



**DIFFERENTIATED
INTEGRATION IN THE EU**
FROM THE INSIDE LOOKING OUT

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STEVEN BLOCKMANS (ED.)

DIFFERENTIATED INTEGRATION IN THE EU
FROM THE INSIDE LOOKING OUT

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1. INTRODUCTION

*STEVEN BLOCKMANS**

A kaleidoscopic picture

Accommodating ‘differentiation’ in EU law and policy is not a new phenomenon but rather is a concept that has been integral to European integration since the Treaty of Rome. The concept is to be generally understood as:

... a model of integration strategies that try to reconcile heterogeneity within the European Union and allow different groupings of Member States to pursue an array of public policies with different procedural and institutional arrangements.¹

While ‘flexibility’ is considered a convenience to accommodate member states’ differing socio-economic and political interests in an expanding European Union, three manifestations of flexibility call into question the constitutional, institutional and instrumental boundaries of this differentiation in an organisation that is based on a special legal order with common institutions and common principles. They take the form of:

- ‘opt-outs’, e.g. from the Area of Freedom, Security and Justice (AFSJ) and the single currency,
- ‘enhanced cooperation’, e.g. on divorce law and the EU patent and
- cooperation between member states outside the EU legal framework, e.g. the Euro-plus Pact and the Treaty on Stability, Coordination and Governance (TSCG).

The sovereign debt crisis has led to a thorough re-assessment of European integration as a project. For the political leaders of some member states the successive creation of a fiscal, economic and political union based on federal principles is the way forward.² For others the time has come to renegotiate their

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¹ A. Stubb (1996), “A Categorization of Differentiated Integration”, *Journal of Common Market Studies* 34: 283.

² See Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal, Spain, 17 September 2012 (www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile/171844/120918-Abschlussbericht-Zukunftsgruppe.pdf).

relationship to the European Union, either by moving further to the periphery of the ‘concentric circles’ that define the level of European integration (e.g. the United Kingdom) or by contemplating to opt back into common policies (e.g. Denmark). In *foro interno*, i.e. with respect to the organisation of its internal common policies, the EU is thus expected to develop further along variable geometric lines.

In foro externo, i.e. with respect to the EU’s external action, there are various kinds of differentiation, both of a structural and of an *ad hoc* nature, some of them the expression of the external dimension of internal differentiation, others of an external character per se. On the structural side, examples include the separation of the Common Foreign and Security Policy (CFSP) – formerly known as the ‘second pillar’ – from all the other external policies of the EU; opt-outs of the Common Security and Defence Policy (CSDP); the external dimension of the Area of Freedom, Security and Justice (AFSJ), e.g. readmission and visa facilitation agreements; and the external representation of the EU (and the eurozone) in international financial institutions. On the ad-hoc side, one can point to the notion of ‘interested member states’ in external migration policy and the possibility for members to constructively abstain from CFSP and CSDP decision-making. As a consequence of the specificity of EU external action, this area is often approached from the perspective of ‘coherence’: joining up different strands of external policies and delivering a single message, in spite of the underlying differentiation. Similarly, there is a perceived need to preserve ‘legal homogeneity’ in a wider European legal sphere.

Aims and structure of the study

The dual objective of this compilation is to analyse the various ways and means by which differentiation is given form in the realm of EU external action and to discuss some constitutional, institutional and instrumental challenges of a multi-speed, multi-tier European Union in the field of foreign policy.

Particular questions of a constitutional nature that will be addressed include how the differentiated ratification of foundational treaties impacts on the EU’s external relations; how variable geometry *in foro interno* impacts on the application of general principles of EU law such as coherence, the exclusive and shared nature of competences, increased complementarity of competences, the principle of conferral, legal homogeneity and the duty of sincere cooperation *in foro externo*; how constructive abstention and enhanced cooperation pan out in EU external action and whether these forms of differentiation could be taken further so as to create ad hoc and/or structural ‘avant garde’ groupings in ‘EU’ external relations.

From an institutional perspective, a number of queries may be relevant: whether a new institutional balance is required to accommodate internal diversity; whether new inter-institutional agreements and arrangements are likely to emerge and whether treaty change is required to accommodate them; which procedural arrangements will have to be made in order to safeguard respect for the general principles of EU law; and which settings serve the interests of different groupings of EU member states in EU external action.

Finally, in instrumental terms, new forms of ‘mixity’ and ‘hybridity’ can be observed, depending on the policy area at issue. What legal consequences do they produce? Will the use of (internal or external) soft law arrangements become even more widespread in EU external relations and, if so, how would this impact its effectiveness?

From the above it is clear that many questions arise from the many faces of differentiation³ and from the trend towards increased differentiation.⁴ This study does not claim to be able to answer all of them. As mentioned above, the focus here is very much on constitutional, institutional and instrumental differentiation in EU external action, an area that hitherto remained underexposed in literature.⁵ Yet, one can hardly embark on such a study without paying attention to differentiation within the European Union. Indeed, the international policies of the EU have traditionally been inspired by internal law and action. Hence the reference in the above to the famous Latin saying ‘*in foro interno, in foro externo*’ applied to the landmark ruling of the Court of Justice in the ERTA-case, in which the Court established that “where the Community implements a common internal policy, the member states are precluded from entering into any commitment in their external relations which might affect the common policy”; this ought to be left to the institutions.⁶ In view of increasingly contentious issues like labour migration, cyber security and the fight against terrorism, it is almost impossible to maintain the traditional division between internal and external policies of the EU. However, rather than trying to compose the mirror image of differentiation in internal policy areas in the external realm, this study will offer observations on the constitutional, institutional and instrumental challenges posed by new forms of economic governance in the EU, before discussing a variety of legal constructs and policy aspects of differentiation in EU external action.

Richard Corbett (Member of the Cabinet of Herman Van Rompuy, President of the European Council) kicks off the discussion by arguing that, other than on eurozone matters, the several instances of variable integration that now exist fall short of creating a ‘two-tier Europe’: there is no institutional separation. Moreover, he posits that we do not have an *avant garde* group but rather several different *arrières gardes*, always consisting of a small number of states, often just one or two but in a different configuration (even if some countries appear frequently) and often seen as an

³ See, e.g., G. De Búrca and J. Scott (eds) (2000), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Oxford: Hart Publishing; B. de Witte, D. Hanf and E. Vos (eds) (2001), *The Many Faces of Differentiation in EU Law*, Antwerp: Intersentia.

⁴ See, e.g., D. Curtin (1993), “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, *Common Market Law Review* 30: 17; and N. Walker (1998), “Sovereignty and Differentiated Integration in the European Union”, *European Law Journal* 4: 355-388.

⁵ For a few legal academic contributions, see, e.g., E. De Smijter (2001), “The External Relations of a Differentiated Community”, in B. de Witte, D. Hanf and E. Vos (eds), *The Many Faces of Differentiation in EU Law*, Antwerp: Intersentia, pp. 269-207; and M. Cremona (2008), “EU External Action in the JHA Domain: A Legal Perspective”, EUI Working Papers LAW No. 2008/24.

⁶ Commission vs. Council (ERTA) [1971] ECR 263.

anomaly, exception or temporary situation. In this context, he touches upon the future of UK relations with the EU. When extrapolating his views on differentiation, he suggests that the outside world still sees the EU as a “single entity with some complications”.

Vít Beneš and Mats Braun (Institute of International Relations, Prague) explore three scenarios of the future institutional development of the EU and the eurozone: i) a federal eurozone within an intergovernmental EU; ii) an intergovernmental eurozone within an intergovernmental EU; and iii) a consolidated EU. They argue that the original ethos that enabled the unprecedented EU enlargement, at a time when the original 12 member states were about to further deepen EU integration (EMU), has faded away. In their opinion, the conclusion of the intergovernmental treaties outside of the EU legal framework (e.g. the Fiscal Compact and the ESM Treaty) represents a serious blow to the original idea that both the deepening and widening of the EU can be reconciled.

The study then turns to the application of the EU’s constitutional principles as ‘housekeeping rules’ in external differentiation. **Ester Herlin-Karnell** (VU University Amsterdam) and **Theodore Konstadinides** (Surrey University) argue that although the EU’s heterogeneity as it emanates from differentiated integration can be manifested in various ways, the application of the principles of consistency, conferral and sincere cooperation offers an attractive solution to reconcile flexible arrangements in the EU with the basic constitutional framework of European integration. **Adam Łazowski** (Westminster University) explores the tension between ‘flexibility’ and ‘homogeneity’ and asks whether the consistent drive to export the EU legal order to third countries comes at too high a price for the homogeneity of EU law. In search of answers, he analyses the best and worst practices offered by the models devised to structure the EU’s relations with the European Economic Area, Switzerland, and the EU enlargement and European Neighbourhood Policy countries that have signed up to the Energy Community Treaty.

The compilation subsequently addresses issues of variable geometry in the EU’s external policies. **Steven Blockmans** (CEPS and University of Amsterdam) analyses differentiation in the EU’s Common Foreign and Security Policy (CFSP), an area which, in spite of its name, is not generally known for a widespread ‘common’ approach by the member states. He finds that, indeed, “under certain conditions, the specialisation and division of labour among the member states can strengthen both the effectiveness and legitimacy of the foreign policy of the EU”.⁷ Blockmans argues that the loopholes in unanimous decision-making in CFSP, i.e. the constructive abstention mechanism, qualified majority voting and the principle of enhanced cooperation, could be extended to allow the EU to pull its weight as a foreign policy actor. **Csaba Törő** (Hungarian Institute of International Affairs) seconds that motion in his exploration of the possibilities for flexibility in the adoption and implementation of Common Security and Defence Policy (CSDP) decisions. Beyond

⁷ The reference here is to an earlier CEPS publication by S. Keukeleire, “EU Core Groups – Specialisation and division of labour in EU foreign policy”, CEPS Working Document No. 252, October 2006.

the potential and occasional instances of flexibility in the operational dimension of CSDP, permanent structured co-operation (PESCO) is explained as a standing platform for the accommodation of diverse aspirations and capabilities of member states. Törő assesses the significance of PESCO as an institutionalised solution for defence policy differentiation within the Union.

Finally, attention is paid to differentiation in the external dimension of the Area of Freedom, Security and Justice (AFSJ). **Claudio Matera** (Asser Institute) asks whether there is perhaps too much ado about the opt-outs obtained by the UK, Ireland and Denmark in this area. He argues that while variable geometry poses institutional challenges to the operation of the AFSJ, the legal implications of such differentiation do not create substantive obstacles for the EU to be a global security actor. This argument resonates with **Juan Santos Vara** (University of Salamanca) and **Elaine Fahey** (University of Amsterdam), who explore the issue through a case study of opting in and out in EU-US relations. Contrary to widespread belief, they find that this kind variable geometry does not in recent years appear to have complicated the negotiation of international agreements dealing with criminal justice and policing measures. Even though it is perhaps too early to establish a clear picture of the UK's implication in the external dimension of the AFSJ, it seems clear that even the UK is committed to intensify international cooperation in these fields.

Semantic clarifications

It is fitting at this stage to map out the multiple ways in which 'differentiation' is expressed in EU law and policy. It is important to note that in spite of its appearance in many guises ('flexibility', 'à la carte integration', 'variable geometry', 'multi-speed EU' or 'two-tier Europe', to name but a few), differentiated integration manifested itself in overlapping conceptual schemes.⁸ In his seminal article in the *Journal of Common Market Studies*, Alexander Stubb has offered a classification of differentiated integration.⁹ However, the problem with classifications is that in reality the boundaries between several categories are often quite fuzzy. For instance, differentiation in EU law finds expression in several types of derogations granted to one or more member states. Such derogations can be found at the level of EU primary law in the highly visible abstentions of member states from the eurozone, the AFSJ and the Schengen *acquis*; the mini 'opt out' from *snus* (loose tobacco) for Sweden; 'emergency brakes' in the CFSP¹⁰ and the AFSJ vis-à-vis judicial cooperation in criminal matters;¹¹ and the transitional (not permanent) arrangements in the EU Accession treaties accompanying the last three waves of enlargement (2004, 2007 and 2013) with the aim to lessen the blow of the competitive pressures unleashed by free

⁸ For a recent graphic presentation, see V. Kreiling (2013), "Differentiated Integration in One Graphic", Notre Europe, Paris, 25 July (www.eng.notre-europe.eu/011-16563-Differentiated-Integration-in-one-graphic.html).

⁹ Stubb, op. cit.

¹⁰ See the contribution by Blockmans to this volume.

¹¹ For details, see the contributions by Matera and Santos Vara & Fahey to this volume.

movement rules upon acceding states.¹² The Treaty-based derogations to the Treaty's fundamental freedoms enshrined in Article 36 TFEU (moral, public policy and human rights justification of quantitative restrictions on imports, exports or goods in transit) and Article 52 TFEU (public policy exception to the right of establishment) also constitute a means of differentiation to the law of the internal market. As mentioned in the previous sections, differentiation is also closely related to the enhanced cooperation procedures provided for by Article 20 TEU and Articles 326-334 TFEU. It is further manifest in the possibility of permanent structured cooperation in CSDP under Articles 42(6) and 46 TEU as well as Protocol 10 attached to the Treaty of Lisbon. Moreover, Article 44 TEU enables a group of member states to implement humanitarian and rescue missions, peacekeeping and combat operations.¹³ In other words, the list is almost endless with regard to the various possibilities for differentiated integration within the current framework of the treaties.

Differentiation also occurs outside the framework of EU law, as recently evidenced by the so-called 'Fiscal Compact' (formally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; also referred to as TSCG). This is the kind of integration that Joska Fischer and others endowed with the term '*avant garde*', pointing to the limited chance for agreement within the current legal configuration.¹⁴ The term has, however, also been employed to denote higher forms of integration between member states within the framework of the treaties – a notion dismissed by others.¹⁵

While Piris and other observers adhere to the concept of a 'two-speed EU', the various opt-outs and provisions of enhanced cooperation mentioned above do not expose a bipolar system operating at two speeds but rather the possibility to create a multipolar system operating at different speeds of cooperation or abstention.¹⁶ Ireland, for instance, is a eurozone member but does not participate in Schengen, or in defence cooperation.¹⁷ The 'multi-speed' concept is therefore to be preferred. To be sure, this concept should not be confused with that of a 'two-tier' (or in the future possibly a 'multi-tier') EU; one that is defined by institutional separation and differentiated voting in the Council. As mentioned above, the sole instance of such

¹² See A. Łazowski (2012), "EU do not worry, Croatia is behind you: A Commentary on the Seventh Accession Treaty", *Croatian Yearbook of European Law and Policy* 8: 1-39; A. Łazowski (2007), "And Then They Were Twenty-Seven...A Legal Appraisal of the Sixth Accession Treaty", *Common Market Law Review* 44: 401-430; and K. Inglis (2004), "The Accession Treaty and its Transitional Arrangements: A twilight zone for the new members of the Union", in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, pp. 77-109.

¹³ See the contribution by Törő to this volume.

¹⁴ See, e.g., T. Hildebrandt and H. Wefing (2011), "Vergesst diese EU", *Zeit Online*, 11 November (www.zeit.de/2011/46/Interview-Fischer); and J.-C. Piris (2012), *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press.

¹⁵ See the contribution by Corbett to this volume.

¹⁶ See P. Craig (2012), "Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe", *European Law Review* 37: 800.

¹⁷ See the contribution by Herlin-Karnell and Theodore Konstadinides.

differentiation currently relates to eurozone matters, where there are separate meetings of the Eurogroup of finance ministers and Eurozone Summits at the level of heads of state or government, to the exclusion of representatives of non-euro member states.

The proliferation of terms and concepts to qualify the subtle differences in forms and dimensions of the European integration process is further proof that the legal and policy aspects of 'patchwork Europe' merit attention and clarification. It also begs the question to what extent the EU is still 'united in diversity', to coin the Union's own motto until it was dropped from the EU Treaty in the pre-Lisbon IGC. Can a divided EU be expected to speak with one voice externally? These and other questions will be addressed in the current compilation.

2. TWO-TIER EUROPE - REALLY?

RICHARD CORBETT*

People have been discussing a multi-tier Europe for decades: after all, the ECSC project in 1950 created what was then seen as a two-speed Europe, involving just six of the then 14 member states of the brand new Council of Europe.

But within our current European Union, I would argue that the several instances of variable integration fall short of creating a two tier Europe.

We do not have an *avant garde* group, but we have several different *arrières gardes*:

- Ten member states not (or not yet) in the eurozone
- Ireland, the UK, Cyprus, (and Romania and Bulgaria not yet) in Schengen
- Denmark not in defence cooperation
- The UK, Ireland and Denmark not participating in all AFSJ areas
- Denmark with an exemption from the single market as regards secondary residencies
- Spain and Italy not joining the unified EU patent
- Twelve states not in divorce law cooperation
- The UK and Poland protocol interpreting the Charter of Right's effect on their domestic law
- The UK and Czech Republic not in the Stability Treaty (fiscal compact)

What is striking is that these *arrières gardes* always consist of a small number of states, often just one or two, always appear in a different configuration (even if some countries appear frequently), and are often seen as an anomaly, exception or temporary situation. For all areas where the EU acts, either all (usually), or the overwhelming majority of member states participate.

Other than on eurozone matters, of which more below, there is also no institutional separation, no two-tier structures or separate institutions apart from, in the Council, differentiated voting, but with everyone around the table. In the European Commission, the Parliament and Court of Justice, there is no differentiated voting.

On eurozone matters, there are separate (under the treaty, 'informal') meetings of the Eurogroup of finance ministers and eurozone summits at the level of heads of state

* Member of the Cabinet of Herman Van Rompuy, President of the European Council.

or government (but even those have the same president as the European Council, and its meetings are normally held in conjunction with European Council meetings). And on eurozone matters too, Commission, Parliament and Court remain whole, with no differentiated voting.

But what about further deepening of the eurozone? Clearly those sharing a common currency must do more together to manage their common currency. Does this potentially lead to two-tier Europe? It evidently does to a degree, and this has already happened in large part. But I see seven reasons why it will *not* lead to fully fledged two-speed Europe.

- First, the group is clearly not *avant garde* on any other subject than those directly linked to the common currency (not foreign policy, justice, environment, transport, agriculture, fishing, consumer protection, or competition policy, etc.).
- Second, it is not a fixed membership group, others will join (Latvia already intends to join next year); only two have legal opt-outs (and even they have a right to reconsider). It is not a fixed-boundary division.
- Third, the deepening measures which have been taken as a response to economic crisis, have been in many cases been at the level of the whole Union, and only some at the level of the euro. For example, the three European Supervisory authorities for the financial sector (European Banking Authority, etc.), the European Systemic Risk Board, substantial legislation on the financial sector, the reinforced excessive deficit procedure, the EU Semester as a means of intensifying macroeconomic policy co-ordination, have all been carried out at the level of the whole Union.
- Fourth, what *has* been done at eurozone level, has usually been done in a way that was deliberately open to others to participate, and attempts have been made to expressly minimise the institutional split between the 17 and the rest. For example: the Stability Treaty ('Fiscal compact'), was done at the level of the eurozone because one member state objected to changing EU treaties, but almost all the others wanted to join and only two did not sign it. Furthermore, the architecture of that was designed to keep it as close as possible to the EU system. Another example, currently underway: the banking union, again not done at the level of the whole EU, (though one could argue that this is needed for the single financial market as much as for the single currency, but because of one member state in particular, it was done at the level of eurozone plus others that wanted to join. Every care was taken to ensure single market compatibility, including safeguards for the 'outs' in the voting procedure. A further example is the Eurozone Summit: these are being held in conjunction with European Council meetings, not on a stand-alone basis. So everyone can raise an issue before the 17 meet separately. It has been given the same president to ensure institutional coherence. Also, at least one of the two annual meetings is open to all signatories of the Stability Treaty, not just the eurozone.
- Fifth, the bulk of what the EU does, even economically, is at the level of the whole EU of 28. The single market is crucial in this respect; it is the glue that holds the EU together and generates the bulk of EU legislation. The common rules on

consumer protection, competition, state aids, standards, etc., is at level of the whole EU. So is trade policy, environment, R&D programmes and, of course, all the non-economic matters such as foreign policy, police and justice etc.

