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**CONFERENCE OF THE
REPRESENTATIVES OF
THE GOVERNMENTS OF THE
MEMBER STATES**

Brussels, 4 October 2000 (OR. de/it)

CONFER 4783/00 LIMITE

TRANSMISSION NOTE

From: M. Gunter PLEUGER, Representative of the Federal Republic of Germany and
M. Silvio FAGIOLO, Representative of Italy
To: Pierre VIMONT, President of the Group of Personal Representatives to the
Intergovernmental Conference
Subject: **IGC 2000:** Enhanced cooperation- Position paper from Germany and Italy

Sir,

You will find attached a position paper on reinforced cooperations and draft amendments to the relevant articles of the Treaties, submitted jointly to the Intergovernmental Conference by the German and Italian Delegations.

We would be grateful if, in connection with our discussions on this topic, you would arrange for the circulation as official document of the Intergovernmental Conference.

(s.) Gunter Pleuger (s.) Silvio Fagiolo

Enhanced cooperation

I.

1. In the chairman's conclusions of the European Council in Feira, the mandate of the Inter-Governmental Conference was extended to the issue of enhanced cooperation.

Already in its opinion according to Article 48 of January 2000, the European Commission stated that "the character of the next round of accessions will create a need to creatively fashion" the existing rules on enhanced cooperation "in an operative manner". The "more heterogeneous shape of an enlarged Union should not keep those Member states who intend to use the institutional framework of the Union for a closer cooperation from doing so".

In its resolution of April 2000, the European Parliament also demanded that "enhanced cooperation should become a gravitational force in order to allow the Union to achieve progress".

2. On 30 August 2000, the Presidency put forward a paper with detailed proposals on enhanced cooperation (CONFER 4766/00). Belgium had already introduced a paper on this topic on 28 August 2000 (CONFER 4765/00). Furthermore, on 14 July 2000, Spain introduced proposals specifically on enhanced cooperation in the second pillar CONFER 4760/00).

Germany and Italy welcome these contributions and support the active efforts by the Presidency for progress in the discussion of enhanced cooperation. With a view to promoting discussion further, they hereby present a joint contribution which is divided into the present explanatory paper and draft articles for revised treaty provisions.

II.

Italy and Germany share the goal to make enhanced cooperation a (in the words of the European Parliament) "gravitational force in order to allow the Union to achieve progress". This is based on the following main considerations:

- In a Union with up to 28 Members, it will become indispensable that those Member states willing to move ahead on the path of integration are enabled to do so, with full respect for the common institutional framework and the existing rules and regulations. It should be possible that these Member States can form an open, functional avantgarde which serves the process of integration and is fully open to future participation by further Member states.
- The present conditions for the application of enhanced cooperation, which were drafted in Amsterdam at the very last moment, practically prevent the use of this instrument.
- The Union's more recent history shows that enhanced cooperation, if it cannot take place within an institutional framework, will do so outside that framework. In such a case, the EU institutions such as the European Parliament and the Commission cannot take their rightful place, what should be avoided. Furthermore, it would be more difficult to reintegrate it into the treaty context and to ensure access for those Member states who lacked the ability or the wish to participate from the very beginning.
- Germany and Italy reject the notion of a "Europe à la carte". The instrument of enhanced cooperation must under all circumstances be used in a selective and politically responsible manner. Enhanced cooperation should not lead to uncoordinated and random parallel initiatives of divergent groups of Member states. In this sense, the goal is not so much "enhanced cooperation" but "enhanced integration".
- The use of enhanced cooperation must serve the common goal of more rapid and increased integration. The acquis of the Union and its institutional framework must not be compromised by the enhanced cooperation.

