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EDITORIAL COMMENTS

What do we want? "Flexibility! Sort-of ..." When do we want it? "Now! Maybe ..."

When the British Prime Minister delivered his much-hyped speech on the future of Europe, in January 2013,[1] one of the main principles he deemed necessary to make the EU fit for the 21st century was "flexibility" – by which he meant structures that could accommodate the diversity of the Member States.[2] Just as predictable as the British calls for more variable geometry, were the reactions of various continental counterparts: thus, the French Foreign Minister was almost immediately at pains to rule out any prospect of a "Europe à la carte";[3] the same point was reiterated by the French President in a speech to the European Parliament soon after.[4] Such evident suspicions about current British intentions towards the Union are entirely understandable.[5] Yet they also overlook the fact that Cameron actually said little specific about what he had in mind when he called for greater flexibility. Of course, such a lack of detail is unsurprising for a speech whose rhetoric, however softened so as not to offend outright the sensibilities of its broader audiences, was nevertheless intended primarily for the consumption of the Prime Minister's legion of backbench Europhobes. Be that as it may, it still makes the job of engaging with the British position decidedly more difficult, when we have little idea of the concrete policy areas he considered ripe for greater flexibility, or of the legal mechanisms he believed appropriate for achieving it. Nor was there much acknowledgement that flexibility (in various guises) has already been a familiar and increasingly important element of the Union legal system for a rather long time – so we are left unsure as to how or why the current range of tools for accommodating Member State diversity should somehow be considered *unfit* for the 21st century.

That said, there is in fact an odd resonance between the British call for greater flexibility and various important developments in the Union legal

1. On 23 Jan. 2013 (to be precise).
2. The other four main principles were: competitiveness; that power must be able to flow back to Member States (not just away from them); democratic accountability; and fairness.
3. As reported on <www.bbc.co.uk/news> (also on 23 Jan. 2013).
4. On 5 Feb. 2013.
5. One might also recall at this point the Conservative Party's preference for exercising the UK's right to repudiate old "Third Pillar" criminal cooperation measures (as provided for under Art 10 of Protocol No 36) – a step which would significantly reinforce the UK's already "flexible relationship" to the AFSJ.

system (even if that resonance is more a matter of coincidence than of design). If necessity is the mother of invention, then flexibility has been one of the most noteworthy of its recent offspring. Indeed, both within and outside the framework of the Treaties, there are signs that the pressure to make real progress with crucial regulatory challenges is overcoming some of the traditional resistance, within the Union institutions and among many Member States alike, against accommodating (let alone advocating) greater flexibility. The question is: are these developments merely the expedient product of a particular historical moment; or might they signal a real and lasting change in the role that flexibility plays within the Union?

Flexibility within the framework of the Treaties

The Treaties have long made provision for enacting Union legislation which is intended to apply, not to all of the Member States, but only to a select group of countries. The immense challenge of tackling the financial and debt crises afflicting certain eurozone countries has inevitably prompted increased recourse to one such mechanism for facilitating greater flexibility within the Union legal order: Article 136 TFEU on reinforced budgetary discipline and economic policy coordination among the eurostates, which has played a central role in many of the recent governance reforms, including the "6 pack" and soon also the "2 pack".[6] Similarly, Article 127(6) TFEU on tasking the European Central Bank with the prudential supervision of credit and other financial institutions now provides the legal basis for the main "banking union" proposals, with their careful distinctions between participating (euro) countries and the remaining Member States.[7]

However, on paper at least, the main system for creating variable geometry by means of secondary Union legislation is contained in the enhanced cooperation regime. As first introduced by the Amsterdam Treaty, enhanced cooperation was subject to various substantive and procedural restrictions which undoubtedly made it very difficult to launch in practice. However, the Lisbon Treaty extensively reformed the enhanced cooperation regime – and did so quite conscious of the possibility that enhanced cooperation should not just provide a means to overcome the odd national veto within Council, by excluding the objecting Member State from having to participate in legislation it could not agree with; but should be capable of growing into a large-scale and relatively stable phenomenon, akin to the legal arrangements applicable to the

6. Council and Parliament reached a "trilogue" agreement on the Commission's proposals in February 2013.

7. See COM(2012)511 and COM(2012)512. Also: COM(2012)510 Final.

euro itself or the Area of Freedom, Security and Justice.[8] Enhanced cooperation thus holds out the prospect that some Member States may refrain from greater integration across entire policy sectors, and do so on a permanent or semi-permanent basis, safe in the knowledge that the Treaties expressly require every enhanced cooperation initiative to balance the rights and interests of both participating and non-participating countries.[9]