- Sixth, no separate institutional structures have been set up, other than the ESM. The ESM is indeed intergovernmental at eurozone member state level. After all, it is financed by national money or guarantees (the EU budget is far too small) and the member states are the shareholders, so they sit on the board of governors. In practice, however, when it comes to using this instrument, they rely on the Commission for country-specific reports, to negotiate Memorandums of Understanding, etc.
- Lastly, in the case of the Stability Treaty, its architecture has been designed to avoid divergence (it was not even originally intended to have a separate treaty – that resulted from UK non-cooperation in December 2011). Every care has been taken to hug the EU institutions closely: the role of Commission, the use of ECJ, etc. And not just eurozone member states, but all bar two Union member states joined in, so rather than being a separate construction, the correct analogy is that of my colleague Luuk Van Middelaar; that it is a buttress, supporting the main structure, not a separate building.

There are different narratives about all of this of course, not just in academia, but also among member states. Nonetheless, the compromises reached do limit the two-tier divergence.

So far, so good. But what of the future? Is there possible treaty change ahead? In general we find that much can be done within existing treaties, more than perhaps initially considered possible. And many of the things for which treaty change would be necessary are things for which there is anyway no consensus (like fully fledged Eurobonds). The procedure for treaty change is long and difficult. And now, the situation in the UK doesn't encourage others to go down the route of treaty change.

What, indeed, about Cameron's January 2013 speech? That speech was made more as party leader than as government leader, and about what a future UK government would do, if the Conservatives win absolute majority in 2015. Up to now no other major party has matched that pledge. There is therefore no certainty yet that further opt-outs or renegotiation or devolution will be on the table in the way that Cameron seemed to envisage. If this eventuality does arise, it remains to be seen what emphasis will be given to multilateral reforms or to unilateral opt-outs, what other member states are willing to accept, and whether the focus will be primarily on treaty change or changes to legislation.

How does all this affect the EU's external relations? I think the outside world sees us the EU as a "single entity with some complications". Notwithstanding monetary policy and the Schengen visa system, Europe's main instrument for dealing with third countries is trade, and other aspects of economic relations, and there we do act as a single entity. We also do on foreign policy, when we have a common position. And third countries see us represented on such matters by entities (the Commission or the EEAS) that represent the whole Union. Many agreements they enter into with

the Union have to be approved by the European Parliament, to which third countries are paying increasing attention – again an institution of the whole Union.

To conclude, expectations of an emerging two-tier system must be nuanced by a host of factors that limit the division into two tiers, blur the boundaries and maintain the primary importance of the whole Union.

3. AN EVER-CLOSER EUROZONE AND ITS CONSEQUENCES FOR DIFFERENTIATED INTEGRATION IN EUROPE

*VÍT BENEŠ AND MATS BRAUN**

There are several unknowns in the process of deepening the integration of the eurozone. Even if we observe a transfer of competences from member states to the eurozone level, we do not know where this process will end. Moreover, how eurozone decisions will be taken in the future is also an open question. Establishing euro summits and the institutionalisation of the Eurogroup have confirmed the intergovernmental decision-making of the eurozone, but we cannot discount a change in this in the future. In particular, an increased eurozone agenda might call for more democratic decision-making at a supranational level, including the use of the European Parliament, a eurozone parliament or, potentially, some directly elected representative of the area. Third, how will the deepening integration of the eurozone affect decision-making within the EU and what we call differentiated integration in the Union? If the assumption is that the different speeds of the EU are moving in the same direction, some suboptimal institutional solutions based on an ad hoc use of EU institutions for solely eurozone-related issues could be more acceptable. At the same time, we would have to find solutions that would enable a smooth passage for non-eurozone countries into the eurozone. But if we, on the other hand, accept that all parts of the EU are no longer moving in the same direction, then this analysis would suggest that we should think along the lines of inventing/restructuring the institutional framework of the EU and the eurozone.

In the debates on the Genuine Economic and Monetary Union, four areas are often discussed: banking union, fiscal union, economic union and political union. The most relevant of these for differentiated integration is political union. Yet, so far little is known about political union, since, in accordance with the functionalist tradition of European integration, changes at this level are likely to be the result of more practical concerns at other levels of integration. In other words, the development of any political union is dependent on the measures that are introduced to solve the eurozone crisis.

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In this chapter we outline three scenarios for the future development of the EU. The first two scenarios follow the principle of a multitier EU; in other words they both envisage the continuation of the diversification of integration within the EU between the eurozone and non-eurozone member states. The third one assumes that the EU is moving in the direction of consolidation. As we see it, however, consolidation does not necessarily mean that the slower group in integration terms would catch up with the faster one. Instead, we presume that at least one version of consolidation could be based on a 'return' to a post-Maastricht arrangement.

3.1 A federal eurozone in an intergovernmental EU

3.1.1 Motivation: budgetary union and democratic approval

The eurozone has so far made progress on the development of a fiscal union, primarily with regard to national budgetary rules through the Fiscal Compact and the so-called 'two-pack' and 'six-pack' regulations. Discussions on banking union have also moved on, even if the pre-launch project as it stands now consists of the surveillance parts (pillar 1) but lacks the budgetary capacity necessary for a bank recapitalisation fund (pillar 2) and a joint guarantee of investments (pillar 3). In both cases, though, the EU has advanced on its regulatory activities, which is perhaps unsurprising given the EU's history as a regulatory power (Majone). Yet, what will be decisive for the further development of political union is how far the eurozone develops a common budget. This is because it is primarily development in this direction that would make increased democratic scrutiny of eurozone activities a must, and thus trigger movement towards political union. We argue that the establishment of a eurozone budget could be the driving force on the path towards political union – the federalised eurozone within an intergovernmental EU. Money is a scarce resource, especially at a time of crisis. We can thus assume that the establishment of the eurozone budget could lead to a drying up of the EU budget in the longer run. Most of the net contributors to the EU budget come from the eurozone; if and when the eurozone establishes its budget, their willingness to contribute to the EU budget will naturally decrease. Meanwhile, countries outside of the eurozone either lack the political will (the UK) or the economic capacity (the CEE countries) to keep the EU-wide budget afloat.

There are two questions we need to ask regarding the possible development of a eurozone budget. First, how will the eurozone budget be financed? And second, what tasks will the budget serve to achieve? The two questions are, in fact, interrelated. If we assume that a separate eurozone budget would be financed in a similar way to the contemporary EU budget, in other words, with a high dependence on member state payments and only a few of the EU's own resources, then it is highly unlikely that the budget would be big enough for interventions aiming to reverse negative economic cycles or to provide for the funding of a crisis mechanism that would be independent of member states' national financing. The question is then: What tasks should such a budget fulfil? One could consider that it would be used in order to provide the banking union with its second and third pillar, which, so far, are missing. Yet, that would demand the creation of a rather large fund to be put in place for use in the event of a crisis.

However, it is more likely that such a fund, if created, is based on member states' commitments rather than on a permanent eurozone budget. Why would member states give up the control of the resources at an earlier stage than necessary? The most likely answer is that the budget could be used as a second and improved version of the EU's cohesion policy. It would be an improvement in that it would allow for greater coordination between the money invested and the economic and financial stability of the eurozone. The revision could also serve to introduce a broader and more systematic use of conditionality. However, the introduction of such a budget would meet resistance from non-eurozone countries, as these would be concerned about the consequences that such a doubling could have on the EU budget. Moreover, it is important to note that a budget which is based on national contributions would provide less of an incitement for institutional reform than one based on own resources. The national contribution model would give member states an excuse to favour less commitment to democratic input based on national parliaments instead of reforms on the supranational level.

If the EU budget were to fulfil cycle-correcting tasks, then the budget would need a) a budget financed by own sources of sufficient size and b) true Eurobonds that could be used to cover gaps in the budget when counter-cyclical activities are necessary. The eurozone could obtain its own sources for the budget through value added taxes or, for instance, through a tax on fiscal transactions (see above). However, the introduction of own taxes and budget would have to include all the eurozone countries, unlike the enhanced co-operation to implement the financial transaction tax (as currently planned). The issue of taxation is controversial and unlikely to receive the support of all EU member states. Therefore, the only possible road for the realisation of this kind of eurozone budget would go through new eurozone treaties, or EU treaty revisions, where some member states accept the eurozone moving ahead in exchange for substantial derogation.

The development or non-development of a eurozone budget is crucial since this is the issue that would make it necessary to provide the eurozone with greater democratic input. There are a few possibilities for future development in regard to this issue. On the one hand, it is rather likely that nothing will happen in the area of a budget, which also allows for a continuation of the status quo. On the other hand, a eurozone budget based on own resources would trigger the biggest changes at institutional level. This development could lead to the scenario we call 'a federal eurozone in an intergovernmental EU'. This scenario would assume that the eurozone continues on its road to deeper integration, including having a budget partly based on own resources in the long run. The eurozone, however, then has to solve issues relating to how to provide for democratic legitimacy in its decision-making for the eurozone.

3.1.2 *Institutional design*

In this scenario we talk of a 'federal eurozone' in the sense that decisions are made by the representatives of eurozone citizens. A federal eurozone thus stands in opposition to an intergovernmental eurozone. While in the federal model decisions are made by the representatives of the European citizens (the European demos), in

the intergovernmental model decisions are made by the representatives of European states (the nations of Europe). The decision-making model (federal vs. intergovernmental) does not predetermine the scope of the EU competences. The intergovernmental model actually allows for a rapid expansion of the EU / eurozone powers, and this is how the eurozone's economic governance has emerged so far. A federalist eurozone, however, by definition would require a stronger direct democratic input into eurozone decision-making. There are three alternatives for how this could be done, each of them with its own disadvantages.

The first solution: eurozone legislation can be passed through the European Parliament. However, eurozone policies are no longer EU-wide policies (compare this with the scenario of a 'consolidated EU', below). Therefore, such a system would not fulfil the intention of strengthening democratic legitimacy, because not only eurozone citizens would be represented. Moreover, such a solution would not be politically acceptable to the eurozone countries.

The second solution is the formation of a Consultative Committee on eurozone issues within the European Parliament with regard to EMU affairs, with its members being selected from eurozone MEPs. Since primary law assumes the equality of MEPs, such an arrangement cannot rest on formalised law. The selection of the members of such a committee from eurozone MEPs can only rest on informal 'gentlemen's agreements' between the political groups in the European Parliament. With regard to plenary sessions, one could consider that there could be an informal agreement that MEPs from non-eurozone countries would abstain from voting, and the discussion could be prepared in the planned Consultative Committee on Eurozone Issues. Such a solution is problematic, however, since it violates the equality principle of European citizens. Moreover, we can assume that the prominence of such a special committee for eurozone policies would grow quickly (remember the rising star of the Eurogroup within the Council). That would only further expose the division among MEPs and, by extension, among European citizens.

The third solution would be the establishment of a new democratically elected institution through a new treaty. In order to solve the democratic deficit problem, either a treaty change or a solution based on separate intergovernmental treaties would be necessary. Article 13 in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union enables coordination between relevant committees of national parliaments and the European Parliament. However, the intention of Article 13 is rather to develop a forum for discussion than to create an institution that could deliver democratic scrutiny.

This treaty falls outside of EU primary law, and its signatories can use this as a point of departure for further treaties and through them create the European institutions anew. That would give them the opportunity to meet the public demand for more effective, lightweight and democratically accountable institutions. This would open up the possibility of the foundation of a distinct eurozone parliament. The democratically elected institution can also take the form of a directly elected president of the Euro summit or the president of the Eurogroup. There are several problems associated with the establishment of new eurozone institutions through a separate treaty, though. First, it would be difficult to sell new or even duplicate

institutions to the electorate. From this point of view it is not politically feasible to have separate parliaments for the EU and the eurozone. The second problem lies in the fact that the separate eurozone institutions (established through a separate treaty) would solidify the division of the EU into eurozone member states and non-eurozone member states. The elections to the eurozone institutions would take place only in eurozone countries, which would divide European citizens into two groups with different political (voting) rights. Moreover, the establishment of a federal eurozone within an intergovernmental EU would sooner or later jeopardise the idea of the EU citizenship. While the 'eurozone citizens' would remain equal in their (political / voting) rights and obligations, the European citizens would be divided into two groups with different (political / voting) rights and obligations. A second class European citizenship would become a formalised reality. Some non-eurozone countries already tend to view the project of 'European citizenship' or the 'European demos' sceptically (e.g. the UK or the Czech Republic). They have already accepted (or even advocated) the 'differentiated membership', so it is fair to assume that they would analogously accept or even advocate the 'differentiated EU citizenship' (second class citizenship).

To conclude, we assume that if and when the eurozone embraces the idea of eurozone-wide democratic legitimacy, the residual organisation (the EU) will move towards the intergovernmental model of decision-making, watering down the idea of EU-wide citizenship. On a more general level, we could argue that any model of differentiated integration (purposefully) does away with the principle of equality of member states. Analogously, differentiated integration in practice (purposefully) does away with the principle of equality of individuals (European citizens) since it grants special obligations, rights or even political rights to a narrow subset of European citizens. The federal eurozone would most probably be established through a separate (constitutional) intergovernmental treaty, and not through the revision of EU primary law.

3.2 An intergovernmental eurozone in an intergovernmental EU

3.2.1 Motivation: functionalist crisis-solving and intergovernmentalism

The scenario of an intergovernmental eurozone in an intergovernmental EU is ideologically based on the combination of functionalist reasoning and an intergovernmental approach to integration. The (neo)functionalist approach sees the European integration as a technocratic process driven by the need to solve immediate economic problems and deliver tangible material benefits. The functionalist approach does not see the geographical, legal and institutional integrity as a goal and a value in itself. Economic imperatives (effective management of the existing EU) trump wider political and geopolitical objectives (unification of Europe / overcoming the divisions in Europe).

Two-tier or multi-tier integration? On one side, the logic of 'geographic spill-over' and the intergovernmental nature of policy-making facilitate the adoption of a multi-level model of European integration. The individual EU member states respond individually to the perceived benefits and costs of particular integration projects /

policies. European integration takes the form of *Europe à la carte*, multi-tier integration, or multispeed integration. Integration is 'differentiated' not only in terms of policy participation, but also in terms of institutions and primary law. But at the same time, the functional logic and the nature of intergovernmental bargaining pushes in an opposite direction towards the consolidation of an 'inner core' – two-tier or two-speed integration (a consolidated eurozone in a two-tier EU) (see the contribution by Richard Corbett in this volume).

First, in line with the functionalist 'spillover' logic, the functional links within the real economy and the interdependency between national economies lead toward a functional 'clustering' of policies and a geographical consolidation of membership in individual integration projects / policies. For example, the integration in the sphere of free movement of goods provides strong incentives for the integration in the capital market. Similarly, integration in monetary policy provides strong incentives for further integration in terms of coordination of national budgets and eventually a unique eurozone budget. Analogously, countries that do not participate in the monetary policy lack incentives to participate in other policies and integration projects initiated by the eurozone (fiscal coordination, banking supervision).

Second, the intergovernmental eurozone is built on the principles of international law (integration through separate international treaties) and international bargaining (diplomacy). The European Union is still to a large extent an intergovernmental organisation. In this situation, individual states do not negotiate with 'Brussels' over their participation in particular policies as the model of 'Europe à la carte' assumes. In fact, states negotiate among themselves over their mutual commitments.

While international law allows for flexible membership, international bargaining is based on the principle of reciprocity. In the anarchical system of international relations, cooperation is often established through a reciprocal exchange of concessions and commitments. Let us assume a situation where state A is interested in cooperation/integration in policy Y, while state B is interested in cooperation/integration in policy Z, and the overall game is a positive sum game. Since neither state can be forced into cooperation, the only solution to the game is a reciprocal exchange of commitments. States A and B end up committing themselves to both policy Y and policy Z.

The reciprocal nature of international negotiations tends to produce arrangements where all (or most of) the participating states share all (or most of) the commitments in all (or most of) the agreed policy areas. While this principle seemed too weak to ensure the coherence of the EU27/28, we can still assume that the reciprocal nature of negotiations within the eurozone will produce a consolidated eurozone where all the participating states share equal rights and obligations in all eurozone-wide policies. Put simply, it is hard to imagine Spain negotiating an 'opt-out' from the Fiscal Compact while being a recipient of the ESM. The reality of the eurozone economic governance supports the idea that the integration project will lead to a two-tier integration rather than a multi-tier model. The bargaining within the eurozone revolves around mutual commitments, and the negotiating states strive for equal rights and obligations among the participating states. Issue linkage and

conditionality are a norm: participation in one policy (such as the Fiscal Compact) is a condition for participation in another area (rescue funds like the ESM).

The intergovernmental nature of the collaboration in the eurozone could be challenged due to a lack of transparency and a lack of democratic input. Yet, if the eurozone returns to economic growth, it cannot be ruled out that the eurozone could receive its legitimacy through its performance, i.e. its output, just as throughout its history the EU's legitimacy was derived from its output rather than its input. This is especially so now, when further reforms, including the budgetary union, are taking place. The intergovernmental structure of the eurozone would also stress that this tier could be one of many and not merely one of two within the EU. Intergovernmental cooperation would also make it rather flexible and open for countries moving from one tier to another. It is also conceivable that in the long run this type of multi-tier collaboration could facilitate enlargement, and it is possible that the EEA countries be viewed as one tier of the EU, and candidate countries could have access to this tier prior to their actual membership.

The introduction of distinct institutions and a distinct primary law for the eurozone not only has legal implications, but also political and geopolitical implications in terms of the shift of negotiating power. We argue that through the establishment of separate institutions and a separate primary law for the eurozone, the non-eurozone countries lose some of their negotiating power. Simply said, the differentiated integration makes the non-eurozone countries more dispensable. While they can still draw on their material (economic) and symbolic power, the introduction of separate eurozone institutions and, notably, the separate eurozone primary law (represented by the Fiscal Compact Treaty and the Treaty Establishing the European Stability Mechanism) would clearly be detrimental to their bargaining position.

3.2.2 *Institutional aspects*

The EU as such is not changing as a consequence of the development described within this scenario. The member states remain sovereign under international law. It means that they can amend and revise the EU treaties, but it also means that any group of EU member states can conclude a separate treaty beyond and beside the EU treaties.