– Enhanced cooperation has its role to play also in the field of common foreign and security policy. A self-evident requirement in this context is the safeguarding of the cohesion and coherence of the common foreign and security policy. It is therefore imperative that an enhanced cooperation may not run counter to the "acquis" of policies already formulated within the CFSP. Italy and Germany consider that in political practice, enhanced cooperation will probably have greater importance in the area of European security and defence policy and in the implementation of established foreign policy positions. However, they suggest to avoid legally restricting enhanced cooperation to such probable cases, as was equally avoided when drafting the present treaty provisions for the first and third pillar.

III.

On the basis of these considerations, Germany and Italy suggest amendments to the Treaties. These amendments build on the existing structure of the treaty provisions and safeguards and merely aim at the changes necessary to make enhanced cooperation a viable political instrument in all three pillars:

1. Italy and Germany consider it a key element of any revision of the treaty rules on enhanced cooperation to abolish the possibility of a single Member state to block enhanced cooperation ("If a Member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken."). This provision is one of the main reasons why enhanced cooperation within the treaty framework, under the existing treaty provisions, is not yet a politically realistic option. The concept of "important reasons of national policy" is vague and puts no limits to any Member state's political discretion to hinder other Member states from moving further ahead towards integration. In the firm opinion of Germany and Italy, an authorisation should be adopted by the Council by qualified majority, without additional procedural obstacles.

2. In a Union of up to 28 members, the requirement of the participation of "at least a majority of Member states" concerned (Article 43 para. 1 d TEU) needs adjustment. Italy and Germany suggest that the quorum be maintained as it exists today in real terms, i.e. eight Member states, or at best be set at a third of Member states. In the second pillar and in the specific case that a closer cooperation serves to implement a common strategy, joint action or common position, they suggest that the minimum number of Member States concerned be lowered to [five].

– Germany and Italy further propose to delete Article 43 para. 1 c TEU ("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"). This provision creates the risk of juridical disputes on which efforts were required to establish that the Treaty objectives could not be attained without the use of enhanced cooperation, a question largely a matter of political discretion.

– They also suggest to delete the vague term "interests" in Article 43 para. 1 f TEU ("does not affect the competences, rights, obligations and interests of those Member states which do not participate therein"), basically for analogous reasons as in the above paragraph.

– In Article 43 para. 1 a TEU, on the other hand, Italy and Germany propose to add the phrase "aimed ... at promoting its integration" as an additional safeguard against a proliferation of cooperations detrimental to the process of integration of the Union as a whole.

– Finally, they suggest to add to Article 43 TEU a provision according to which Member States participating in a closer cooperation will encourage the participation of additional Member States wishing to join the cooperation.

3. In order to establish the possibility of enhanced cooperation also in the second pillar, Germany and Italy propose the insertion of an Article 27 bis TEU, which generally follows the model of Articles 40 TEU and 11 TEC with the general modifications outlined above, but contains some additional modifications reflective of specific features of the second pillar:

– Article 27 bis para. 1 a) and b) contains clauses aimed at ensuring the cohesion of the common foreign and security policy.

– Para. 2, second subpara. (requirement of unanimity in case of a negative opinion of the Commission) gives the Commission the role of a guardian of EU cohesion which it already has in the first and third pillar, but adapted to the specific character of the common foreign and security policy.

– Para. 2, third subpara. lowers the quorum for enhanced cooperation in the case that it serves to implement a common strategy, joint action or common position.

– Para. 4 ensures that the High Representative for the common foreign and security policy can play his role also in the context of enhanced cooperation. Part of his role is to keep the European Parliament informed on the development of the closer cooperation pursuant to Article 45 TEU.

4. In Article 11 TEC, Italy and Germany also propose:

– to replace the phrase in para. 1 b "does not affect Community policies, actions and programmes" by "does not cause any prejudice". The actual precondition contained in para. 1 b, if taken seriously, is virtually impossible to fulfill.