There are tentative signs that those Lisbon reforms are now beginning to bear fruit. Enhanced cooperation was authorized for the first time in July 2010, so as to permit a sizeable group of Member States to pursue joint measures in the field of cross-border divorce and legal separation.[10] Much more recently, the Council granted authorization to proceed with two more politically sensitive and legally complex enhanced cooperation regimes: one in March 2011, for the creation of a unified patent protection;[11] the other in January 2013, as regards the introduction of a financial transactions tax.[12]

Three enhanced cooperations in as many years hardly heralds the start of a revolution. But these developments are nonetheless significant and the possibility remains that we are now witnessing the slow awakening of a system which will come to play a much more central role within the Union legal system. Indeed, the door may well have been opened for variable geometry to become a matter, no longer either of simply regulating the eurozone when it comes to the conduct of essentially eurozone business, or of managing the opt-outs negotiated by a small number of Member States from the Area of Freedom, Security and Justice; but rather of different and changing groupings of Member States picking and choosing the limits of their participation in all manner of individual legislative initiatives or even broader policy fields across a wide range of Union business. Viewed from that perspective, one can sense the resonance with Cameron's speech. Indeed, it is perhaps puzzling that the UK has not previously acted as a standard-bearer for the "normalization" of enhanced cooperation, since in many ways it already provides a model for the sort of controlled flexibility within the EU framework that many UK politicians seem strongly drawn to by nature.

The explanations for enhanced cooperation's marginal status have surely been essentially political: many Member States seem deeply wary of the dynamics such fast-and-easy variable geometry might unleash, and especially of being one of the countries left behind in important policy initiatives, and

8. See, in particular, CONV 723/03.

9. See, in particular, Art. 327 TFEU.

10. See Council Decision 2010/405, O.J. 2010, L 189/12. And now Regulation 1259/2010, O.J. 2010, L 343/10.

11. See Council Decision 2011/167, O.J. 2011, L 76/53. And now Regulation 1257/2012, O.J. 2012, L 361/1 and Regulation 1260/2012, O.J. 2012, L 361/89.

12. See Council Decision 2013/52, O.J. 2012, L 22/11. And now COM(2013)71 Final.

have thus seemed prepared to test its implementation only gradually. But the explanation may also be partly legal: even despite the liberalization under Lisbon, several of the key requirements for engaging in enhanced cooperation remain decidedly vague: for example, what it means for enhanced cooperation to be a "last resort" because there is no prospect of common action by all the Member States within a reasonable period;[13] or when exactly enhanced cooperation would have the (prohibited) effect of undermining the internal market.[14]

After all, some commentators would argue that almost any regulatory division between groups of Member States could have adverse implications for free movement or the conditions of competition – thus effectively equating the test for judging whether or not a proposed enhanced cooperation would be unlawful, with the rather undemanding conditions for triggering the possibility of Union harmonization under Article 114 TFEU.[15] Even without going that far, there was surely a widespread assumption that enhanced cooperation was intended primarily for use in social rather than economic policy fields (precisely on issues such as cross-border cooperation in the field of family law) and yet it is striking that the two most recent enhanced cooperation decisions (on unified patent protection and financial transaction taxes) concern issues closely connected to cross-border economic activity and thus the operation of the internal market. The internal market is no stranger to a degree of flexibility in the design of otherwise common Union rules – think of the new approach to technical harmonization, or the use of minimum harmonization clauses – but are the recent enhanced cooperation authorizations a sign of growing institutional acceptance that even the enactment of genuinely non-common Union rules, directed squarely towards economic activities, should not be treated as inherently incompatible with the very idea of an internal market?

The recent ruling of the European Court of Justice in *Spain and Italy* v. *Council*, concerning the legality of the Council's authorization to proceed with an enhanced cooperation in the field of unified patent protection, provides important judicial clarification of the constitutional framework for engaging in enhanced cooperation.[16] It is unsurprising to find that the Court rejected an argument that recourse to enhanced cooperation in respect of a legal basis requiring unanimity among the Member States should almost per se be considered a "misuse of powers" on the grounds that such an enhanced

13. Art. 20(2) TEU.
14. Art. 326 TFEU.
15. Under Case C-376/98, *Germany* v. *Parliament and Council,* [2000] ECR I-8419 and its progeny.
16. Joined Cases C-274 & 295/11, *Spain and Italy* v. *Council,* judgment of 16 April 2013, nyr. See also A.G. Bot's Opinion of 11 Dec. 2012.