Differentiated integration is often presented as the next step in the integration process. According to the official narrative, the eurozone deepens its integration while the integrity and coherence of the EU remains intact. However, the 'intergovernmental eurozone in an intergovernmental EU' is a result of *both* the closer integration of the eurozone *and* the disintegration of (some of) the non-eurozone countries from the eurozone. The disintegration is evident from the loosening of the attachment of non-eurozone countries to the eurozone policies and institutions.

Under Maastricht, the EU and the eurozone were one in terms of both policies and institutions (see the scenario 'consolidated EU'). Economic and monetary policy was established as an EU-wide policy shared by all EU member states, and was supplemented with temporary derogations and permanent opt-outs. The fact that the EMU was an EU-wide policy was reflected by the inclusive nature of the institutions.

All EU countries participated at the discussions in the ECOFIN Council. The fact that some countries had a permanent opt-out or temporary derogation from the third stage of the EMU was reflected in the distribution of voting rights. The voting rights of countries with a temporal derogation from the third stage of the EMU were derogated.

In the post-Lisbon period, political discourse changed rapidly. Due to the 'blame game' that followed the sovereign debt, financial and economic crisis, the non-eurozone countries to a greater or lesser degree refused to take their share of political responsibility for the fate of the EMU. In terms of political responsibility, it is widely acknowledged (both by the eurozone members and the non-eurozone states) that the eurozone policies are primarily owned by the eurozone countries (i.e. the countries that moved to the third stage of EMU) rather than by the EU as a whole. In reality, the status of the non-eurozone countries changed from 'being in with a temporal derogation of rights and obligations' to 'being out with the possibility to enter'.

In the post-Lisbon period, the eurozone gradually established its own institutions. The creation of dedicated eurozone institutions went hand in hand with i) the shift of the ownership of and responsibility for the eurozone policies from the EU members to the eurozone members; ii) the postponement of the transition to the third stage of the EMU in some EU countries (e.g. the Swedish referendum in 2003); and iii) the continuing EU enlargement (2004, 2007, 2013), which means that the adoption of the euro by all EU members is postponed *ad infinitum*.

The institutions that have so far been established for the eurozone are intergovernmental in nature. The first of these institutions, the Eurogroup, received formal recognition through the Lisbon Treaty, and is dependent on the Council (ECOFIN) for its decision-making. The second, the euro summit, however, was established through the fiscal compact, in other words, through a separate intergovernmental treaty. The Commission has so far been used to provide the eurozone countries on an *ad hoc* basis with an institution that would facilitate the enforcement of any intergovernmental decisions that are taken. The Commission might continue to do this even if this could also be challenged by non-eurozone member states. Even if the role of the Commission is strengthened in its vertical scrutiny tasks towards the member states, this is not the case in its horizontal relations with other EU institutions, most notably in its relations with the Council and the European Council.

Does the 'intergovernmental eurozone in an intergovernmental EU' require another treaty change? As history shows, new institutions or policies do not necessarily require a treaty change. The Eurogroup came into being as an informal platform long before its endorsement through primary law. If there is a political will to do so, eurozone members may establish a similar informal platforms in other policy areas. The eurozone policies can be established by using the mechanism of 'enhanced cooperation' under article 20 or another legal base. However, these changes in institutions and policies come at a cost of stretching the existing EU treaties to their limits. The existing EU treaties do not often provide a sufficiently solid basis for new eurozone policies (such as the banking union), new institutions or new tasks for old institutions (such as the banking supervision for the ECB). The allocation of new

tasks to the EU institutions (the Commission, the ECB and the Court) by separate intergovernmental treaties, though, is not unproblematic either. Even the most pragmatic actors (e.g. the Bundesbank) eventually start to speak about the need for further treaty change when it comes to such treaties.

Will the new treaty take the form of an EU primary law revision or a separate intergovernmental treaty? We assume that the 'intergovernmental eurozone in an intergovernmental EU' is primarily driven by pragmatic, functionalist concerns. In this context, a separate intergovernmental treaty would be a better choice for the eurozone countries simply because the negotiation and ratification of an EU-wide treaty revision would be too risky. An EU-wide treaty revision would require a delicate balancing act between the priorities of a very diverse group of 28 member states. Since EU treaty revision requires a ratification by all the EU member states to come into force, treaty revision can easily be derailed through intentional blackmailing by a single state or by an unintended internal dispute between the representatives who negotiated and signed the treaty (the government) and those who ratify the treaty (the parliament, the president or the general public). Meanwhile, a separate international treaty is a very attractive option for the eurozone countries. First, it is easier to find a compromise between 18 (soon 19) states than between 28 states. Second, a separate intergovernmental treaty is a 'tabula rasa'. In drafting such a treaty, the signatories are not adding new articles to the hundreds of pages of some historical treaties, but they have an opportunity to write a new, simpler, streamlined treaty that would reflect the contemporary priorities and concerns of the signatories and their constituencies. Third, the fact that a separate intergovernmental treaty does not require ratification by all the signatories minimises the risk of blackmailing or unanticipated delays during the ratification process. The fast ratification of the Fiscal Compact and the smooth Irish referendum provide strong evidence for that. Fourth, the conclusion of a separate intergovernmental treaty requires neither the blessing of the European Parliament nor a cumbersome convention.

The conclusion of a separate intergovernmental treaty for the eurozone opens up the possibility for a revision of the EU treaties. As the eurozone integration deepens, EU integration will loosen. One can expect that as a result of a compromise between the eurozone states and the non-eurozone states, the statute of the ECB will no longer be part of an EU-wide treaty but will be included in the eurozone treaty. Similarly, economic and monetary policy will be appropriated by the eurozone treaty, and it will cease to exist as an EU-wide policy. The eurozone treaty would remain open for accession to any EU member state. But the very existence of two treaties and separate eurozone institutions will provide a final blow to the (post-)Maastricht idea of a consolidated EU with a single set of policies and institutions.

Which policies will remain with the EU, and which will be appropriated by the eurozone? With regard to the scope of the eurozone-wide policies, it is the sovereign decision of the signatories to conclude agreements in their areas of competence. As long as they steer away from the EU's exclusive competences (which are fairly limited), the eurozone member states are free to establish new common policies among themselves, using a separate intergovernmental treaty for the eurozone. The

separate intergovernmental treaties are not part of EU law and thus they, in principle, fall outside of the jurisdiction of the ECJ if the signatories do not decide otherwise. The scope of the EU-wide policies will more or less depend on the ability of the non-eurozone states to find a compromise among themselves. It will be interesting to see the UK, Sweden, the Czech Republic, Romania, Bulgaria and other non-euro countries negotiating about the scope of the EU-wide cohesion policy, the common agricultural policy, freedom of movement of labour or cooperation in criminal matters. Since all pro-integrationist countries will join the eurozone by then, we can assume that the scope of the EU-wide policies will reflect the lowest common denominator (the position of the UK).

3.3 A consolidated EU

3.3.1 *Motivation: overcoming the division of Europe*

During the 1990s and early 2000s the idea of a consolidated (united) EU rested on the assumption that deepening and enlarging the EU are mutually compatible and not mutually exclusive. It is worth recalling that period since it allows us to identify the political background behind the notion of a ‘consolidated’ (united) EU. The idea of a consolidated (“united”) EU rested on the assumption that the EU can deepen and enlarge at the same time. The process of ‘deepening’ was associated with the establishment of the EMU and institutional reforms, which centred around the expansion of the QMV and the strengthening of the European Parliament. The deepening of the EC/EU was a continuous process that long preceded the end of the Cold War. The negotiations of the Maastricht Treaty and the creation of the EMU were a culmination of discussions and negotiations about internal market and economic integration that occurred during the 1980s and earlier. Despite disputes over the deepening of the European integration, most of the EC/EU12 member states were anxious to maintain the dynamics after the end of the Cold War and the legal and institutional integrity of the EC/EU.

The process of ‘enlarging’ referred to the eastward expansion of the EU, which was, despite the previous rounds of EC enlargements, a novel and unexpected challenge. In European political discourse, motivations for the enlargement were largely (geo)political rather than purely economic. The supporters of the EU enlargement on both sides of the former Iron Curtain successfully portrayed EU enlargement as a way to overcome the division of Europe and support the newly democratic countries of CEE. For their part, the newcomers to the CEE saw EU membership (the ‘return to Europe’) as a return to normality and obtaining an equal status. They were very anxious to avoid a ‘second-class’ membership. At the time, the possibility of a ‘second-class membership’ was rejected by both the ‘euro-optimists’ and the ‘euro-pessimists’ in, for instance, the Czech Republic. Full membership was the ultimate goal, and even though not all Czech politicians embraced the idea of a ‘united’ (ever deepening) Europe, the notion of equal rights and obligations for all member states (‘fully-fledged membership’) was shared unanimously. All the new member states struggled to access the EU on an equal footing.

The conundrum rested in the fact that the new member states were not expected to fully participate in EMU policies at the time of their entry into the EU. While the new member states feared becoming second class member states, the old member states feared that a massive EU enlargement could bring the EU decision-making to a grinding halt and prevent further deepening of the European integration. The model of a 'consolidated' EU was enacted in order to tackle the above-mentioned fears and reach the political goal of overcoming the division of Europe. The EU would enlarge, the deepening towards the EMU would continue, the decision-making process would not collapse and the new member states would access the EU and all its institutions on an equal footing.

3.3.2 *Institutional aspects*

In contrast to the scenario of 'an intergovernmental eurozone in an intergovernmental EU', the idea of a 'consolidated EU' assumes that permanent opt-outs from policies and institutions are formalised in a coherent and universally ratified legal framework. It means that permanent opt-outs for particular member states are agreed to (and ratified) by the rest of the member states. And vice versa. By ratifying a shared legal framework (such as the Maastricht Treaty), the countries with permanent opt-outs (e.g. the UK) give the remaining countries a formal blessing to push for further integration (such as introducing the euro) among themselves.

The idea that widening and deepening can and should go together was also reflected in the accession criteria (the so-called Copenhagen criteria). The Copenhagen criteria presupposed the candidate's adherence to the aims of political, economic and monetary union. By entering the EU, the new member countries subscribed to the EMU. Even today, when the economic and monetary union in practice ceases to exist as a shared common policy, the new member states formally sign up to the EMU in their accession treaties.

The scenario of a consolidated EU, formalised in the (post-)Maastricht EU primary law, asserts that as a matter of principle, all EU member states participate in the economic and monetary policy (some have a temporal derogation from the third stage of the EMU), and at the same time, as a matter of principle, all EU member states participate in the EMU decision-making (some have a temporal derogation from their voting rights in the EMU-related agenda). The principle of unity in terms of policy participation (as a matter of principle, all the new member countries entered the EMU and will adopt the euro) was matched by the principle of unity (coherence) of institutions (as a matter of principle, all the new member countries participated in decision-making through EU-wide institutions and will abrogate their derogation of voting rights). Without a single legal framework, we cannot conceive of common policies or common institutions. And vice versa. A common legal framework and common institutions are based on the consensus over the scope of more or less common policies.

How can a consolidated EU be achieved? The necessary condition for a consolidated EU is a single legal framework. The consolidation of the EU would require the incorporation of the existing separate intergovernmental treaties (the ESM, the Fiscal Compact) into EU primary law, just like the Schengen treaty was incorporated into

the EU treaties (Amsterdam 1997). The consolidation of the EU into a coherent entity would also require a merger of the two-track EU-eurozone institutions (ECOFIN and the Eurogroup, the European Council and the Euro Summits). The precedent could be the merger of the institutions of Euratom, the European Economic Community and the European Coal and Steel Community through the Merger Treaty signed in 1965. However, the current trend is moving in the opposite direction, and a (re)merger of the EU and eurozone institutions seems a bridge too far.

The prospect of a (re)merger of treaties and institutions stands and falls with the ability of all 28 EU members to find a compromise over the scope of the common policies. At a minimum, the 'consolidated EU' requires that the 'outs' are at least able to give the 'ins' a formal blessing by ratifying a treaty that would enable the ins to proceed with the more or less common policy. Exemptions for the outs would be needed in order to gain their assent, however. On the other hand, if the number of exemptions and derogations were too high (and the derogations were permanent rather than temporary), the ins would not agree to sharing institutions and decision-making processes with the outs. In other words, the unity of the EU institutions rests on the assumption that the derogations from common policies (such as the derogation from the third stage of the EMU) are temporary, not permanent.

There are three factors that may facilitate such consensus. First, a common (geo)political goal comparable with the post-Cold War reunification of a divided Europe would provide a strong incentive to hold the EU together policy-wise, treaty-wise and institution-wise. Second, a freeze on the EU enlargement process or a stronger conditionality with regard to the candidate's adherence to the aims of political, economic and monetary union would make the EU-wide negotiations manageable. And last but not least, the exit of the unhappiest EU members would allow the rest of the EU to consolidate itself and reduce the demand for a differentiated integration.

3.4 Conclusion

In this paper we tried to identify three scenarios of the future institutional development of the EU and the eurozone. Each of them is linked to a particular driving force. The first scenario is a federal eurozone within an intergovernmental EU. The difference between a federal eurozone and an intergovernmental one does not rest in the scope of competences that are transferred to the eurozone level, but in the decision-making model. The federal model emerges as a result of a push towards a shared eurozone budget that would be at least partially financed through own resources. The eurozone's own resources would create pressure for a stronger democratic legitimacy. The intergovernmental model which dominates the eurozone decision-making leads to the detachment of citizens from EU politics, as the citizens resent the fact that their voice does not count in the EU. However, the frustration arising from the current decision-making model does not necessarily translate into a demand for directly elected decision-makers on the EU level.

The second scenario is an intergovernmental eurozone within an intergovernmental EU. This scenario is driven by a mix of functionalist and intergovernmentalist logic. The functionalist reasoning, which relies on output legitimacy, has been a major

driving force behind the European integration process since its inception. The outcome is a familiar combination of intergovernmental bargaining (treaty negotiations) and intergovernmental institutions (the Eurogroup, the Euro Summits) coupled with politically independent (i.e. democratically unaccountable) institutions (the Commission and the European Central Bank) as guardians of the commitments negotiated on the intergovernmental level. Especially in times of a crisis, the functionalist spillover creates an impetus for further deepening of the integration, but it cannot secure the legal and institutional integrity of the widened EU. As the current evolution of the eurozone suggests, the functionalist push for further deepening (spillover) and the intergovernmental model of decision-making can be easily combined. However, the functionalist deepening in the widened EU leads to a differentiated integration. The differentiated integration reaches a tipping point once the eurozone takes over the ownership of the supposedly common policies and creates its own primary law and its own institutions, which are separated from the EU's treaties and institutions.

And that is the case today. In reality, the euro is no longer the common currency of the EU. The 'ownership' of the euro was taken over by the eurozone states, which assumed the political responsibility for its fate. While the 'outs' express 'support' for the struggling eurozone and occasionally contribute to the eurozone's rescue funds, they have largely refused to take political responsibility for the fate of the 'common' currency. Furthermore, the supposedly common economic and monetary policy is no longer governed by common EU institutions. The Eurogroup was established through the EU primary law (i.e. with the approval of all EU member states), and it can be called an 'EU institution' at least on paper. However, the Euro Summits were not established through an EU treaty, and thus they do not constitute an 'EU institution'. Does such an unprecedented move herald the establishment of the eurozone as a separate international organisation, as was envisioned by the scenario 'an intergovernmental eurozone in an intergovernmental EU'? So far, the pragmatic functionalist logic driven by the need to solve the eurozone crisis pushes in that direction. The conclusion of separate intergovernmental treaties and the establishment of separate eurozone institutions radically changed the (geo)political status of the non-eurozone countries, reduced their negotiating power and severed their access to the institutions governing the (supposedly common) euro-related policies. Quite simply, they saw their status being degraded from 'ins with suspended voting rights' (ECOFIN under the Maastricht Treaty) to 'outs' (the Euro Summits under the Fiscal Compact).

The third scenario is a consolidated EU. The consolidation of the EU is driven by the shared (geo)political goals, and is comparable to the task of 'reunifying Europe after the Cold War division'. A consolidated EU is characterised by a unity of the legal base (the primary law) and the institutions. In this case, policies are, in principle, 'common', i.e. their ownership is shared by all EU member states. The scenario of a consolidated EU can be illustrated on the (post-)Maastricht design of the European integration.

As the Cold War and the division of Europe recedes into history, the original rationale for keeping Europe 'consolidated' slips from the minds of both the

decision-makers and the general public. The original ethos that enabled the unprecedented EU enlargement – at a time when the original EU12 was about to further deepen its integration (EMU) – faded away. Not all new EU member states any longer strive for a ‘fully-fledged membership’. At least in the Czech Republic and Hungary, the political elite wrote off the idea of equal rights and obligations for all EU member states. While for instance the Czech government initially protested against the fragmentation of the institution (the establishment of exclusive eurozone summits), Czech politicians in fact accept or even support the model of differentiated integration. The conclusion of the intergovernmental treaties outside of the framework of the EU primary law (the Fiscal Compact and the ESM Treaty) represents a serious blow to the original idea that the deepening and the enlarging do not exclude each other and that the enlarged EU can keep its legal and institutional integrity.

4. EU CONSTITUTIONAL PRINCIPLES AS HOUSEKEEPING RULES IN EU EXTERNAL VARIABLE GEOMETRY

*ESTER HERLIN-KARNELL AND THEODORE KONSTADINIDES**

This contribution discusses the vitality of a rigid constitutional structure within differentiation in the European integration process. As elucidated in the opening chapter to this volume, despite its very broad terminology, the notion of variable geometry or ‘differentiation’ is generally taken to mean the accomplishment of EU objectives in the framework of different grades of integration within the EU constitutional setting. This chapter will study the constitutional tenets of differentiation, including the differential validity of classic EU law principles/obligations across the member states. Its main focus will be on the application of the same constitutional principles that are prominent in classic EU law to differentiated integration initiatives in order to effectively delineate competence matters between the EU and the member states in both internal and external policies.

A key argument presented in this contribution is that the EU needs a set of housekeeping rules to operate effectively, both internally and externally. Specifically, it is recognised that although the EU’s heterogeneity emanating from differentiated integration can be manifested in various ways, a set of housekeeping rules (including the principle of consistency, conferral and sincere cooperation) form an attractive solution to reconcile differentiated integration in the EU with the basic constitutional framework of European integration. There are at least two reasons for this. First, the uniformity and predictability of EU law would be strengthened if there is some parity in the way classic and differentiated integration are managed. To this end, it is argued that a proper level of housekeeping can be maintained through both the application of principles enshrined in the EU treaties and those that have been established by the Court of Justice of the EU (CJEU). The chapter will emphasise, in particular, the importance of the CJEU’s adjudication on the authorisation, merits and procedural hurdles of such differentiation within the auspices of EU law. Second, the assumption that the EU needs a set of concrete legal rules to monitor differentiation is based on the fact that, even in the context of variable geometry,

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member states still have to act in a spirit of sincere cooperation vis-à-vis EU objectives and values.