– to delete para. 1 c ("does not concern the citizenship of the Union or discriminate between nationals of Member states"). This restriction introduced in the last negotiation phase of the Amsterdam IGC prevents a group of Member states to develop Articles 17 to 22 TEC further, e.g. by granting the right to vote not only in local elections, but also in country-wide political elections. A safeguard against falling behind the present rules on the citizenship of the Union is contained in Article 43 para. 1 a TEU as suggested by Germany and Italy ("aimed ... at promoting its integration"), in addition to the main safeguard already provided for in the existing Art. 43 para. 1 e TEU.

– the suggested addition to para. 1 d ("as provided for in particular by Article 3") gives an element of greater precision.

ANNEX II

Draft amendments to the Treaties

Treaty on the European Union

ARTICLE 27 bis

5. Member States which intend to establish closer cooperation between themselves in the common foreign and security policy may be authorised, subject to Articles 43 and 44, to make use of the institutions, procedures and mechanisms laid down by the Treaties provided that the proposed cooperation:

a) respects the powers of the European Communities, as well as the objectives set for the CFSP by this Title and serves the policies and strategies defined in the common foreign and security policy;

b) aims to promote the identity of the Union as an actor in foreign and security policy and does not impair its effectiveness as a cohesive force in international relations.

6. The authorisation referred to in paragraph 1 shall be granted by the Council acting by qualified majority at the request of the Member States concerned and after inviting the Commission and the Secretary-General of the Council, High Representative for the common and security policy to present their opinions; the request shall also be forwarded to the European Parliament. When the Commission expresses the opinion that a proposed closer cooperation in the CFSP is not advisable for the reasons contained in Article 43 paragraph 1 a) or b), the authorisation referred to in paragraph 1 shall be granted by unanimity. In that case, abstentions by members present in person or represented shall not prevent the adoption of the said authorisation. When a closer cooperation is proposed in order to implement a common strategy, joint action or common position, the minimum number of concerned Member States can be [five]. The votes of the members of the Council shall be weighted in accordance with Article 205 (2) of the Treaty establishing the European Community.

7. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification. Within four months of the date of that notification the Council shall decide on the request and on possible specific arrangements as it may deem necessary. This decision shall be deemed to be taken unless the Council, acting by qualified majority, decides to hold it in abeyance; in this case, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this paragraph, the Council shall act under the conditions set out in Article 44.

8. The Secretary-General of the Council, High Representative for the common and security policy shall be fully associated with the closer cooperation. He shall keep the European Parliament regularly informed on the development of the closer cooperation pursuant to Article 45.

9. The provisions of Articles 11 to 28 shall apply to the closer cooperation provided for by this Article, save as otherwise provided for in this Article and Articles 43 and 44.

Title VI

Provisions on police and judicial cooperation in criminal matters

Article 40

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles 43 and 44, to make use of the institutions, procedures and mechanisms laid down by the Treaties provided that the cooperation proposed:

- a) respects the powers of the European community, and the objectives laid down by this Title;
- b) has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice.

2. The authorisation referred to in paragraph 1 shall be granted by the Council, acting by a qualified majority at the request of the Member States concerned and after inviting the Commission to present its opinion; the request shall also be forwarded to the European Parliament.

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

The votes of the members of the Council shall be weighted in accordance with this Article 205 (2) of the Treaty establishing the European Community. For their adoption, decisions shall require at least 62 votes in favour, cast by at least 10 members.

3. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification, possibly accompanied by a recommendation for such specific arrangements as it may deem necessary for that Member State to become a party to the cooperation in question. Within four months of the date of that notification, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this paragraph, the Council shall act under the conditions set out in Article

4. The provisions of Articles 29 to 41 shall apply to the closer cooperation provided for by this Article, save as otherwise provided for in this Article and in Articles 43 and 44.

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

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

Draft amendment to Article 40

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles 43 and 44, to make use of the institutions, procedures and mechanisms laid down by the Treaties provided that the cooperation proposed:

- c) respects the powers of the European Community, and the objectives laid down by this Title;
- d) has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice

2. The authorisation referred to in paragraph I shall be granted by the Council, acting by a qualified majority at the request of the Member States concerned and after inviting the Commission to present its opinion; the request shall also be forwarded to the European Parliament.