cooperation seeks to circumvent the Treaty's ordinary voting requirements. More interesting is the Court's assertion that the "last resort" requirement is a particularly important one, which should be considered satisfied only when it is impossible to adopt common legislation within the foreseeable future – though the Court also signalled that such an assessment is essentially a political choice for the Council, amenable only to a limited degree of external judicial scrutiny, i.e. to ensure that the Council has carefully and impartially examined the relevant evidence and provided adequate reasons for its conclusions. It is also significant that the Court seemed prepared to accept that the functioning of the internal market must reconcile itself to the sort of regulatory flexibility which will simply be inherent in many enhanced cooperation initiatives – a point that may be further developed in the context of the UK's planned legal challenge to the financial transactions tax enhanced cooperation.[17] Such rulings might well remove whatever legal inhibitions continue to dissuade the Member States from viewing enhanced cooperation as a standard tool of Union policymaking – even when it comes to devising differentiated regulatory responses to issues intimately connected with the internal market itself.

Flexibility outside the framework of the Treaties

As well as variable geometry spreading its wings within the Treaties, recent developments have again highlighted the willingness of the Member States to enact rules which will not apply to everyone, but to do so this time altogether outside the Union framework (even if the resulting rules are closely related to Union law and even anticipated to be integrated into the Union legal system at some stage in the future). Again, such extra-EU variable geometry is far from novel: one need only consider the Schengen Agreement or the Prüm Convention. But the international agreement which is most recent and most relevant is the Treaty on Stability, Coordination and Governance signed in 2012 by 25 of the Member States, after the UK vetoed any prospect of incorporating the Franco-German "fiscal compact" into the Union treaties themselves.[18] Yet even having vetoed any treaty amendments, the UK still objected to the new international agreement, primarily on the grounds that it would infringe Union law: in the first place, by providing for the participation of the Commission in various non-Union activities; and in the second place, by

17. The UK's decision to initiate legal action was confirmed by the Chancellor of the Exchequer on 19 April 2013 during a trip to Washington.

18. At the European Council meeting in December 2011.

providing for the European Court of Justice to exercise its jurisdiction over various aspects of the fiscal compact.[19]

The legality of the TSCG itself has not yet been tested in the courts. However, the European Court of Justice's *Pringle* ruling has already provided us with the likely answers.[20] Although this dispute concerned the compatibility of the European Stability Mechanism Treaty with Union law, the ruling addressed some of the same points of broader constitutional principle which had coloured the UK's objections to the TSCG. In particular, when it comes to certain Member States requesting a Union institution (such as the Commission) to exercise various non-Union functions on their behalf, *Pringle* offers a clear confirmation of that possibility as a matter of Union law. According to the Court, "the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union . . . provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[21] What remains unclear is whether that proposition holds true also where one Member State positively objects to a Union institution being co-opted into extra-Union functions – though even in the case of the TSCG, the UK eventually chose to reserve its position rather than object outright.[22] In addition, when it comes to certain Member States conferring jurisdiction upon the European Court of Justice over disputes arising under an international agreement to which those Member States are party, *Pringle* adopts a broad interpretation of the Court's special jurisdiction under Article 273 TFEU: for example, affirming the possibility of consenting to jurisdiction over a pre-defined category of potential future disputes (not just submitting an actual current dispute to the Court for resolution); and construing widely the concept of international agreements "related to" the subject matter of the Treaties (even if they are not formally part of Union law per se).

Altogether, *Pringle* thus suggests that many of the legal objections originally raised against the TSCG were not well-founded. That in turn opens up the prospect that international agreements, separate from but closely

19. A position backed, if anything even more strongly, by the European Scrutiny Committee of the House of Commons: see Sixty-Second Report of Session 2010–2012, which explores in detail the legal issues surrounding the compatibility of the TSCG with EU law.

20. Case C-370/12, *Pringle,* judgment of 27 Nov. 2102. nyr. See more fully annotation by de Witte and Beukers in this *Review*.

21. At para 158 of the judgment.

22. Letter to Uwe Corsepius, Secretary-General of the Council of the European Union, from Jon Cunliffe CB, the UK's Permanent Representative to the European Union (22 Feb. 2012) – full text reproduced in the European Scrutiny Committee of the House of Commons' Sixty-Second Report of Session 2010–2012 (Ev74).

related to and even drawing upon the Union Treaties themselves, can continue to act as an effective legal vehicle for greater variable geometry within the broader sphere of European integration.