The chapter will discuss how EU constitutional principles can be applied as a means of influencing the results of non-unitary action in a manner that is not offensive to the wider EU objectives and aspirations – especially those in the field of external action under Articles 3 (5) and 21 TEU. We begin our exploration by looking at the principle of consistency. We will then move on to consider the principle of sincere cooperation before we finally discuss the utility of the principle of conferral in the context of differentiation. Of course one could add the principles of primacy, subsidiarity, proportionality and national identity to the list of constitutional principles that have a place in the context of differentiated integration. However, for reasons of economy, we will focus here on the three main principles that are indicative of the way housekeeping rules can influence the conduct of member states when they decide to differentiate in EU law.

It is argued that an effective application of the EU constitutional framework on differentiated integration serves to consolidate and enlarge what Dashwood once characterised as a “constitutional order of states”.¹ Nonetheless, this chapter will not explore the thematic application of EU housekeeping rules in different areas of EU external action. In this sense any such discussion will constitute warm-up reading and will be incidental to the purpose of this chapter: namely to highlight a set of constitutional principles to achieve some element of certainty in differentiated integration. In any case, subsequent individual contributions in this volume will provide an in-depth analysis of flexibility in the setting of, for instance, the Common, Foreign and Security Policy (CFSP),² the Common Security and Defence Policy (CSDP)³ and the external dimension of the Area of Freedom Security and Justice (AFSJ).⁴ As such, this contribution will provide a tour de horizon of variable geometry through the lenses of EU constitutional law offering a comprehensive introduction to major concepts involved in the development of substantive EU external relations law.

4.1 Consistency

The principle of consistency has a prominent place in EU law and appears especially important in managing the outcomes of differentiating integration. It constitutes an umbrella principle under which other legal principles of EU law follow as corollaries. For the sake of clarification, two notions of consistency in EU law are identified namely: formal consistency attributed to the Treaty structure and its insistence on institutional balance, and strategic consistency linked to judicial interpretation, in

¹ A. Dashwood, “States in the European Union”, Vol. 23, *European Law Review*, 1998, p. 201.

² See the contribution by Blockmans to this volume.

³ See the contribution by Törő to this volume.

⁴ See the contributions by Matera; Santos Vara and Fahey to this volume.

particular, the CJEU's teleological reasoning.⁵ Textually, it is worth noting that apart from Art. 7 TFEU, which can be seen as a programmatic principle, all other Treaty provisions mentioning consistency provide a list of legal assignments for the EU institutions within specific policy areas. In that sense, consistency is a driving incentive for EU institutions and a rationale for the uniformity of application of EU law.

The Treaty, however, is neither explicit about the degree of cooperation demanded by member states to achieve consistency nor transparent about the permissible degree of supranational pre-emption against inconsistent national rules. For instance, the search for consistency in various external affairs presents a very different picture to that which applies in internal EU policies. This is the case in particular with regard to the level of intensity of the role of the CJEU. Throughout its jurisprudence, the CJEU has attempted to give consistency some teeth via its teleology in order to strike a balance between national and collective EU interests. The present authors have previously argued that especially in the early stages of European integration, consistency helped the CJEU resolve 'hard cases' and establish the autonomous legal nature of the EU legal system. As such consistency is key to our understanding of the notions of effectiveness (*effet utile*) and uniformity in EU law. It constitutes a driving incentive and a *leitmotif* that coordinates the uniform application of EU law in the member states.

With reference to EU external action, consistency is equally important (see Arts 18(4), 21(3) and 26(2) TEU) and, in the absence of express reference to it, the CJEU's role is instrumental in utilising it implicitly. For instance the application of consistency may be useful in the execution of opt-outs on the AFSJ that touch upon external matters. Such an implied use of consistency is significant, especially since it has been noted that external action in the AFSJ accounted in 2011 for over 19% of all texts adopted by the Justice and Home Affairs Council.⁶ Nevertheless, it should be recalled that the CJEU is altogether excluded from monitoring the CFSP which covers a substantial part of EU external relations. The rule of non-jurisdiction under Article 275 TFEU is subject to certain exceptions vis-à-vis the delimitation between CFSP and the TFEU exercise of competence under Article 40 TEU and the review of legality of CFSP acts imposing restrictive measures against natural or legal persons under Article 215 TFEU.⁷ In particular, consistency will prove instrumental in policing the CFSP/non-CFSP boundaries. This is not always easy given the common objectives of EU external action in Articles 21 and 23 TEU.

In the context of variable geometry, the underlying question is the following: If we accept that consistency features a one-size-fits-all model, then one may ask whether it

⁵ See E. Herlin-Karnell and T. Konstadinides, "The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration", *Cambridge Yearbook of European Legal Studies*, Vol. 15 (2012-2013), pp. 139-167.

⁶ J. Monar, "The EU's growing role in the external AFSJ domain: Factors, framework and forms of action", *Cambridge Review of International Affairs*, 2013 (www.tandfonline.com/doi/abs/10.1080/09557571.2012.710586).

⁷ See Case 130/10 Parliament v. Council, 31/1/2012, not yet reported.

is weakened by the various forms of differentiation in which member states participate on an ad hoc basis. Indeed, it appears impossible to reconcile the orthodoxy of consistency with the heterodoxy of differentiation. This is because the latter appears adverse to the traditional view that perceives consistency as symmetry of the components of the EU legal system. Constitutional asymmetry, however, is a longstanding feature of European integration. Yet the question still stands: How can the principle of consistency be capable of transfusing the classic integrative values of unitary integration to newly established sub-systems, such as those created in the adoption and implementation of CSDP decisions?⁸ The answer lies on whether consistency is perceived by EU Institutions as a symbolic notion or as one with practical significance. As the latter, consistency is capable of forming a requirement mandating a certain pattern of behaviour vis-à-vis the conduct of EU Institutions and the uniformity of their activities with the wider policies of the EU. This is all the more important since under the Treaty of Lisbon, consistency has become a justiciable principle.⁹ Article 21 (3) TEU provides:

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.¹⁰

Such reference to consistency, absent prior to Lisbon *qua* loyalty under Article 4 (3) TEU, is based on setting common principles and unified objectives in EU foreign policy with the aim of eliminating contradiction.¹¹ It is no paradox that such desire for consistency accompanies the several forms of ‘flexibility’ under the Treaties. To provide an example, consistency has a special place in Title III of Part VI TFEU, which contains in Articles 326-334 TFEU provisions on enhanced cooperation. In particular, Article 334 TFEU provides that the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the EU, and shall cooperate to that end. Yet, although Article 20 (1) TEU transmits consistency to enhanced cooperation taking place in all areas of EU external action, such requirement is absent in Title IV TEU vis-à-vis enhanced cooperation in the CFSP and CSDP. One has to turn to Articles 21 (3) and 26 (2) TEU where the obligation to ensure consistency rests on the High Representative of the Union for Foreign Affairs

⁸ For details, see Törő’s contribution to this volume.

⁹ See C. Hillion, “Tous pour un, Un pour tous! Coherence in the External relations of the European Union”, in M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, pp. 10-36; and E. Herlin-Karnell and T. Konstadinides, “The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration”, *Cambridge Yearbook of European Legal Studies*, Vol. 15 (2012-2013), pp. 139-167.

¹⁰ See also Article 26 (2) TEU.

¹¹ G. De Baere, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 251.

and Security Policy, supporting the Council and the Commission, but where judicial enforcement by the CJEU is absent.

Moreover, the notion of consistency appears inexorably linked to the axiom of loyalty. Both principles drive EU law forward by insisting on uniformity of outcomes from the perspective of EU law.

4.2 Sincere cooperation/loyalty

The principle of loyalty is vital in the context of vertical delimitation of EU competence between the EU and the member states. The express obligation of member states to always refrain from endangering the EU project has resulted in a cumulative but silent transfer of power from the intergovernmental to the supranational setting. The principle of loyalty, codified in Article 4 (3) TEU, has always played a crucial role in shaping the contours of the effectiveness of EU law.¹² For example, it has given birth to the doctrine of indirect effect and has always been a very powerful source of EU integration.¹³ Moreover, the notion of loyalty has been a useful buffer for EU Institutions to mandate a specific pattern of behaviour from member states in the absence of other competence available to rely on. In her prominent Pupino Opinion, which extended Community-based reasoning to the former Third Pillar, Advocate General Kokott stated that the principle of loyalty encompassed certain axiomatic principles, namely that “obligations must be fulfilled and damaging measures refrained from without needing to be expressly mentioned”.¹⁴ In light of this position, loyalty seems to go further than the general principle of *pacta sunt servanda* in international law because it purports to apply in new areas that were initially excluded from the original deal that member states signed onto.

In addition, the principle of loyalty set out in Article 4 (3) TEU applies also in the whole field of EU external relations without exception to CFSP.¹⁵ It is long established that in the context of EU external relations, member states are under an obligation to refrain from an international obligation that may potentially jeopardise the full effectiveness of EU law. Ever since the CJEU’s ERTA dictum,¹⁶ the principle of loyalty has become a necessary component of the external dimension of EU law

¹² J. Temple Lang, “The developments of the Court of Justice on the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC”, 31 *Fordham International Law Journal*, 1483, 2008. For a recent analysis on loyalty see also E. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations”, *Common Market Law Review*, Vol. 47, No. 2, 2010, pp. 323-359; C. Hillion, “Mixity and coherence in EU external relations: the significance of the ‘duty of cooperation’”, CLEER Working Paper No. 2, Centre for the Law of EU External Relations, T.M.C. Asser Institute, The Hague, 2009.

¹³ See Case C-106/89 *Marleasing* [1990] ECR I-4135.

¹⁴ Opinion of Advocate General Kokott delivered on 11 November 2004. Case C-105/03 *Pupino* [2005] ECR I-5285.

¹⁵ See C. Hillion, *op. cit.*, p. 29 ff.

¹⁶ Case C-22/70 *Commission v. Council* [1971] ECR 263.

and the development of EU implied competences.¹⁷ Indeed, the CJEU has gone so far as to find in the principle of loyalty an obligation of providing a designated result – a ‘best endeavours’ obligation. For instance, in *Commission v. Sweden*,¹⁸ the CJEU held that where the subject matter of a convention falls partly within the competence of the EU and partly within that of the member states, it is imperative to ensure close cooperation between the member states and the EU institutions. Such cooperation should take place both in the process of negotiation and conclusion as well as in the fulfilment of the commitments entered into.

Loyalty has, thus, a ‘pre-emptive’ effect upon the behaviour of member states in that it stops them from undertaking any action that could potentially undermine the objectives of the treaties. For this reason, it seems clear that the duty of loyalty can lead to a duty of abstention even if the competence at issue is neither *a priori* exclusive nor pre-emptive through the application of ERTA.¹⁹ Such a use of a ‘best endeavours obligation’ or an ‘obligation of result’ to discard any inconsistencies in the EU’s external relations approach seems to blur the procedural duties of member states under the principle of loyalty as an obligation of conduct.²⁰ The *Commission v. Sweden* judgment illustrates that the obligation to cooperate derives from the requirement of unity in the international representation of the EU.²¹ By contrast it can be argued that it constitutes a one-off decision confined to the specific legal context set out by the exceptional Treaty provisions in question. If we were to follow this argument, then we should conclude that one judgment is not sufficient to generate broad conclusions about the coercive role of the CJEU imposing a general obligation of result upon the member states. We cannot overlook, however, that in this case loyalty barred member states from taking unilateral actions despite the fact that they could legitimately do so in the context of mixed agreements.

Taken as a whole, the loyalty obligation implies that the member states are precluded from damaging the potential of the EU integrationist project. Yet in the context of differentiation, the notion of loyalty seems rather perplexing. A good example on which to ponder is in the context of the first authorisation of enhanced cooperation

¹⁷ J.T. Lang, *op. cit.* See also E. Neframi, “The duty of loyalty: rethinking its scope through its application in the field of EU external relations”, *Common Market Law Review*, Vol. 47, 2010, p. 323 and R. Schutze, *EU Constitutional Law*, Cambridge: Cambridge University Press, 2012, Chapter 10.

¹⁸ Case C-246/07, *Commission v. Sweden (PFOS)* [2010] OJ C 161 3. The CJEU held that, by unilaterally proposing that a chemical substance (perfluorooctane sulfonate - PFOS) be listed in Annex A to the Stockholm Convention on Persistent Organic Pollutants (2001), Sweden failed to fulfil its obligations under Article 4 (3) TEU. See also the earlier judgment of the CJEU in Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

¹⁹ G. De Baere, “‘O, where is faith? O, where is loyalty?’”, Some thoughts on the duty of loyal co-operation and the Union’s external environmental competences in the light of the PFOS case, *European Law Review*, Vol. 36, No. 3, 2011, p. 417.

²⁰ See to that effect C. Hillion, *op. cit.*

²¹ See also Opinion of Advocate General Maduro in Case C-246/07, *Commission v. Sweden (PFOS)* [2010] OJ C 161 3, paras 36-38.

on the European patent. The recent judgment in *Spain and Italy v Council*²² concerned a challenge against the decision of EU institutions to authorise the enhanced cooperation procedure on the grounds that the unitary EU patent concerned an area of EU exclusive competence and not shared competence. The latter constitutes one of the criteria for relying on Article 20 (2) TEU and Article 326 TFEU. In this instance, the CJEU upheld the decision of the majority of member states to establish closer cooperation in a matter that fell within the scope of the internal market – a shared competence.²³ In doing so, the CJEU made it plain that by creating a unitary patent restricted to the participating member states (while being open to all their counterparts), the contested decision did not damage the internal market or the economic, social and territorial cohesion of the EU. There was no conflict with the principle of loyalty here as the enhanced cooperation in question was taking place within the framework of the treaty and did not jeopardise the wider objectives of the treaty.

Furthermore, in the recent *Pringle* case, which concerned differentiation outside the treaties, the CJEU made a loyalty pronouncement.²⁴ It stressed that the establishment of the ESM Treaty, which established a permanent European Stability Mechanism in the form of an intergovernmental agreement between euro area member states, did not infringe the provisions of the TFEU relating to economic and monetary policy. The CJEU pointed out that the ESM Treaty contains provisions that ensure that, in carrying out its tasks, the ESM will comply with EU law. The CJEU then argued that such an establishment was not contrary to EU competence and not inconsistent with the axiom of loyalty. The explanation here lies in the fact that according to the CJEU there was no competence in the first place to adopt the measure in question within the EU legal framework. As a result, loyalty was not relevant as the ESM Treaty was adopted outside the EU framework. As pointed out by the CJEU, member states have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the member states who are parties to such an agreement are consistent with EU law.²⁵

It appears as if the CJEU has had its way: while it allows a degree of flexibility to respond to the euro-crisis, at the same time it protects its own legal order from encroachment by differentiation occurring outside the aegis of EU law. Contrary to the above-mentioned case of *Spain and Italy v Council*, the *Pringle* case concerned a challenge against cooperation outside the Treaty framework. Therefore, *stricto sensu* there was no direct loyalty obligation at stake with regard to the establishment of a eurozone firewall since the strengthening of EU economic governance did not involve the conferral of new competences to the EU. Still, however, it can be argued that the CJEU's treatise of loyalty in *Pringle* contradicts the stringent best endeavours

²² Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* judgment of 16 April 2013 nyr.

²³ *Ibid.*

²⁴ Case C-370/12 *Pringle*, judgment of 27 November 2012 nyr.

²⁵ *Ibid.*, para 109.

notion established in the field of EU external relations. Perhaps this can be attributed to the recognition of the CJEU's limits of EU competence, or as expressed in the words of a commentator, "the obsession with conferral".²⁶

4.3 Fragments of conferral in a differentiated landscape

As explained above, consistency manifests itself in several ways when member states decide to proceed at different speeds of integration. So the EU is striving for consistency throughout its policies and this very endeavour stems from the principle of conferral: it is a two-way street – not a one-way track. A lack of consistency, therefore, results in legal uncertainty, which in the context of CJEU case law would have an adverse effect on, for example, the rights of EU citizens and effective judicial protection.²⁷ Thus, the notion of consistency is no *carte blanche* but rather, it needs to be reconciled with the conferral of powers.

The starting point here is Article 7 TFEU which stipulates that "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". In the same vein, Article 13 (1) TEU provides that the EU institutional framework "shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the member states, and ensure the consistency, effectiveness and continuity of its policies and actions". A glance at Articles 7 and 13 TFEU therefore suggests that not only is consistency important as a way of ensuring that the EU is acting *intra vires* but it also forms a significant aid in the drafting and negotiation of EU legislative proposals. It follows that EU law is only consistent if it complies with the principles listed in Article 5 TFEU namely, conferral or attribution of powers, subsidiarity and proportionality.

Moreover, conferral is eminent in the context of differentiation. According to Article 20 (2) TEU and Article 326 TFEU, one of the criteria for establishing enhanced cooperation is that the cooperation at issue does not concern an exclusive competence and that it is the last resort. In *Spain and Italy v Council*, discussed earlier in the context of loyalty, the CJEU held that:

It is apparent from the first paragraph of Article 326 TFEU that the exercise, within the ambit of enhanced cooperation, of any competence conferred on the Union must comply with, among other provisions of the Treaties, that which confers that competence. The enhanced cooperation to which these actions relate must, therefore, be consistent with Article 118 TFEU.²⁸

In the CJEU's view, the correct interpretation of Article 118 TFEU did not imply a uniform interpretation throughout the whole EU but one that takes heed of Article 20

²⁶ L.S. Rossi (2012), "Does the Lisbon Treaty provide a clearer separation of Competences", in A. Biondi et al. (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, p. 93.

²⁷ In *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission, Council and United Kingdom v Yassin Abdullah Kadi*, 19 March 2013, Advocate General Bot opined that the principle of judicial review laid down by the CJEU in *Kadi I* requires further clarification.

²⁸ *Joined Cases C-274/11 and C-295/11 Spain and Italy v Council* judgment of 16 April 2013 nyr, para 66.

(4) TEU, which states that acts adopted in the framework of enhanced cooperation shall only be binding on participating member states. As mentioned, the CJEU was explicit in *Spain and Italy v Council* that the rules established under the enhanced cooperation procedure on the European patent only bound its participants and were not damaging upon the internal market or the economic, social and territorial cohesion of the EU. This reasoning needs to be reconciled with the rather strict case law of the CJEU on the principle of loyalty, *viz.* the preclusion of any activity that could potentially threaten the consistency of EU law.

It should perhaps be recalled that prior to the entry into force of the Lisbon Treaty, the rigorous legal criteria governing enhanced cooperation meant that the procedure was never effectively utilised.²⁹ A lot of emphasis was placed on ensuring that member states would not establish enhanced cooperation in a way that would compromise the former Community's interests.³⁰ Today the picture looks different in that it has become much easier to establish enhanced cooperation if it concerns a shared competence, as demonstrated by the *Italy and Spain v Council* ruling. Future case law will clarify the relationship between the constraints set by the Treaty/conferral of powers and the desirability to allow for flexibility in EU policy-making. This is an area where any potential 'opt-outs' from legal safeguards will be problematic with regard to due process guarantees. In addition, it is an area where the reach of the Charter of Fundamental Rights could become the turning point as regards the general application of fundamental rights beyond Title V of Part III of the TFEU.

