonn axis). In addition he points out the different fields of interest which lead to negotiation problems in certain fields of European Union policy. Amato concludes that a vital core is needed for the enlarged European Union. He draws a scenario of a future European Union where member states which are not interested in or qualified for enhanced cooperation would soon see themselves encouraged to join in order to avoid being excluded from the foreseeable functional and political benefits - as it has been with the Monetary Union and Schengen. Amato calls this "going back to the future." **B. Reflecting on a "Center of Gravity"** [3] The basic problem shining through the discussion about closer cooperation is the impending enlargement of the European Union, which may lead, in the end, to a Union of nearly 30 states. It is beyond doubt that an enlargement of this scale will have an enormous effect on the political and the institutional structure of the European Union. The question is, however, how to overcome this situation without following the wrong path away from integration. The solution Fischer and Amato offer seems to be a very problematic one. [4] Already in the current version of the Treaties, Article 43 EU allows a group of member states to establish closer cooperation between themselves, provided in the main that they respect the principles and with it the single institutional framework of the European Union and that the cooperation concerns at least a majority of Member states. Furthermore the closer cooperation must only be used as a last resort. (2) [5] The political will for "reinforcing closer cooperation" resulted in the promulgation of provisions for the simplification of the utilization of Article 43 EU in the Treaty of Nice. Providing the ratification of the Treaty of Nice, there may be a closer cooperation (then named "enhanced" cooperation) possible between only eight Member states, Art. 43(g) EU Treaty of Nice-version. With the expected enlargement, however, this is actually no longer a majority. In addition, with the Treaty of Nice there will be no chance for one Member State to stop closer cooperation with a veto. Although a new enhanced cooperation must be (a) aimed at furthering the objectives of the Union, (b) at protecting and serving its interests, (c) tied to the principles of the Treaties and (d) must at least be open to all Member States, the simplified provisions for establishing enhanced cooperation actually lead the European Union as a union in the wrong direction (away from integration) as a result of its inherent divisiveness. [6] The idea of building a "center of gravity," as described by Fischer and supported by Amato, goes beyond the scope of Article 43 EU in the current and even in the forthcoming version of the Treaty of Nice. [7] First, the principle of a single institutional framework appears to have been surrendered by the idea of establishing a new framework treaty along with exclusive institutions. Nevertheless, the original institutional problem of the enlargement capability would not be solved by this new creation. Newly built institutions of the European Union must be created for an enlarged union of 30 even if fewer states are participating at first. Otherwise this would indicate the abandonment of the idea of a united Europe including Middle and Eastern Europe. [8] Closer cooperation was once permitted, not as an equal instrument to joint activity, but as a "last resort." The idea was not to create an *avant garde* of some states only wanting to satisfy their national interests within the European Union while leaving the rest "outside." Common development is still to be given the priority. (3) Taking the Fischer proposal seriously means making a rule out of the exception. [9] The path of Harmonization which is grounded in the European Treaties seems then to be abandoned in favor of political functionalism. It is well known that some Member States were sometimes standing behind the first line in the process of integration which led to some added protocols in the Treaties. But these protocols contain only special provisions like the so-called "opting-

out" of Great Britain in case of the Monetary Union. (4) But in general, these kind of protocols only grant a partially (and hopefully short-term) exception. The principle of common and concerted action as stated in the founding Treaties (5) was securely beyond question. With the implementation of the idea of enhanced cooperation as a rule, the unity of the European legal order as a structural feature created by the Court of Justice is abandoned. Enhanced cooperation itself cannot create an *aquis communautaire* binding for the Union as a whole. The result will be the creation of several parallel legal systems, binding only on a limited number of Member States. [10] That also has an effect on the idea of a European citizenship based in Article 17 EC. If one aim of the European Union should be the establishment of a Europe of the citizens then it is counter-productive to invoke the former, more nation-state oriented concept of the Community. Doctrine emphasizes the importance of cohesion of the European citizenry based on shared values, shared understandings of rights and the law of the European Union in general. Fischer himself promotes the "highly integrative force" of common laws. But this could not be translated into action by calling for expansion of enhanced cooperation, therefore increased inter-governmentalisation, at the same time. [11] Expansion of enhanced cooperation in the sense that Fischer described it will then result in a divided European Union. The formation of a "center of gravity" and in addition the conclusion of a new framework treaty will generate two groups of Member States, two groups of Europeans. The two parts, the *avant garde* and the non-*avant garde*, would then be based on different Treaties and have different institutions. This will mean the end of the European Union as a union and the beginning of a hegemony of the states assembled at the "center of gravity." Indeed, creating the desired "center of gravity" could not be called "going back to the future" but must be called "going back to the past." **D.** **Conclusion** [12] It is preferable to illuminate the idea of a community or union of members with equal rights. Within the bounds of possibility the objective of European integration must be to proceed in common. It is beyond doubt that there has been and will ever be a group of member states forcing European integration in their desired direction. But this must not lead to the termination of the European consensus of a union of states and citizens with equal rights by the establishment of some kind of "*avant garde*." Otherwise mere functionalism seems to be the ruling force in the European Union. With that the honorable idea of a united Europe in peace and freedom gives way to the newly strengthened interests of some nation-states. If the enlarged European Union seems this unbearable in view of joint action as a union, then one should better immediately give up the idea of a united continent of Europe than abusing this idea as a pretext for reinforced pursuit of hegemonic interests under the guise of the European Union.

(*) Both texts are printed in: Christian Joerges/Yves Mény/J.H.H. Weiler, WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY ? - RESPONSES TO JOSCHKA FISCHER, 2000.

(1) Article 43 EU must be read with Article 40 EU and Article 11 EC.

(2) For an in-depth description, see Filip Tuytschaever, DIFFERENTIATION IN EUROPEAN UNION LAW 49 (1999).

(3) Stefan Griller/Dimitri P. Droutsas/Gerda Falkner/Katrin Forgó/Michael Netwich, THE TREATY OF AMSTERDAM - FACTS, ANALYSIS, PROSPECTS 207 (2000).

(4) Protocol (No 25) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, as annexed to the Treaty of Amsterdam.

(5) See the preambles of the Treaty establishing the European Community and the Treaty on European Union.

(6) Manfred Zuleeg, *What holds a nation together ? Cohesion and Democracy in the United States and in the European Union*, 45 *American Journal of Comparative Law* 505-506 (1997); Joseph H.H. Weiler, *The Reformation of European Constitutionalism*, in Karl F. Kreuzer/Dieter H. Scheuing/Ulrich Sieber (Eds.) *DIE EUROPÄISIERUNG DER MITGLIEDSTAATLICHEN RECHTSORDNUNGEN DER EUROPÄISCHEN UNION*, page 9-35 (27 f.).