However, *Pringle* did not answer one important question here: how far does the possibility of engaging in enhanced cooperation within the framework of the Treaties positively oblige the Member States to refrain from seeking extra-Union solutions to their problems? The Court in *Pringle* provided a minimalist answer to this important question: since the Treaties did not contain any specific Union competence to establish a permanent stability mechanism, so neither was there any possibility of creating the ESM through enhanced cooperation, and the latter framework could not therefore impliedly prevent the Member States from doing so under ordinary international law.[23] Was that minimalist answer meant to suggest, *a contrario*, that enhanced cooperation would prevent recourse to extra-Union instruments in situations where Union competence was indeed provided for under the Treaties? Some would see that as a rather unlikely interpretation: surely if the Treaties intended enhanced cooperation to be more than a voluntary framework, which has instead compulsorily stripped the Member States of their inherent sovereign power to contract inter se on the international plane, the Treaties should have spelled out that rather far-reaching legal consequence much more explicitly? But the question remains very much open for further debate and it would be perfectly possible to present a different understanding.

In any event, the experience of the TSCG surely illustrates vividly why extra-Union flexibility is not necessarily a desirable model. After all, for countries such as the UK which stood aside from the new international agreement, there was clearly a loss of control and indeed influence. But the same could prove true also for the Union institutions (including the Commission and the European Parliament): as agenda-setting and indeed decision-making power becomes more focused on primarily intergovernmental fora, there is the real risk of reform packages being presented to the broader Union almost as a *fait accompli*.[24] At least flexibility within the Union framework, through the enhanced cooperation provisions, means that all Member States can be closely involved in the policy process – with both specific protections for the benefit of non-participating countries and the greater participation of institutions such as the Commission and European Parliament.

23. See *Pringle,* cited *supra* note 20, paras. 166–169.

24. Similar concerns have been expressed repeatedly, and as regards different legal and policy contexts, by the European Union Committee of the House of Lords: consider, e.g. *Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm* (40th Report of Session 2005/2006); *After Heiligendamm: doors ajar at Stratford-upon-Avon* (5th Report of Session 2006/2007).

The institutional challenges of greater flexibility

An expansion in recourse to flexible integration, if that is indeed what we are now witnessing, might soon focus greater attention on various institutional issues which have long been noted in the scholarship but perhaps kept only on a simmer because they felt more academic than real. For example: we all know that Member States not participating in an enhanced cooperation can debate but do not vote within the Council; though are we really comfortable with a situation in which MEPs from non-participating Member States – who may well add up to a large majority in the European Parliament – do still have a full say even within an up-and-running enhanced cooperation system? And did anyone think through the consequences of greater flexibility for the national parliaments' new policing role in relation to the principle of subsidiarity? After all, the Treaties contain no express exceptions from the full operation of the "yellow card" system even in situations of flexibility, such as restricting the power to object on subsidiarity grounds only to national parliaments from Member States actually participating in an up-and-running enhanced cooperation.

Recent developments highlight another area for enquiry and concern: the possible emergence of a eurozone "core" exercising dominant political influence within the European Council and acting as a powerful legal bloc also within the Council – particularly if those Member States begin to vote together not just on issues which are already or imminently the subject of variable geometry, but also as regards Union policies that undoubtedly remain matters of common concern and of Union-wide legal application. For some, the TSCG already hints vaguely yet worryingly in that direction.[25] And the prospect of an accelerating eurozone juggernaut which marginalizes the influence of the remaining Member States across ever more fields of Union activity continues to be a major political preoccupation for countries such as UK. Of course, there are various reasons why one should not assume that greater flexibility will make such a serious distortion of the Union's normal institutional dynamics somehow inevitable: there is no reason to believe that all the eurozone States will always share common interests, nor conversely that their interests will always be antagonistic to those of the other Member States; one should not overlook the fact that many important legal bases remain subject to

25. In particular, Art. 7 TSCG on the commitment by eurozone Member States to vote in favour of certain Commission proposals / recommendations within the framework of the excessive deficit procedure.

unanimity; and of course, even as regards legal bases governed by QMV, there remains the ex ante input of the Commission and European Parliament as well as the ex post review of the European Court of Justice. But the very prospect is a useful reminder that the UK's call for greater flexibility comes at a potentially high price…