In a snapshot, with regard to the Area of Freedom, Security and Justice (AFSJ) and the consequence of differentiation, suffice to say that the opt-outs offer a challenge to the feasibility of the harmony of EU law.³¹ The UK and Ireland have until next year to decide if they wish to opt into existing Third Pillar instruments when the transitional period (2009-14) will come to an end and these instruments will be fully 'Lisbonised' in accordance with Protocol 36. Moreover, according to Protocol 21, the UK and Ireland may opt in or opt out from each new measure adopted under the criminal law provisions in Title V of the TFEU. In addition, Denmark offers a good example of real the limits to the benefits of differentiation. The extensive opt-out granted to Denmark in terms of Protocol 22, which affords it a special position to the whole AFSJ, is highly unfortunate from an integrationist perspective. This is because regardless of the merits from a sovereignty perspective, it could lead to fragmentation in fundamental rights protection as Denmark's conduct in the matters covered by the AFSJ will remain outside the CJEU's jurisdiction. Protocol 22 thus provides that Denmark participates in Schengen-related measures and Pre-Lisbon third pillar instruments on the basis of international law which continue to be

²⁹ Prior to the Lisbon Treaty, the rules on enhanced cooperation were set out in former Article 11 EC and Articles 40 and 43 TEU.

³⁰ S. Weatherill, "If I'd wanted you to understand I would have explained it better: What is the Purpose of the provisions on closer co-operation introduced by the Treaty of Amsterdam?", in D. O'Keefe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty*, Oxford: Hart Publishing, 1999, pp. 21-40.

³¹ See the contributions by Matera and Santos Vara and Fahey to his volume.

binding and applicable to Denmark as before, even if these acts are amended (i.e. unlike acts under the Transitional protocol). At the end of the day, the question of how to best tackle EU flexibility goes to the core of the rule of law and citizens rights.

4.4 Conclusion

The Treaty is rich in instances of differentiation which not only indicate endorsement of multiple speeds but rather encourage differentiation where situation demands and the old 'Communitarian' consensus is in short supply. Differentiation in EU law as such is a well-travelled ground in literature with scholars, including the present authors, either taking a critical approach to the relevant Treaty provisions which authorise it,³² or exploring the impact of different speeds upon certain substantive areas of EU activity.³³ Against this common trend in literature, the present authors endeavoured here to map certain general principles that apply in differentiated integration. These organising principles, applied in classic Communitarian integration were dubbed in this contribution as housekeeping rules.

A set of housekeeping rules in the context of differentiation should allegedly guide the CJEU when balancing the varied geometry initiated by the Treaty and therefore help transform it into systematic geometry (rather than let it grow unprecedentedly into an *avant garde*³⁴). Such a development includes building a rationale for resolving promptly any issues arising when, for instance, a proposal is in contradiction with the interests of some member states. Whether or not EU constitutional principles are fit for the purpose of regulating differentiation is a theoretical question which goes beyond the scope of this chapter. Suffice to mention here that adjudicating challenges to differentiation or policing national opt-outs and opt-ins will reveal a systemic problem of differentiation. This can be summarised in that although alternative routes to integration open new windows of opportunity for their participants, there are hardly any pointers in the treaty with regard to the application of organising principles to accommodate differentiation.

It is worth mentioning that the treaties take a holistic approach to the application of the main principles that underpin the EU legal order in all fields of their application regardless of the method under which member states choose to cooperate. Nonetheless, the CJEU does not always have jurisdiction to adjudicate in all areas covered by the Treaties. To use one example, security and defence is an area where enhanced cooperation could potentially open in future. Member states which are reluctant to cede their autonomy in defence and wish to bring an action for

³² E. Herlin-Karnell, "Enhanced Cooperation and Conflicting Values: Are new forms of governance the same as good governance?", in M. Trybus et al., *Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham: Edward Edgar, 2012, p. 146; T. Konstadinides, *Division of Powers in EU law: The Delimitation of Internal Competence between the EU and the Member States*, The Hague: Kluwer, 2009, Chapter 8.

³³ See for instance in the context of Justice and Home Affairs: S. Peers, *EU Justice and Home Affairs*, Oxford: Oxford University Press, 2011, p. 93.

³⁴ See C. Joerges and J.H.H. Weiler (eds), "What Kind of Constitution for what kind of Polity?", *Symposium: Responses to Joschka Fischer*, Florence, EUI, 2000.

annulment under Article 263 TFEU against the offspring of enhanced cooperation would, however, be confronted with the specificity of the CFSP. This specificity includes, most prominently, the lack of CJEU jurisdiction as confirmed in Article 275(1) TFEU and the decision of the Court in *Grau Gomis*.³⁵

The picture that has emerged from this chapter is, inevitably, a patchy one. Whilst hardly anyone would disagree that the EU should be a consistent project, reconciling the principle of consistency with that of loyalty and conferral remains an arduous yet vital task. The somewhat asymmetric constitutional arrangements, such as the enhanced cooperation procedure and the AFSJ opt-outs demonstrate that the application of housekeeping rules, as a means of retaining predictability in EU law, is not only relevant where organising constitutional principles enjoy an express/textual reference in the treaty. Their application could equally comprise an implied concern in all EU policy areas because they could assist EU Institutions (the CJEU in particular) countering fragmentation. Yet, it is crucial to call to mind that the constitutional fencing of asymmetry emanating from differentiation has to be counterbalanced against its political nature and its irregular justiciability.³⁶ The latter remains a recurrent problem since it is of vital importance to the CJEU whether differentiation is taking place under the TFEU or the TEU. In this sense one can feel haunted by the relevance of the former EU pillar leftovers. It follows that, however desirable it may be, the application of EU constitutional principles in the often fragmented landscape of differentiated integration remains an ongoing and rather tortuous task.

³⁵ Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023.

³⁶ F. Amtenbrink and D. Kochenov, "Towards a more flexible approach to enhanced cooperation", in A. Ott and E. Vos (eds), *50 years of European Integration: Foundations and Perspectives*, The Hague: TMC Asser Press, 2009.

5. FLEXIBILITY AND HOMOGENEITY: TWO UNEASY BEDFELLOWS

ADAM ŁAZOWSKI*

5.1 Introduction

Flexibility and homogeneity are two uneasy bedfellows of European integration. The key question is whether flexibility is a good way forward or whether it is a threat to integration, leading to erosion of coherence of policy-making and homogeneity of EU law. Experience proves that with 28 member states in the EU, flexibility is no longer a rarely used cushion on which an avant garde group of states may theoretically sit, but rather is an indispensable tool to keep the EU together. Indeed, flexibility may be considered as remedy for political stalemates but at the same time it guarantees that the majority may move forward. Nevertheless, the risks to homogeneity of the EU legal order resulting from flexible integration are rather obvious. It leads to deep fragmentation of the legal framework and makes it look like a chaotically designed spider web. To complicate matters even further, Europe of different speeds is not only a domestic affair for the EU. Various models of economic and legal integration without EU membership have been developed in the last 20 years. EU law has become an exportable commodity in its own right. Furthermore, in some cases EU law is applicable in relations to third countries. To achieve this, a degree of flexibility was required from both – the EU and its neighbours. At the same time numerous mechanisms to secure the homogeneity were required. This contribution argues that flexible integration is neither easy to design nor to handle in the EU's external relations. With the exception of the EEA (European Economic Area), the existing institutional and procedural frameworks are not particularly supportive of homogeneity. Arguably, during the negotiations with the neighbouring countries too much emphasis was put on flexibility. Alas, this was to the detriment of the uniform application and interpretation of the EU *acquis*. The question this contribution aims to answer is whether this drive to export the EU legal order to third countries comes at too high a price for the homogeneity of EU law.

5.2 The external face of flexibility

The external face of flexibility is equally puzzling and complex. The European Union, despite all its drawbacks so gladly criticised by ever more knowledgeable euro-sceptics, is an attractive economic and legal endeavour not only for the current and

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potential candidates¹ for membership but also for those countries that wish to benefit from the internal market but shy away from deeper political integration. As is well known, there is a group of neighbouring countries which, on the one hand treasure free trade, but, on the other hand, do not wish to be part of the ever-closer Union. Achievement of those objectives served as the *raison d'être* behind the creation of the European Free Trade Association (EFTA) in 1960. Although in hindsight it may be hard to believe but during its first years EFTA was considered as a competitor of the European Economic Community (EEC). As soon as some EFTA countries were allowed to try their luck in the EEC, the remaining EFTA states pursued closer links with the European Communities by means of free trade agreements.² This eventually led to the creation of the European Economic Area in the early 1990s.³ The objective was to expand the internal market to the EFTA countries without their accession to the European Union. This approach required flexibility on both sides.

For the EU the question was how to accommodate new participants in the internal market without taking a risk that this would come at a price of homogeneity of the EU legal order. For the EFTA countries one of the main concerns was to guarantee their participation in the EU decision-making. Although full participation was out of the question, a *modus vivendi* was reached. As the EFTA and EEC member states were getting ready to launch the European Economic Area, the Swiss voters, by a narrow margin, opted out of that newly emerging framework. After a short pause for reflection, it led to deepening of the bilateral relations and creation of an idiosyncratic bilateral model. Alas, it is far from perfect and its deficiencies are more visible now than ever.⁴

One should also mention deeper integration frameworks that are evolving in relations with the neighbours in the Western Balkans and some former Soviet Union countries covered by the European Neighbourhood Policy. One of those frameworks – the Energy Community – has been operational for a while now, while the Transport Community Treaty and the European Common Aviation Area Treaty are still being negotiated.⁵

What makes all those models unique is an obligation imposed on the third countries to apply EU law. By this means some elements of the internal market and carefully selected flanking policies are extended to the neighbouring states. The level of commitment goes beyond mere approximation of laws, which is a well-established

¹ As of 1 September 2013, the list of candidate countries includes Turkey, Former Yugoslav Republic of Macedonia, Montenegro and Serbia. Potential candidates are Albania, Bosnia and Herzegovina as well as Kosovo.

² See further E.P. Wellenstein, "The free trade agreements between the enlarged European Communities and the EFTA countries", *Common Market Law Review*, Vol. 10, 1973, p. 137.

³ Agreement on the European Economic Area, OJ 1994 L 1/1.

⁴ See Council Conclusions on EU relations with EFTA countries, Brussels, 20 December 2012.

⁵ See further, inter alia, S. Blockmans and B. Van Vooren, "Revitalizing the European 'Neighbourhood Economic Community': The case for legally binding sectoral multilateralism", *European Foreign Affairs Review*, Vol. 17, 2012, pp. 577-604.

concept in countless agreements the EU has with third countries.⁶ The latter leads to the creation of legal transplants, without, however, an underpinning obligation to apply EU law in relations with the European Union. In the cases at hand, however, the obligation to apply EU *acquis* leads to the creation of a wider European Legal Space.⁷ The third countries have a fair degree of flexibility although not absolute freedom to choose what they are bound by. This flexibility has an impact on the European Union and its decision-making. It affects the homogeneity of the EU legal order and also, in broader terms, of the European Legal Space created with the neighbouring countries.

Before we look at different mechanisms of securing the homogeneity of the European Legal Space, it is worth exploring the interaction between the internal and external dimension of flexibility. No other framework is more suitable for this exercise than the Schengen *acquis*. As is well known, several member states of the European Union do not participate fully in the Schengen cooperation. This is either because they express no desire to do so (the United Kingdom, Ireland and Denmark) or as a consequence of not meeting the required criteria (Bulgaria, Romania, Cyprus and Croatia). At the same time Norway, Iceland, Liechtenstein and Switzerland are associated with Schengen *acquis*. The paradox then is that non-EU countries are far more integrated with the EU core than some of its own member states. The entire institutional and procedural set-up is filled with complexities. As explained below, this has consequences not only for the homogeneity of the European Legal Space, but it also directly affects citizens' rights. Needless to say that such a legal regime is difficult to navigate and it is largely incomprehensible not only to members of the public but also to practitioners.

5.3 How to marry flexibility with homogeneity?

Arguably, the higher the levels of flexibility, the bigger are the challenges to homogeneity. The sections that follow explore the relationship between these notions further. In order to prove this argument I will take into account the following points. Firstly, EU law is very dynamic and subject to constant evolution. When it is exported to third countries as part of the European Legal Space, the difficult question that has to be answered is to what extent are these countries, which participate in such deep integration frameworks with the EU, bound by the new EU *acquis* (both written and case law of the Court of Justice of the European Union – CJEU). Secondly, such frameworks require guarantees that EU law will be interpreted in a uniform way not only in national courts of EU member states, but also by judges in the neighbouring countries. Both aspects of homogeneity have been discussed thoroughly ever since the European Economic Area was created over 20 years ago. In

⁶ A. Łazowski and S. Blockmans, "Between dream and reality: Approximation of domestic laws with EU law in the Western Balkans", in R. Petrov and P. Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?*, London: Routledge, 2014 (forthcoming).

⁷ See further, A. Łazowski, "Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union", *Common Market Law Review*, Vol. 45, 2008, pp. 1433-1458. Parts of this contribution draw from that article.

fact, both of these issues had been extensively dealt with during years of brainstorming and negotiations that led to the establishment of the EEA. Although these discussions focused solely on the EEA, the issues that were raised and a variety of arguments that were employed are more universal and apply *mutatis mutandis* to all frameworks discussed in this chapter. Both the legislative homogeneity and implementation homogeneity are presented in turn.

5.3.1 *Flexibility vs. homogeneity: a law book perspective*

The first crucial issue is how to guarantee that the third countries benefiting from flexible integration with the European Union do not undermine too much the homogeneity of the EU legal order. As mentioned above, the latter is constantly developing. Despite all the conceptual and practical deficiencies of the decision-making process, the European Union remains a prolific legislator. The question is to what extent such third countries should be bound by new EU *acquis* and how to secure their access to the EU decision-making. When it comes to the former, seemingly there is only a binary choice available, that is either to make them bound by the new legislation or not. This translates into two models: dynamic and static. No doubt it is the dynamic model that is usually preferred by the European Union as it serves homogeneity better. At the same time it may not be the third countries' cup of tea as it takes away the desired flexibility. Arguably the model chosen for the European Economic Area serves both objectives. To start with, it is a good example of a dynamic model whereby the three EEA-EFTA countries are bound by any new EU legislation falling within the scope of the EEA Agreement. It is notable that annexes to the EEA Agreement contain lists of EU *acquis* that apply to the entire European Economic Area and they include hundreds of pieces of EU secondary legislation. It is the task of the EEA Joint Committee to secure the homogeneity of the EEA legal space and amend the annexes as fast as possible in order to allow simultaneous entry into force of the legislation in the entire EEA.

To offset negative consequences it may have for the EEA-EFTA countries and to bring flexibility into the equation, the EEA Agreement provides for a tailor-made procedure giving Norway, Iceland, Liechtenstein as well as the EEA Joint Committee some leeway.⁸ Furthermore, these countries do not participate in the EU decision-making *per se*, but they do contribute to the process of decision-shaping. Their representatives are invited to sit in countless EU committees/working groups, which allows them to exercise the power of persuasion and to shape the EU secondary legislation at the early stages of the EU decision-making process. Practice proves that this *modus operandi* is generally satisfactory, although delays affecting the homogeneity of the EU legal order are inevitable.⁹ The reality is, however, that the member states themselves are frequently late with transposition of EU secondary legislation, hence similar risks to homogeneity of the European Union legal order stem from the inside as they do from the outside. One should also add that the fields

⁸ See Articles 102-104 EEA Agreement.

⁹ See pt. 28 of Council Conclusions on EU relations with EFTA countries, Brussels 20 December 2012. See also Jacques Pelkmans and Philipp Böhler, *The EEA Review and Liechtenstein's Integration Strategy*, CEPS Paperback, CEPS, Brussels, 2012.

of cooperation between the European Union and the EFTA countries now spread well beyond the internal market. Seemingly a political decision was taken to move ahead without amendment to the EEA Agreement but rather through parallel bilateral/trilateral treaties. Each of those has own institutional framework and, if necessary, an adaptation mechanism.

The EU-Swiss bilateral framework is a different kettle of fish. Without a shadow of a doubt, the centre of gravity is on flexibility, not on homogeneity. The dynamic character of the model employed in the European Economic Area was one of the reasons why the Swiss voters rejected participation in this endeavour in 1992. Hence when two packages of bilateral treaties were negotiated in the wake of the EEA fiasco, it was clear that an alternative solution would have to be developed. Several agreements forming the Bilateral I and II packages require Switzerland to apply EU *acquis* listed in the Agreements and their annexes.¹⁰ However, in most of the cases the agreements are static,¹¹ and hence Switzerland has no obligation to follow developments in EU secondary legislation. This is proving particularly tricky when it comes to the EU-Swiss Agreement on Free Movement of Persons. So far Switzerland has refused to accept Directive 2004/38/EC, which constitutes a backbone of EU 'free movement of persons' *acquis*.¹² As a result the EU-Swiss legal framework is composed of several directives and regulations, which were adopted as late as in 1964 and are no longer in force in the European Union.¹³ It is crucial that there are a number of differences between the old and the new legislation. For instance Directive 2004/38/EC extends the derived residence rights to a larger number of family members; it also abolishes residence permits and introduces a general right of permanent residence. Last but not least, it provides a regulatory framework on restrictions to residence rights that is far more elaborate than the previous legislation. However, the static character of the EU-Swiss Free Movement of Persons Agreement is not the only problem. In 2012 Switzerland unilaterally re-introduced residence permits for citizens of eight EU member states, which allegedly is contrary to the Agreement. All of this makes the bilateral framework patchy and incoherent, not to mention that homogeneity is becoming a mirage in the desert. Not surprisingly the

¹⁰ See, for instance, Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ 2002, L 114/6.

¹¹ The EU-Swiss Agreement on Schengen is one of very few exceptions. It provides for a dynamic adaptation mechanism. Furthermore, if Switzerland does not accept new *acquis*, the Agreement may be eventually terminated.

¹² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC), OJ 2004, L 158/77.

¹³ For instance Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 1963-64 English Special Edition, p. 117.

Council of the European Union in its EFTA Conclusions of December 2012 expressed deep concern about the functioning of the current arrangement and questioned whether it is still fit for purpose. It is also notable that the contemporary EU-Swiss institutional framework is very complex with dozens of different committees based on the bilateral agreements. This is far from ideal.

Last but not least, one should also mention the Energy Community created between the European Union, the countries of the Western Balkans and some of the European Neighbourhood Policy (ENP) countries.¹⁴ Its aim is two-fold: to create the common energy market in the region and also to prepare the candidate and potential candidate countries for accession to the European Union. Seen from that perspective the Energy Community is one of the pre-accession instruments. The Energy Community Treaty imposes two kinds of obligations when it comes to the applicable *acquis*. First, there is an exhaustive list of EU legal acts to which the parties have an obligation to adhere. Second, there are parts of the *acquis* covered by best-endeavours clauses. A threat to the homogeneity of the legal regime comes from the necessary adaptations procedure set forth in Article 24 Energy Community Treaty. It vests the Energy Community with powers to adapt the relevant *acquis*, bearing in mind the framework of the Treaty and specific situations of the parties. Hence, the procedure of adapting the legal framework to subsequent developments in EU law is of a static character. It gives ample flexibility to the Energy Community institutions and the non-EU countries participating in this endeavour. As specified in Article 25 of the Energy Community Treaty, measures may be adopted to take such changes on board. It may also be decided to implement other parts of the *acquis* related to network energy. *A contrario*, there is no obligation to do so. This guarantees flexibility, yet at the same time it may lead to the fragmentation of the applicable legal regime, hence it is likely to affect the homogeneity within the European Legal Space.