(sentence deleted)

The votes of the members of the Council shall be weighted in accordance with Article 205(2) of the Treaty establishing the European Community. **(sentence deleted)**

3. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the

Council within three months of receipt of that notification, possibly accompanied by a recommendation for

such specific arrangements as it may deem necessary for that Member State to become a party of the cooperation in question. Within four months of the date of that notification, the Council shall decide on the request and on such specific arrangements as it may deem necessary. The decision shall be deemed to be taken unless the Council, acting by a qualified majority, decides to hold it in abeyance; in this case, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this paragraph, the Council shall act under the conditions set out in Article 44.

4. The provisions of Articles 29 to 41 shall apply to the closer cooperation provided for by this Article, save as otherwise provided for in this Article and in Articles 43 and 44.

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

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

TITLE VII

PROVISIONS ON CLOSER COOPERATION

Article 43

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

- e) is aimed at furthering the objectives on the Union and at protecting and serving its interests;
- f) respects the principles of the said Treaties and the single institutional framework of the Union;
- g) 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;
- h) concerns at least a majority of member States;
- i) does not affect the 'acquis communautaire' and the measures adopted under the other provisions of the said Treaties;
- j) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
- k) 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;
- l) 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.

Draft amendment to Articles 43

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 provided that the cooperation:

- m) is aimed at furthering the objectives of the Union, **at promoting its integration** and at protecting and serving its interests;
- n) respects the principles of the said Treaties and the single institutional framework of the Union;
- o) (sentence deleted);**
- p) concerns at least **eight (word deleted)** Member States;
- q) does not affect the 'acquis communautaire' and the measures adopted under the other provisions of the said Treaties;
- r) does not affect the competences, rights **and** obligations **(word deleted)** of those Member States which do not participate therein;

s) 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;

t) 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.

3. Member States participating in a closer cooperation shall encourage the participation of Member States wishing to become a party to that cooperation.

Treaty establishing the European Community

Article 11

1. Member States which intend to establish closer cooperation between themselves may be authorised, 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:

u) does not concern areas which fall within the exclusive competence of the Community;

v) does not affect Community policies, actions or programmes;

w) does not concern the citizenship of the Union or discriminate between nationals of Member States;

x) remains within the limits of the powers conferred upon the Community by this Treaty, and

y) does not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter.

2. The authorisation referred to in paragraph 1 shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

If a member of the Council declares that, for important and stated reasons of national policy, it intends to propose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the Council, meeting in the composition of the Heads of State or Government, for decision by unanimity.

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

3. Any Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification. Within four months of the date of that notification, the Commission shall decide on it and on such specific arrangements as it may seem necessary.

4. The acts and decisions necessary for the implementation of cooperation activities shall be subject to all the relevant provisions of this Treaty, save as otherwise provided for in this Article and in Articles 43 and 44 of the Treaty on European Union.

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

Draft amendment to Articles 11

1. Member States which intend to establish closer cooperation between themselves may be authorised, 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:

z) does not concern areas which fall within the exclusive competence of the Community;

aa) does not **cause any prejudice** to the Community policies, actions or programmes;

bb) (Sentence deleted);

cc) remains within the limits of the powers conferred upon the Community by this Treaty, **as provided for in particular by Article 3;**

dd) does not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter.

2. The authorisation referred to in paragraph 1 shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

(sentence deleted)

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

3. **Any** Member State which wishes to become a party to cooperation set up in accordance with this Article shall notify its intention to the Council and to the Commission, which shall give an opinion to the Council within three months of receipt of that notification. Within four months of the date of that notification, the Commission shall decide on it and on such specific arrangements as it may seem necessary.

4. The acts and decisions necessary for the implementation of cooperation activities shall be subject to all the relevant provisions of this Treaty, save as otherwise provided for in this Article and in Articles 43 and 44 of the Treaty on European Union.

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