5.3.2 *Flexibility vs. homogeneity: a court room perspective*

A law book perspective is just one side of the coin. The other is what happens when the importers of EU law are in breach of their commitments and how such exported EU law is applied in everyday practice. The only framework that provides sufficient guarantees for compliance with EU law is the European Economic Area, with the Surveillance Authority and the EFTA Court serving as guardians of effectiveness of EEA law, and, by the same token, acting as guarantors of homogeneity. The enforcement design is quite similar to the internal EU arrangement with the infraction procedure¹⁵ and the advisory opinion procedure.¹⁶ The first allows the EFTA Surveillance Authority to be the EEA guardian; the second equips the national

¹⁴ Current membership includes the European Union, Albania, Bosnia and Herzegovina, Kosovo, Former Yugoslav Republic of Macedonia, Moldova, Montenegro and Ukraine.

¹⁵ Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ 1994 L 344/1 (similar to Articles 258-260 TFEU).

¹⁶ Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (similar to Article 267 TFEU).

courts in the EEA-EFTA countries with the possibility to engage in the judicial dialogue with the EFTA Court. Although the EEA Agreement limits the obligation to follow the case law of the Court of Justice to pre-EEA Agreement case law, this caveat has never been a particular problem in everyday practice. Post-EEA Agreement jurisprudence of the Court of Justice is duly followed by the EFTA Court.

On a critical note, it should be emphasised that the jurisdiction of the EFTA Court extends neither to the Free Trade Agreements between the EU and the EFTA countries¹⁷ nor to other flanking agreements extending the scope of cooperation to new areas.¹⁸ This may potentially have far-reaching implications, as demonstrated by the judgment of the Court of Justice in the case of *Van Esbroeck*.¹⁹ It was a reference for preliminary ruling from a Belgian court on interpretation of Article 54 of the Schengen Implementing Convention.²⁰ It provides that a person whose trial has been finally disposed of in one state may not be prosecuted in another state for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced. This provision applies to the EU member states that participate in the Schengen *acquis* and also to EEA-EFTA countries and Switzerland on the basis of bilateral/trilateral treaties with the European Union.

In the case at hand, the facts were rather straightforward, but the legal issues were quite profound. *Van Esbroeck* was involved in trafficking of drugs from Belgium to Norway. He was caught, prosecuted and sentenced for importing drugs by the Norwegian authorities. Upon his release from a Norwegian prison, *Van Esbroeck* returned to Belgium where, much to his surprise, he was prosecuted for exporting drugs. Since both prosecutions dealt with the same set of acts, the question was whether it was a *ne bis in idem* scenario. The Court of Justice held that the divergent legal classifications of the same acts (export and import) were not decisive and it was the identity of the material acts that mattered. Hence, *Van Esbroeck* successfully challenged the legality of the second prosecution. In this case the Court of Justice had jurisdiction to deal with the preliminary ruling from the Belgian court.

¹⁷ Agreement between the European Economic Community and the Republic of Iceland, OJ 1972, L 301/2; Agreement between the European Economic Community and the Kingdom of Norway, OJ 1973, L 171/2.

¹⁸ For instance: Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a member state or in Iceland or Norway, OJ 2001, L 93/40; Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, OJ 1999, L 176/36.

¹⁹ Case C-436/04 Criminal proceedings against Leopold Henri Van Esbroeck, ECR [2006] I-2333.

²⁰ Convention signed in Schengen on 19 June 1990 between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Schengen Agreement of 14 June 1985, OJ 2000, L 239/19.

However, the question is what would have happened had *Van Esbroeck* been prosecuted in the reverse order – first in Belgium and then in Norway. Since the EU-Iceland/Norway Schengen Agreement falls outside of the scope of the EEA Agreement, the EFTA Court would have had no jurisdiction to assist a Norwegian court. In purely speculative terms one could imagine *Van Esbroeck* serving the second sentence in Norway had the interpretation of Article 54 of the Schengen Implementing Convention been left solely to the Norwegian courts. The same argument is applicable internally to the European Union. Until 1 December 2014, only courts from the member states which recognised the jurisdiction of the Court of Justice as per Article 35 TEU have the jurisdiction to refer. This demonstrates another internal dimension of flexibility. Not only are some member states not fully covered by the Schengen *acquis* but also in some cases national courts may not engage in dialogue with the CJEU. This case is definitely a good laboratory for analysis of the impact of flexibility on homogeneity of the EU legal order and the European Legal Space.

The lack of judicial-enforcement machinery in the EU-Swiss framework is yet another drawback of the existing treaty arrangement. Swiss courts, even when in doubt about the interpretation of EU-Swiss *acquis*, have to venture into a DIY (do-it-yourself) exercise. Although technically they are bound by some case law of the CJEU, but when a case at hand raises novel legal issues, the Swiss judges are left on their own. Furthermore, when Switzerland is in breach of the bilateral agreements, there is no judicial enforcement machinery. Only the traditional dispute settlement arrangements laid down in the bilateral agreements are available and they are not robust enough. It does not come as a surprise that the Council of the European Union has called for an “international mechanism for surveillance and judicial control”.²¹ This is yet another example that more emphasis was put on the flexibility in the EU-Swiss framework, which affects the homogeneity of the legal space provided therein.

The Energy Community provides for a special enforcement procedure, although it is not of a judicial nature. Detailed rules are set out in Title VII of the Energy Community Treaty; they partly echo the infringement procedure known from the EU framework. According to Article 90 Energy Community Treaty, a failure to comply with an obligation set forth in the Treaty or to implement a decision of the Energy Community may be brought to the attention of the Ministerial Council by any Party to the Treaty, the Secretariat of the Energy Community, the Regulatory Board and private parties. The Ministerial Council has the authority to determine a breach of obligations and, should the breach be of a serious and persistent nature, the Ministerial Council is vested with powers to suspend certain rights stemming from the Energy Community Treaty, including the voting rights. The effectiveness of this mechanism is yet to be verified.

²¹ See pt. 33 of Council Conclusions on EU relations with EFTA countries, Brussels, 20 December 2012.

5.4 Conclusions

This contribution demonstrates that flexibility and homogeneity are two uneasy bedfellows of European integration. Both have advantages and disadvantages, but the key to success is to find an equilibrium between the two. This applies to both – the internal and the external dimension, although in this analysis the centre of gravity was on the latter. As argued above, the closest to this equilibrium is the European Economic Area. On the one hand, it gives some flexibility to the EEA-EFTA countries; on the other hand, it provides for a number of institutions and procedural mechanisms which serve as guarantors of the homogeneity of the EEA legal order. However, the equilibrium is lost when one steps outside the EEA framework. To start with, all other agreements with the EEA-EFTA countries do not provide for adequate mechanisms to secure the homogeneity of the legal space. The case *Van Esbroeck* discussed above is a very good example to prove this point. Furthermore, the EU-Swiss framework is not satisfactory either.

As argued by the Council of the European Union, the current framework needs to be replaced by a coherent mechanism that will guarantee homogeneity of the legal space between the European Union and Switzerland. To reach consensus will undoubtedly require flexibility on both sides. An equilibrium will have to be found to remedy the existing arrangement which puts too much emphasis on flexibility and not enough on homogeneity. Two options might be considered. The first is the extension of the competence of the EFTA Surveillance Authority and the EFTA Court to both – the flanking agreements with the EEA countries and EU-Swiss framework. The second and less-likely one is the extension of the competences of the European Commission and the Court of Justice. Finally the functioning of the Energy Community needs to be thoroughly evaluated. The experience of the first years of its operation proves that the implementation of the EU *acquis* for the participating countries is a major challenge, and henceforth also a threat to the homogeneity of the legal space.²² This should be taken into account not only for the sake of the Energy Community itself but also the emerging two legal frameworks for closer sectoral rapprochement (the Transport Community and the European Common Aviation Area).

²² Report from the Commission to the European Parliament and the Council, under Article 7 of Decision 2006/500/EC (Energy Community Treaty), COM(2011) 105 final of 10 March 2011, Brussels.

6. DIFFERENTIATION IN CFSP

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6.1 Introduction

The Common Foreign and Security Policy (CFSP) is an area of EU external action that is notoriously difficult to forge. The general rule of unanimity in CFSP decision-making often holds the European Union back in its attempts to protect its interests and pursue its global objectives. In an enlarging Union, differences in (geo)strategic and political interests, socio-economic realities and historical trajectories all potentially contribute to the creation of ever-more fissures in the image of the EU as an actor on the international stage. Arguably, a common commitment to values and norms is an insufficient basis for policy consensus on what are still largely perceived to be the foreign policy interests of individual member states.

The member states' most notable public failure to reach a common position within the EU on a foreign and security policy issue arose out of the 2002-3 transatlantic crisis over military intervention in Iraq.¹ Internal disunity led to extensive soul-searching. In an effort to paper over the cracks, the European Security Strategy was adopted,² but it did not detract from the fact that, more often than not, the EU fails to co-ordinate a common policy response to external crises, even when the means to address them are at hand. For instance, judgments about the EU's reaction to the flare-up of conflict over the breakaway regions of Abkhazia and South Ossetia, Russia's incursion into Georgia, and Moscow's unilateral recognition of the two de facto states, have varied. In a rare display of unity, at their emergency summit on 1 September 2008 – only the third in its history – the EU member states were united in their condemnation of Russian aggression.³ Moscow – otherwise used to a squabbling and uncritical EU – will have taken note of the Union's strong reaction, and of the swift intervention by the French EU Presidency to broker a ceasefire

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¹ See, e.g. U. Puetter and A. Wiener, "Accommodating Normative Divergence in European Foreign Policy Co-ordination: The Example of the Iraq Crisis", *Journal of Common Market Studies*, Vol. 45, 2007, pp. 1065-1088; and A. Toje, "The Consensus-Expectations Gap: Explaining Europe's Ineffective Foreign Policy", *Security Dialogue*, Vol. 39, 2008, pp. 121-141.

² European Council (2003), "A Secure Europe in a Better World, European Security Strategy", Brussels, 12 December.

³ Presidency Conclusions, Extraordinary European Council, Brussels, 1 September 2008, doc. 12594/08, 11.

agreement with Tbilisi. However, when the sense of urgency over the Georgian crisis dissipated, the classic divisions between EU member states over how to deal with Russia reappeared – ranging from the ‘new cold warriors’ (e.g. Lithuania and Poland), to the ‘friendly pragmatists’ (Austria, Belgium, Bulgaria, Finland, Hungary, Luxembourg, Malta, Slovakia, Slovenia and Portugal), to Russia’s ‘strategic partners’ (Germany, France, Italy and Spain) and ‘Trojan horses’ in the EU (e.g. Bulgaria and Cyprus).⁴

Whereas it is true that the success of the CFSP largely hinges on the ability of the member states to find consensus on issues that touch upon the core of their sovereignty as independent actors on the international stage; a process that often results in a race to the bottom in search of the lowest common denominator, over time a certain flexibility has been introduced into the CFSP to keep the member states “united in diversity” (as the old maxim of the EU goes). Arguably, this is the way forward.

[U]nder certain conditions, the specialisation and division of labour among EU member states [big *and* small] can strengthen both the effectiveness and legitimacy of the foreign policy of the EU (...).⁵

This is especially so in cases where there is a lack of interest or political will among all member states. As long as such more or less structured coalitions of member states work towards the attainment of the Union’s external action objectives, this may assist in the operationalisation of EU foreign policy and increase the visibility and credibility of the EU as an international actor.

This contribution will first focus on the legal space which has gradually been introduced into the constituent treaties to accommodate differences between member states in CFSP. In particular, the chapter will analyse the departures from unanimity decision-making, i.e. the constructive abstention mechanism and the introduction of qualified majority voting, the extension of enhanced cooperation to CFSP and other procedural peculiarities introduced by the Lisbon Treaty. The analysis will then turn to the practice and functions of different types of coalitions of member states that coordinate matters of foreign policy more closely and the constitutional limitations to differentiation in CFSP, i.e. the duty of loyal cooperation and the principle of vertical consistency in policy-making – which aim to put the C back into CFSP.

6.2 Treaty departures from unanimity decision-making

6.2.1 Introduction

The European Union’s competence in CFSP remains formulated as broadly as before, covering

⁴ For the conceptualisation and categorisation of EU member states’ positions on Russia-related topics, see M. Leonard and N. Popescu, “A Power Audit of EU-Russia Relations”, ECFR Policy Paper, 2007, p. 2.

⁵ See S. Keukeleire (2006), “EU Core Groups – Specialisation and division of labour in EU foreign policy”, CEPS Working Document No. 252, Centre for European Policy Studies, Brussels, October.

all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence' (Article 24(1) TEU (emphasis added)).

CFSP is a non-exclusive EU competence running concurrently with national competences in the realm of foreign affairs.⁶ An *a contrario* reading of the principle of conferral in Articles 4(1) and 5 TEU suggests that the CFSP does not extend to those external competences attributed to the Union under the TFEU (e.g. trade, financial and technical assistance). Such a reading is confirmed by Article 40 TEU, which determines, inter alia, that the implementation of the CFSP may not affect the application of procedures and the respective scope of powers held by EU institutions for the implementation of non-CSFP competences referred to in Articles 3-6 TFEU.⁷ It is up to the European Council to identify the Union's strategic interests, determine the objectives of and define general guidelines for the CFSP, including for matters with defence implications (Article 26(1) TEU) and to the Council to frame the CFSP accordingly and take the decisions necessary for defining and implementing it (Article 26(2) TEU).

The Lisbon Treaty confirms that CFSP remains a policy area separate from the Union's other activities. Article 24(1) second subparagraph TEU clearly states that

[t]he common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise.

As before, CFSP remains largely in the hands of the Council and of the representatives of member states' governments. It is put into effect by the High Representative of the Union for Foreign Affairs and Security Policy (HR) and by the member states. Article 24(1) also states that "[t]he specific role of the European Parliament and of the Commission in this area is defined by the Treaties." The Court of Justice only has jurisdiction to monitor compliance with Article 40 TEU and to review the legality of certain sanctions decisions taken on the basis of Article 275(2) TFEU.

Article 31 TEU establishes the modalities in Council decision-making in CFSP matters. Article 31(1) TEU lays down the general rule for decision-making in CFSP, i.e. unanimity. However, there is one qualification to the rule, the so-called "constructive abstention". Moreover, Article 31(2) TEU packs three exceptions where

⁶ See, in this respect, Declarations Nos. 13 and 14, which member states attached to the Lisbon Treaty. In nearly identical terms, these declarations stress that the CFSP does not affect national competences in the field. See further M. Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process", in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, p. 34.

⁷ See A. Rosas and L. Amati, *EU Constitutional Law: An Introduction*, 2nd ed., Oxford: Hart Publishing, 2010, p. 243; P. Eeckhout, *EU External Relations Law*, 2nd ed., Oxford: Oxford University Press, 2012, pp. 167-171 and S. Blockmans and M. Spornbauer, "Legal Obstacles to Comprehensive EU External Security Action", *European Foreign Affairs Review*, Vol. 18, 2013, Special Issue, pp. 7-24.

the Council decides by qualified majority. The legal space that has thereby been created offers some room to accommodate differentiation in CFSP.

6.2.2 *Constructive abstention*

In a mechanism which is unique under the Treaties, Article 31(1) leaves room for a member state to abstain from Council decision-making in the field of CFSP. The second subparagraph clarifies that, “[w]hen abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration”. The latter is not an obligation but rather offers each member state with a discretionary power to offer an explanation for its position. The provision further states that, in the case of an abstention, the member in question

shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, [that] Member State shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect its position.

Although not giving support to the adopted decision, the abstaining member state can therefore not be relieved of the general duty of loyal cooperation in CFSP matters: it “shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations” (Article 24(3) TEU). The rules of CFSP decision-making leave no doubt about the prevalence of external solidarity over internal divisions. The Treaty does not permit that the member state abstaining from the implementation of a properly adopted CFSP decision disregards its binding consequences. All EU member states, whether giving or withholding their support, need to respect the resulting commitments for the EU as a whole and must therefore refrain from any action that goes against that decision.⁸

In general terms, the mechanism of constructive abstention aims at reconciling the position held by the majority of member states with the reservations and concerns of some. It has been observed that while the possibility of keeping a ‘constructive distance’ from certain decisions – as, indeed, the possibility of their obstruction – facilitates the formation of common positions on CFSP matters, it also drains the CFSP’s potential impact when the adopted decisions require active implementation by as many member states as possible.⁹ In fact, Article 31(1) second subparagraph TEU determines that if such constructive abstentions “represent at least one third of the member states comprising at least one third of the population of the Union, [then] the decision shall not be adopted.” Under the pre-Lisbon Treaty regime, Council members representing one third of the weighted vote used for calculating QMV could block a CFSP decision (cf. Article 23(1) second subparagraph former TEU). Now, a double threshold is required for a blocking minority: one third of the member states, representing at least one third of the EU population. The Lisbon

⁸ Second subparagraph of Article 31(1) TEU.

⁹ See C. Törő, “The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The benefits of flexibility and differentiation in European Security and Defence Policy decisions and their implementation”, *European Law Journal*, Vol. 11, 2005, pp. 641-656.

Treaty has therefore widened the legal space to accommodate member states' interests in abstaining from CFSP decision-making by unanimity. It is unclear, however, whether the mechanism of constructive abstention carries much practical relevance. It appears that this instrument for flexibility in CFSP decision-making still has to gain in popularity. So far, the mechanism has only been used once, in February 2008, when Cyprus abstained when the Council adopted the Decision establishing the EULEX Kosovo mission.¹⁰ Cyprus argued "for an explicit decision of the UN Security Council [to mandate] the EU mission in Kosovo",¹¹ an entity it does not recognise as a sovereign and independent state. This significant case shows that the constructive abstention mechanism provides a form of flexibility that can prevent the type of decision-making *impasse* in the CFSP that QMV and enhanced cooperation are designed to avoid.¹²

6.2.3 Qualified Majority Voting

Since its inception, intergovernmentalism has been the governance mode *par excellence* in CFSP. Yet, limited but significant exceptions to the unanimity rule have slowly 'spilled over' from adjacent fields of EU external action into CFSP. As Eeckhout explains, the Treaty of Nice¹³ introduced three types of decisions which the Council adopts by QMV, pursuant to the current Article 31(2) TEU: i) when adopting a decision defining a Union action or position on the basis of a European Council decision relating to the Union's strategic interests and objectives (cf. Article 22(1) TEU); ii) when adopting any decision implementing a decision defining a Union action or position; and iii) when appointing an EU Special Representative in accordance with Article 33 TEU.¹⁴ To be sure, these QMV constellations did not and do not undermine the continued centrality of unanimity for the adoption of CFSP decisions, because they represent clearly stated 'derogation[s]' from the general unanimity requirement laid down in Article 31(1) TEU.¹⁵ In each of these cases, any member state is entitled to pull the 'emergency brake' and block a CFSP proposal 'for vital and stated reasons of national policy' (see below). The Treaty of Lisbon has inserted a fourth instance of QMV in CFSP decision-making by the Council, i.e. when

¹⁰ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

¹¹ See Council Secretariat, Council doc. CM 448/08 of 4 February 2008, point 2, on file with author.

¹² See M. Cremona, "Enhanced Cooperation and the European Foreign and Security and Defence Policy", in J.M. Beneyto (ed.), *Unity and Flexibility in the Future of the European Union: the Challenge of Enhanced Cooperation*, Madrid: CEU Ediciones, 2009, No. 75, p. 87, who also points to Jaeger's argument that enhanced cooperation is 'less negative' than constructive abstention. See T. Jaeger, "Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy", *European Foreign Affairs Review*, Vol. 7, 2002, No. 297, p. 302.

¹³ See Article 23(2) former TEU.

¹⁴ See Eeckhout, *op. cit.*, pp. 488-489.

¹⁵ As before the Lisbon Treaty, procedural decisions are to be taken by a simple majority. See Article 31(5) TEU.

adopting any decision defining a Union action or position, on a proposal which the High Representative has presented “following a specific request from the European Council, made on its own initiative or that of the High Representative”.

The opportunity of opening up more avenues for QMV was also enshrined in a new *passerelle* clause: Article 31(3) TEU enables the European Council to extend the cases of QMV by unanimously adopting a decision stipulating that the Council shall act by qualified majority in other cases, with the exception of decisions having military or defence implications (Article 31(4) TEU). This new and generous licence for extending the QMV mechanism enables the European Council to adjust the CFSP decision-making order in response to future needs and considerations of member states. Törő has observed that this *passerelle* clause might well be the “thin edge of the wedge which leads to the erosion of intergovernmental foreign policy-making in the Union”.¹⁶ However, the condition of full concurrence of national positions among the heads of state and government guarantees that the doors to the passage from unanimity to QMV will be firmly guarded and remain shut when contrary to the vital national interests or opposition of any member state.¹⁷ Moreover, in some member states (e.g. the UK and Germany), the government will not be able to agree to use this *passerelle* without prior approval by its parliament.¹⁸

As already noted, there are two exceptions to the use of QMV in CFSP matters. First, it does not extend to decisions having military or defence implications (Article 31(4) TEU). Secondly, every member state has a veto right and can pull the so-called ‘emergency brake’ (Article 31(2) TEU):

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

On the basis of the foregoing, one may conclude that the general rule of unanimity makes it difficult for the EU to forge common foreign and security policies on matters of both general and specific interest. Especially on questions about the use of force or interference in the internal matters of third states (e.g. Iraq 2003, Syria 2013), a ‘common’ foreign and security policy is unlikely to emerge from the divisions that separate the member states. Yet, it is unlikely that EU member states are ready to give up their veto power in return for more extended use of QMV in highly sensitive areas of international relations. QMV in CFSP will realistically work only in situations in which either none of the member states have particularly strong preferences or when there are no major divisions within the Council. In these cases it is reasonable to assume that the Heads of State and Government could reach the

¹⁶ Contribution by Csaba Törő to the EPIN Conference devoted to “The External Dimension of EU Variable Geometry”, held in Brussels on 6 May 2013.

¹⁷ *Ibid.*

¹⁸ See J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 262.

consensus needed to request a proposal from the High Representative and that no member state would consider its interests vital enough to justify hitting the emergency brakes. In general, though, the reality will remain that consensus among member states is sought, even where QMV is possible.

6.3 Extension of enhanced cooperation to CFSP

Enhanced cooperation, which was designed in the pre-Amsterdam IGC to allow some member states, using the EU framework and institutions, to cooperate further between themselves in cases where the others do not wish to do so, has been extended by the Lisbon Treaty to cover the entire realm of CFSP (Article 331(2) TFEU), including defence.¹⁹ The Lisbon Treaty also removed the ‘emergency brake’ procedure, albeit not completely. Furthermore, the Treaty provided for a new *passerelle* which allows participants in an enhanced cooperation to decide in the Council to switch from unanimity to QMV and from a special legislative procedure to the ordinary legislative procedure (Article 333(2) TFEU), except in defence matters (Article 333(1) TFEU).

Yet, these innovations might not provide the flexibility that several member states had hoped for. After all, enhanced cooperation in CSFP is characterised by its narrow scope, cumbersome procedures and strict establishment requirements. As Piris has pointed out,

the effect of these slight improvements will be somewhat reduced by the increase in the minimum number of participants from eight to nine member states [...]; the requirement of unanimity in the Council for authorising any kind of enhanced cooperation in CFSP, without any exception for an enhanced cooperation that would aim at implementing CFSP decisions which have already been adopted (whereas until the Lisbon Treaty there had been QMV in such a case); [and] the requirement of the consent of the European Parliament (where MEPs from all member states have a right to vote) for launching an enhanced cooperation, even for cases where the codecision procedure does not apply (whereas, until the Lisbon Treaty, in cases where codecision did not apply the European Parliament was only to be consulted) [...].²⁰

Moreover, some of the pre-conditions for the launch of an enhanced cooperation in CFSP continue to apply: it is a ‘last resort’ mechanism (Article 20(2) TEU) and there is no undermining the internal market (Article 326 TFEU). Taken together, these factors explain why the mechanism has not been used in practice in the area of CFSP. Instead, member states, in particular the smaller ones, have sought refuge in alternative forms of closer cooperation, created in a more flexible and informal way outside the framework of the treaties, i.e. without the burdensome decision-making procedures and without the exacting requirements for ‘enhanced cooperation’, helped by the fact that the CFSP – and thus the determination where the limits of the powers shared with the EU precisely lie – falls outside of the jurisdiction of the Court of Justice.

¹⁹ Pre-Lisbon, it only covered the implementation of a CFSP action which had already been decided upon. Compare Articles 27A to 27E former TEU.

²⁰ Piris, *op. cit.*, pp. 89-90.

6.4 Coalitions of member states

Close foreign policy cooperation among a limited number of EU member states is generally looked upon with suspicion as it is associated with *directoires* of large member states (e.g. the UK, France and Germany in the context of the E3+3 negotiations with Iran).²¹ However, under certain conditions, the specialisation and division of labour among EU member states, big *and* small, can strengthen the effectiveness and legitimacy of EU foreign policy, especially in cases where there is a lack of interest or political will among all member states.²² Indeed, as long as such more or less structured coalitions of member states work towards the attainment of the Union's external action objectives (cf. Article 21 TEU) and policies, the extra efforts, money and other national resources devoted by 'core groups' to specific foreign policy matters (regional or thematic) can help to i) alleviate the stress on an understaffed and cash-strapped European External Action Service (EEAS),²³ ii) assist in the operationalisation of EU foreign policy, and iii) increase the visibility and credibility of the EU as an international actor.

In practice, several types of coalitions of member states have been formed:

- permanent (e.g. Benelux²⁴) and *ad hoc* (e.g. the UK and France pushing the EU on lifting the ban on arming opposition forces in Syria²⁵);
- institutionalised (e.g. Visegrad Group²⁶) and loosely organised (e.g. the EU Core Group on Somalia, created early 2004, consisted primarily of the UK, Italy, Sweden and the European Commission, and was endorsed by the Council²⁷);

²¹ See, e.g., C. Gégout, "The Quint: Acknowledging the existence of a big four-US *directoire* at the heart of the European Union's foreign policy decision-making process", *Journal of Common Market Studies*, Vol. 40, 2002, pp. 331-344. See further, S. Lehne, "The Big Three in EU Foreign Policy", Carnegie Paper, July 2012 and S. Blockmans, "Beyond Entrenchment over Iran: Can the EU offer a framework for regional security?", CEPS Commentary, Centre for European Policy Studies, Brussels, 3 September 2012.

²² Keukeleire, *op. cit.*

²³ See S. Blockmans, "EEAS Reloaded: Recommendations for the 2013 Review", CEPS Commentary, Centre for European Policy Studies, Brussels, 12 December 2012.

²⁴ Article 3(2) sub d and Articles 24-27 of the 2008 Benelux Treaty attribute an external relations competence to the institutions of the Benelux. See also Ministry of Foreign Affairs of the Netherlands, Press release, "Verhagen: new impetus for Benelux foreign policy", 9 April 2008 and A. Rettman, "Benelux countries urge EU unity on Syria", *EU Observer*, 15 March 2013.

²⁵ See C. McDonald-Gibson, "Syria arms embargo lifted: Britain and France force EU to relax ban on supplying weapons to rebels", *The Independent*, 28 May 2013.

²⁶ See (<http://www.visegradgroup.eu>), the collaborative framework consisting of Poland, Czech Republic, Slovakia and Hungary intent joining up on, *inter alia*, foreign policy towards the Western Balkans. See Ministers of Foreign Affairs of the Visegrad Group (V4) and Western Balkans, "Joint Statement of the Visegrad Group on the Western Balkans", Warsaw, 25 October 2012.

²⁷ See GAERC, "Somalia - Council conclusions", Press release 7033/06 (Presse 68), Brussels, 20 March 2006.

- regional (e.g. Baltic Council of Ministers²⁸), inter-regional (e.g. the partnership framework of the Baltic and Benelux countries²⁹ and that of Nordic, Baltic and Visegrad countries³⁰), and thematic (e.g. mediation or reconciliation efforts³¹).

From this overview it becomes clear that these types of coalitions of member states have the potential to reinforce the CFSP. The challenge, however, is to make sure that these groupings do not obstruct but rather buttress the structures (in particular the HR, EU Special Representatives and the EEAS), procedures, policies and actions of the EU in the foreign and security field by:

- pooling more intensively the coalition members' views, efforts, measures and policies to support a more coherent and effective CFSP;
- adopting new measures to further the external action objectives of the EU, particularly through measures by member states in policy domains where the EU as such has few or no competences or capabilities, but where some coordination with the EU is useful or essential;
- preparing the ground for new EU initiatives and decisions in CFSP;
- concretising, implementing and assuring the follow-up of CFSP decisions;
- initiating, broadening or deepening the dialogue, mediation or negotiation with third parties (in particular those not recognised by the EU, e.g. *de facto* states, terrorist groups), allowing less formal and more frequent, flexible and purposive interaction, in addition to the efforts conducted by the EU;
- strengthening the coordination with external actors (e.g. third states, other regional organisations, UN agencies, NGOs), in a systematic way compatible with that by the EEAS; and
- implementing any other tasks that the Council or the High Representative may assign to a particular coalition of EU Member states.³²

In short, the existence of core groups of EU member states should not be seen as a problem for the development of CFSP *per se*. As shown above, it could rather be part of the solution in overcoming the constraints in CFSP decision-making. There are, however, two other 'constitutional' obligations that should guide such core groups' activities: i) the fact that member states are under a legal obligation to loyally

²⁸ See <http://www.mfa.gov.lv/en/policy/4595/cooperation-among-the-baltic-states/>, also for a link to the "Terms of Reference" of the Baltic Council.

²⁹ See P. Vaida, "Baltic and Benelux formins [*foreign ministers*] discuss EU foreign policy in Estonia", *The Baltic Course*, Vilnius, 12 September 2011.

³⁰ See Co-Chair's Statement, "Meeting of Foreign Ministers of the Visegrad, Nordic and Baltic states", Gdańsk, 20 February, 2013 (<http://www.visegradgroup.eu/documents/official-statements/meeting-of-foreign>).

³¹ E.g. the Swedish-Finnish initiative to set up a European Institute of Peace. See J. Claes, "Toward a European Institute of Peace", *Peacebrief*, No. 141, 21 February 2013.

³² This list of tasks and functions is inspired on the longer one developed by Keukeleire, *op. cit.*

cooperate with the EU institutions (European Council, Council and Commission, supported by the EEAS acting under the authority of the High Representative); and, in the slipstream thereof, ii) the duty to ensure the (vertical) consistency of EU external action (arguably the latter requires consultation and coordination with HR + EEAS). Respect for these principles should prevent EU external policies and actions from being diluted, undermined, rendered less visible, and re-nationalised by core groups' activities.

6.5 Putting the C back into the CFSP

Whereas the scope of the EU's specific competences in the realm of the Common Security and Defence Policy is more or less clearly defined (Articles 42-46 TEU), the open-ended notion of "all areas of foreign policy" in Article 24 TEU is misleading. Given that EU competence in this field is neither exclusive nor unlimited, differentiation may trigger problems of vertical consistency between the EU's CFSP and member states' foreign policies, as indeed problems of horizontal consistency among the different national foreign policies. This begs the question how to reconcile the general principles of consistency and loyal cooperation with the reality of differentiation.³³

As to the former, the principle of consistency has been ascribed great constitutional value.³⁴ A general principle of EU law codified in the Treaties (in, e.g., Articles 13(1) and 18(4) TEU), it is perceived, first and foremost, as an organising principle at the policy-making level aimed at creating synergies between different strands of EU policy. As such, the notion of 'consistency' comes closer to the formulation used in the French language version of the Treaty, i.e. "*coherence*" (Article 21(3), second subparagraph TEU).³⁵

Member states are under the obligation to support the Union's external and security policy "actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action" in the specific area of CFSP (Article 24(3) first subparagraph TEU). This not only means that the member states are held to work together to enhance and develop their mutual political solidarity (coherence), it also means that they are required to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations" (Article 24(3) second subparagraph TEU).³⁶ The latter chimes

³³ See E. Herlin-Karnell and T. Konstadinides, "The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration", *Cambridge Yearbook of European Legal Studies*, Vol. 15 (2012-2013), pp. 139-167.

³⁴ See, e.g. C. Hillion, op. cit. and M. Cremona, "Coherence in European Union Foreign Relations Law", in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar, 2011, pp. 55-92.

³⁵ According to the rules of Section 6 of Chapter I, Title I, Part VI of the TFEU, Article 21(3) TEU falls under the jurisdiction of the Court. With the Treaty of Lisbon, this particular notion has therefore become a justiciable principle in the realm of EU external action.

³⁶ Pursuant to Article 275(1) TFEU, these principles are not justiciable. Compare also ECJ, Case C-167/94 *Grau Gromis* [1995] ECR I-1023. Hence, only political enforcement is foreseen:

with the second – and better – interpretation of the principle of consistency, where the notion is perceived as setting common interests and unified objectives with the aim of eliminating contradictions in EU external action. The emphasis thus shifts from coherence at the policy-making level to consistency in implementation, whereby the latter imposes on the member states a negatively formulated behavioural duty geared towards the maintenance of a uniform pattern of outputs.

Seen in this light, it is no wonder that the principle of consistency (coherence) occupies a special place in the set of provisions on enhanced cooperation in Title III of Part VI TFEU. In particular, Article 334 TFEU provides that “the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the EU, and shall cooperate to that end.” Even if a *lex specialis* is absent from Title V TEU on EU external action (writ large), Article 20(1) TEU absorbs the principle of consistency of Article 334 TFEU and applies it indirectly to enhanced cooperation in *all* areas of non-exclusive EU competences, including CFSP.³⁷ Tied to the principle of loyalty, the notion of consistency thus guides different coalitions of member states in observing the Union’s interests, objectives, policies and actions under the CFSP. When these constitutional requirements are fulfilled, the CFSP sets to gain from the support of differentiated sub-structures, be that in terms of visibility, legitimacy and effectiveness of the European Union as an international actor.

Ultimately, what counts in reality is proper consultation and coordination between the member states and the central EU actors. With the creation of hybrid positions and bodies (High Representative and EEAS), the Lisbon Treaty has provided the necessary mechanisms to guarantee and foster this vertical consistency between the EU and partial numbers and varying sets of its member states. All that remains to be added is trust and goodwill on both sides.

“The Council and the High Representative shall ensure compliance with these principles”, (Article 24(3) third subparagraph TEU). Conversely, the principle of loyal cooperation is derived from the *lex generalis* laid down in Article 4(3) TEU, which does fall under the jurisdiction of the Court.

³⁷ See Herlin-Karnell and Konstadinides, *op. cit.*

7. ACCOMMODATING DIFFERENCES WITHIN THE CSDP: LEEWAY IN THE TREATY FRAMEWORK?

*Csaba TÖRŐ**

7.1 Preliminary remarks

The frequently varying interests of member states render the formulation and conduct of Common Foreign and Security Policy a complex and challenging exercise of accommodating persistent differences. Within CFSP, CSDP as its operational component often presents particularly difficult dilemmas with costly choices, revealing significantly divergent aspirations, expectations and capabilities among EU countries. The depth and breadth of the differences depend on a range of circumstances, from geopolitical considerations to budgetary concerns. Although these differences may prove difficult to overcome for international political or domestic economic reasons, the CSDP treaty framework does not raise insurmountable obstacles to their accommodation. Even if the rules applicable to the adoption and implementation of CSDP decisions admittedly hold limited possibilities for flexibility, in both phases – decision-making and execution – of the EU crisis management procedure the respective treaty provisions offer enough room for resilience and recognition to accommodate divisions among member states, if politically possible.

In spite of the seemingly straightforward limitation imposed by the requirement of unanimity in CSDP decision-making, the existing possibilities should be identified and examined under the current treaty framework. Particular attention will be paid to the accommodation of differences in CSDP within the limits of unanimity: flexibility through constructive abstention.

With respect to flexibility in the implementation of adopted decisions, the feasible modalities for the execution of CSDP operations by groups of member states will be explored, either in the form of ad hoc coalitions or designated formations from inside the Union.

At last, permanent structured cooperation will come under consideration as a standing platform for the accommodation of diverse commitments and capabilities in CSDP, together with its significance for defence policy differentiation within the Union.

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7.2 Accommodating differences in the course of CSDP decision-making

7.2.1 CSDP firmly within the realm of unanimity

The adoption of CSDP decisions is embedded in the broader context of rules defining decision-making in CFSP, which fall under Chapter 2 of Title V of the TEU.¹ Nevertheless, the enlarged scope of the permissible application of qualified majority voting and the perspective of its future expansion into further terrains of CFSP did not alter the place of CSDP within the order of decision-making on the external actions and security policy of the Union. Its military dimension continued to represent an unreformed exception to the possibility of differentiated modes of decision-making within Common Foreign and Security Policy.

Since the insertion of QMV into the 2nd pillar of the EU, the decision-making rules of CFSP have always contained some special provisions of assurances for the preservation of military or, more precisely, defence issues within the realm of unanimity. Matters relating to national armed forces and defence resources have been treated as being politically too sensitive to be decided in any other fashion than by overarching compromise. Accordingly, the respective treaty provisions on the general rules of CFSP decision-making explicitly rules out the possibility of recourse to *qualified majority voting* (QMV) with respect to “decisions having military or defence implications”.² These implications include any question that is related to operational or organisational decisions, and decisions on capability developments that give rise to obligations of a military nature. The exclusion of “military or defence” issues from the scope of QMV in decision-making corresponds to particular EU treaty provisions on the “non-interference” and compatibility of CSDP with the defence policy obligations of member states outside the Union.³ If a decision with consequences for defence commitments beyond the EU framework were permitted to pass by QMV, it could bring about major conflicts of duty for certain member states without their agreement. Sustained unanimity in military and defence matters provides assurance for every potentially affected EU member to avert any resulting conflict by withholding its approval of a decision having contradictory implications for its defence policy commitments inside and/or outside the Union.

In the specific section on CSDP within the CFSP chapter, TEU provisions plainly stipulate that all sorts of decisions, either operational or organisational, in relation to any aspect of the Common Security and Defence Policy must be unanimously adopted by the Council.⁴ No exception is permitted, regardless of subject matter, scope or character. In the general provisions of CFSP decision-making (Article 31) only decisions with “military or defence implications” are explicitly not exempted from the principal rule of unanimity. The related specification on CSDP acts seems to leave no room for manoeuvre as to the extent of necessary agreement among EU members.

¹ See the contribution by Blockmans to this volume.

² Article 31(4), TEU.

³ Article 42(2), TEU.

⁴ Article 42(4), TEU.

The EU treaty expressly allows diversion from the requirement of unanimity in the field of CSDP only in the case of a Council act on the approval of closer and sustained form of defence cooperation for a number of EU member states. Besides this particular type of act of authorisation, no other formal permission is granted for the adoption of decision by less than unanimity. Therefore, the sole exception to unanimity is confined to the formation and operation of permanent structured cooperation.

More importantly, the absence of QMV does not exclude every opportunity for flexibility in the course of the adoption of CSDP acts. The general rules of decision-making in Common Foreign and Security Policy offer some, though fairly limited, space for divergence and discord among member states without the prevention of a unanimous conclusion, as long as the disagreements are not manifested in the explicit rejection of the given proposal for decision.

7.2.2 *Narrow exception to the rule of unanimity: instances of QMV in CSDP*

However clear and categorical it may seem, the exemption of CSDP from the use of QMV in CFSP should not be understood to cover all aspects of the Common Defence and Security Policy. One remarkable exception allowed by the TEU to the use of QMV in decision-making on matters of a military nature is related to the operation of closer defence collaboration among EU countries. Upon completion of the prescribed process of notification and consultation, the Council may take a decision on the establishment of permanent structured co-operation (PESCO) by ready and capable member states with stated commitments to advanced and closely coordinated defence capability development. The authorising act to launch PESCO can be adopted by qualified majority with the participation of all member states in the Council.⁵ Although it certainly serves as a platform for functional association of EU countries within the scope of treaty provisions regarding CSDP (including Protocol No. 10), it was deemed permissible to proceed with the formation of closer cooperation in military matters below the level of the Union without the unanimous accord of all member states.

In the course of its operation, decisions on the acceptance of new partners in PESCO,⁶ and their suspension,⁷ may also be taken without unanimity in the Council. Only the qualified majority of votes from participating member states would be necessary for the admission or temporary exclusion of a given country. Every other decision with regard to permanent structured cooperation may require unanimity in the Council, but only among the participating member states.⁸

⁵ Article 46(2), TEU.

⁶ Article 46(3), TEU.

⁷ Article 46(4), TEU.

⁸ Article 46(6), TEU.

7.2.3 *Accommodating differences in CSDP within the limits of unanimity: flexibility through constructive abstention*

In the case of divergent national positions among member states on international situations, the requirement of unanimity for CSDP decisions may seem to lead either to deadlock and inaction or to the adoption of the lowest common denominator of diverging national opinions. Due to the prescription of agreement among members in the Council, it is probable that none other than completely non-contentious cases would offer the chance of initiation to any EU security action with a defence component. Despite the need for unanimous decisions on CSDP military missions, certain CFSP decision-making rules have the required amount of resilience to overcome the inherent constraints of plenary accord among EU member states.

Although unanimity is prescribed, it is important to note that full consensus is not required. In other words, the Council cannot take decisions on any organisational or operational (military or civilian missions) aspect of the common security and defence policy unless and until all formal and open disagreement has been overcome by mutually acceptable compromise, even in the absence of full consensus.

Even the foundations of the normative contours of CSDP in the TEU permit, with some qualifications, the application of certain flexibility through a clear differentiation between the *absence of concurrence* preventing the adoption of a common stance on possible collective EU action and the recourse to an agreeable compromise with (a limited number of) national reservations. This is to avoid the unnecessary obstruction of decision-making without full consensus among the member states. Consequently, those members of the Union with no intention of participating in a proposed CSDP mission do not have to block the entire decision-making process in order to avoid unwanted entanglement in a prospective EU crisis-management enterprise.

Although the initiation of an operation is to be decided unanimously, the rules on *constructive abstention* could be applied to ensure the flexibility and efficiency of institutional deliberations and conclusions. The provisions on constructive abstention in the TEU offer flexibility in the considerations of CFSP positions and soften the rigidity of the general requirement of unanimity for taking decisions on foreign policy and security issues at EU level.⁹

The optional flexibility by recourse to *constructive abstention* has been enshrined in the rules governing CFSP decision-making. In the event of political compromise among member states, it may be a truly useful instrument in the adoption of decisions on CSDP actions that divide EU countries. If these divisions could be reduced and reconciled to the extent of *rejection of participation* in a decision instead of *rejection of a complete initiative* for an EU undertaking in a given crisis or country, *abstention* rather than *obstruction* offers the exit route from potential stalemate in the Council. This solution would permit member state governments potentially or actually facing political difficulties, or having specific interests in the area of suggested CSDP

⁹ Article 31(1), TEU.

operation (or close by) to sustain their position and, at the same time, avoid conflict with other members eager to see more EU action on particular matters.

In the case of failure to reach a collective decision by having resort to *constructive abstention*, willing and capable member states would still be able to orchestrate military or civilian (e.g., police) action outside the institutional framework of the EU. Such situations demonstrate that reaching a common position and approach by the Union was impossible, in spite of its system of foreign and security policy coordination among member states. However, in the case of persistent and deep divisions in the political considerations and perceptions of the desirability or utility of a CSDP mission, the identifiable differences between the governments of member states would probably prevent the admission of the proposed EU mission for formal deliberations and decision-making in the Council.

When differences of opinion or judgment from the majority position are maintained without the intent of derailing it, the dissenting minority (one or more states) may choose to announce (in a specific statement) its/their abstention from a decision on a proposed military or civilian operation.¹⁰ In the previous version of the treaty, the possibility of abstention was explicitly determined as an eventuality that should not prevent the adoption of decisions by itself.¹¹

With respect to the CSDP missions, the “formal declaration” of the abstention of any EU member carries practical relevance, because it relieves the country of the obligations of contribution and participation in any form stemming from the decision adopted by the majority. The possibility to keep “constructive distance” from particular decisions – and also from the prevention of their adoption – facilitates, to a remarkable extent, the formation of compromise positions on international security undertakings as operational instances of CSDP, but curtails the range of potential resources available for implementation measures through a coordinated EU response.

The general limits of flexibility in CFSP decision-making *on behalf of all but without the explicit accord of every MS* equally apply to decisions on EU crisis-management enterprises by either military or civilian means. Consequently, the same threshold defines the ‘critical mass’ of legitimacy for the adoption of a collective stance on CSDP-related matters with stated reservations from member states. With the amendment of previous rules on “one third of the votes weighted” as the blocking minority quota in the TEU,¹² the Lisbon Treaty increased the room for flexibility in decision-making on the issues of Common Security and Defence Policy by the introduction of another requirement besides the size of the group of member states seeking exemption from taking position and part in the process. In addition to the already existing condition of *one-third of EU member states* qualifying their abstention by making formal declarations, at least *one-third of the population of the Union* was determined as another crucial quantitative indicator of insufficient support for any

¹⁰ Article 31(1), TEU.

¹¹ The second sentence of ex Article 23(1), TEU.

¹² Second subparagraph of ex Article 23(1), TEU.

position or action to be taken on behalf of the Union. At this point, the flexibility and legitimacy of decisions on CSDP undertakings adopted without full consensus, but also in the absence of express rejection reaches its outer limits.¹³

Although not giving express support to the adopted decision, the abstaining state(s) cannot be relieved of the general CFSP duty of loyalty and solidarity. The unambiguous requirement of “mutual solidarity” aims at reconciling the actions launched by the majority with the reservations and concerns of individual states.¹⁴ As the overarching rule of conduct in the TEU prescribes, member states must refrain from any action that may “impair the effectiveness” of the Union as “a cohesive force in international relations”.¹⁵ Representing one of the key norms of required conduct by member states in pursuit of CFSP, external solidarity must prevail over any lingering divisions, doubts or disagreements within the EU once the decision has been taken to launch a military or civilian mission under the banner of the Union. Abstention allows the adoption of a common denominator in exchange for exemption from the implementation of, or participation in, the execution of the approved joint CSDP enterprise. It nevertheless does not permit that member state(s) distancing themselves from an EU engagement to disregard the binding consequences of a properly adopted CFSP decision. All members, either giving or withholding their support for any particular EU mission, need to respect the resulting commitments for the European Union as a whole and refrain from any action in conflict with the underlying collective decision.¹⁶

In this way, any member state refraining from a military, civilian or financial contribution to an operation does not have to oppose, only to abstain from the executive measures. In order for a state to relieve itself of the burden of implementation, it needs to make a formal declaration of its position to avoid the application of the adopted decision. A preventive formal declaration could be particularly meaningful for an abstaining state if it – quite understandably – intends to extricate itself from the costs of an operation for which it did not vote. Under the general rules of the allocation of expenditures incurred during the conduct of EU undertakings, the administrative and operational expenses can be charged to the Union budget,¹⁷ but all costs resulting from EU military missions are covered by the member states collectively, though proportionately with their GNP. Only those member states that distance themselves from the common enterprise by virtue of a formal declaration of abstention in the Council can be saved from paying their share of operational expenditures (regardless of their participation).¹⁸

¹³ Article 31(1), TEU.

¹⁴ The duty of “mutual solidarity” under the CFSP was already contained in the second subparagraph of Article 23(1) TEU (Nice). It was redubbed “mutual political solidarity” in Article 24(2) TEU (Lisbon).

¹⁵ Article 24(3), TEU.

¹⁶ Second subparagraph of Article 31(1), TEU.

¹⁷ Article 41(1)-(2), TEU.

¹⁸ Article 41(2), TEU.

Once a CSDP operation is under way, abstaining states do not participate in operational management (conducted within the Committee of Contributors), but remain involved in the exercise of political and strategic oversight through the Political and Security Committee. Thereby, all EU member states, whether abstaining or supporting a given CSDP mission, could take part in the formation and adoption of decisions of political significance, such as fundamental changes in the concept, scope or means of operation.

In conclusion, constructive abstention offers a flexible solution in times of looming deadlock in the Council. Particularly, when most of the member states may be expected to reach political consensus on the necessity or propriety of a collective move on an issue or region, but the adoption of decisions leading to actions is hindered by the reluctance of some participants in the Council to get directly engaged in specific “security enterprises”. The extension of flexibility - inherent in the modality of constructive abstention - from the phase of deliberations and voting to the stage of action and implementation outlines the possible solution to otherwise insurmountable *disagreements* between the *intentions* of some EU countries to take a stance and the *anxieties* of others about the (un)foreseeable implications of possible collective action. Another frequent contradiction emerges between the *ambitions* and the *actual capacity* of member states to act once they have concluded their deliberations.

7.3 Room for the accommodation of differences in the implementation of CSDP decisions

7.3.1 *Flexibility in execution: collective decision by all, but implementation only by some of the member states*

In order to reconcile various foreign policy traditions and considerations, inevitable compromises often constrain the difference and impact which CFSP actions (with or without CSDP operations) may otherwise make. Since the operationalisation of the European Security and Defence Policy (ESDP) in 2003, practice has spurred several solutions for the accommodation of differences among member states as to their intentions and means of participation in expeditionary EU undertakings.

The origins of the need for differentiation in the involvement of EU members into implementation can be traced back to the divergence in their positions with regard to the military aspects of CFSP, in particular

Reliance on such coalitions was partly influenced by historical reservations when it came to defence related issues from Denmark (with its opt-out on all defence-related provisions of the TEU), as well as the political or constitutional concerns of the neutral or non-aligned EU member states (Austria, Finland, Ireland and Sweden).¹⁹

¹⁹ Simon Duke, “The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its international role”, EIPA, Working Paper No. 2003/W/2, European Institute of Public Administration, Maastricht, the Netherlands.

Besides the constitutional constraints and policy reservations of these member states, pragmatic reasons and political caution also figure prominently in the considerations of other countries wishing to avoid unwanted responsibilities and expenses resulting from joint CSDP enterprises.

The restraints on collective EU action due to the varying ‘appetites’ and/or capacity for engagement of member states can be eased by a pragmatic approach already practised from the early stages of ESDP, but which received recognition in the aborted Constitutional Treaty and later confirmation in the Lisbon Treaty. The solution lies in the *differentiation* between participation in taking decisions and involvement in their implementation. In other words, it calls for the separation of the *adoption* of authoritative CFSP decisions (*permissions to act*) by the consent of all states in the Council from the *execution of decisions* (*operational performance*) by a smaller or larger cluster of EU members. This crucial and pragmatic distinction holds the perspective of flexibility and separation of *policy formation* from *implementation*.

The possibility for differentiation between the *adoption* and the *execution* of a decision in the case of CSDP undertakings is laid out in the TEU. In line with a specific enabling clause, the Council is permitted to delegate the operational implementation of an EU action to an identifiable cluster of member states. By an act of authorisation, the Council in its decision may “entrust the execution of a task, within the Union framework,” to a certain group of EU countries in order to protect its values and serve its interests.²⁰ This provision offers an applicable and pragmatic modality for the delegation of CSDP enterprises to a designated combination of EU countries acting with the authorisation of the Union as a whole. Already, the prospect of the inclusion of this provision was deemed “a major step in the direction of increased flexibility”.²¹ The insertion of this option certainly opened a window of opportunity for flexibility in the implementation of operative CFSP decisions.

The availability of this solution underlines the conceptual and practical feasibility of distinction between the approval of an action in the plenary of the Council and the discharge of operational measures by a subset of EU members invested with the responsibility for an operation in the name of the European Union. The explicit reference to a practical and legally permissible example of differentiation between decision-making and implementation indicates the two distinct phases of EU crisis management procedures that may be accomplished with two different levels and forms of involvement of member states.

In the first phase, the debate and adoption of the underlying political decision in the Council have to determine the parameters and conditions of an EU engagement agreeable to all member states. The emerging *consensus* reflects the compromise acceptable to all members. Even in the absence of complete and equal endorsement by every government within the Union, without express rejection the unanimity

²⁰ Article 42(5), TEU.

²¹ Stephan Keukeleire, “EU Core Groups – Specialisation and division of labour in EU foreign policy”, CEPS Working Document No. 252, Centre for European Policy Studies, Brussels, October 2006, p. 12.

requirement of the approval of CSDP decisions²² can be fulfilled with the same legal effect and meaning as in the case of full concurrence of national positions. Thereby, the *legality* and the international *legitimacy* of any collective action as an EU operation – signalling the common stance of the entire Union – are duly founded on the accord of all member states.

As to the second phase, the more delicate and demanding task of implementation can be carried out by “the coalition of the willing and able” (e.g., a collection of EU member states usually in a consortium with various non-EU countries). Differentiation between *plenary decisions* and *voluntary collective actions* has a direct bearing on the occasional formation of viable coalitions of sufficient political commitment and operational capabilities. The decisions taken by the entirety of EU members in the Council could be translated into operational security and defence policy measures by ready and capable member states acting as an *occasional* cluster or relying on their *permanent* formations within or outside the EU framework.

7.3.2 Implementation by casual and variable combinations of EU members

In the event of occasional clusters, a temporary “action group” could be assembled around the jointly pursued aims of a mission without specification or reference to any set of EU members willing to carry out the implied tasks. In line with the collectively defined mission objectives, the intentions and available capabilities of the participants will determine the composition of an initial (possibly extended later by other member states or external partners) coalition within the EU framework.

In light of the experience of the first decade of CSDP missions, the implementation of EU crisis-management undertakings by ad hoc groups is very likely to remain the permanent feature of the Common Security and Defence Policy. CSDP operations can be executed either through NATO structures (using NATO assets and command structures under the direction of its Deputy Supreme Allied Commander Europe-DSACEUR)²³ or carried out as autonomous EU missions²⁴ (under military direction from a national command centre serving as the EU Operation HQ) with the contribution of EU countries and, most of the time, external partners. In either case, plenary participation and contributions from all member states cannot be presumed as the defining characteristic of CSDP operations.

²² Article 42(4), TEU.

²³ Since the launch of EU military operations in 2003, two CSDP missions in the Western Balkans – Operation Concordia in Macedonia (in 2003) and Operation Althea in Bosnia-Herzegovina (since 2004) – have demonstrated the activation of the Berlin Plus option in practice.

²⁴ Most EU undertakings of a military nature have been accomplished or still discharged as autonomous CSDP missions. Examples of this kind of land or naval operations include deployments in Congo (Operation Artemis, 2003 and EUFOR DRC, 2006), in Chad and the Central African Republic (EUFOR TCHAD/CAR, 2008-2009), off the coasts of Somalia (EU NAVFOR, 2008-), in Uganda (EUTM Somalia, 2011-2012), in Niger (EUCAP SAHEL Niger, 2012-) and latest in Mali (EUTM, 2013-).

The repeated examples of Common Security and Defence Policy missions by *variable combinations* of states from inside and outside the Union illustrate a consolidated pattern of practice. Acting in coalition by some or many of the member states representing the entire EU continues to define the prevailing mode of execution of CSDP missions. The rate of participation of EU members varies case by case from full representation (EUMM in Georgia²⁵) through two-thirds majority (Operation EUFOR ALTHEA in Bosnia with the contribution of 18 EU countries²⁶) to one third (EUCAP SAHEL Niger with ten countries from the Union²⁷) of EU membership. Multinational configurations assembled for the implementation of undertakings within the Common Security and Defence Policy are normally composed of casual combinations of acting EU countries and third states as external contributing partners. The variety of potential partners from outside the Union envelops European NATO members (Norway,²⁸ Turkey²⁹ or Albania³⁰), EU candidates (Croatia,³¹ FYROM³² or Montenegro³³), other states from Europe (Switzerland³⁴) or partners from other continents (the US,³⁵ Brazil, Canada and South Africa³⁶)

²⁵ EU Monitoring Mission in Georgia, *Factsheet*, 2 May 2013.

²⁶ EU military operation in Bosnia and Herzegovina (Operation EUFOR ALTHEA), *Factsheet Althea/28*, 13 February 2013.

²⁷ EUCAP SAHEL Niger, *Factsheet*, 2 May 2013.

²⁸ EU Maritime Operation against piracy (EU NAVFOR Somalia - Operation ATALANTA), *Factsheet EUNAVFOR/40*, 30 May 2012.

²⁹ EU military operation in Bosnia and Herzegovina (Operation EUFOR ALTHEA), *Factsheet Althea/28*, 13 February 2013. For more on Turkey and CSDP operations, see S. Blockmans, "Participation of Turkey in European Security and Defence Policy: Kingmaker or Trojan horse?", GGS Working Paper No. 41, 04/2010.

³⁰ EU Military Operation in Eastern Chad and North Eastern Central African Republic (EUFOR Tchad/RCA), *Factsheet*, March 2009.

³¹ Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN), *Official Journal of the European Union*, L 270/28, 13 October 2007.

³² EU military operation in Bosnia and Herzegovina (Operation EUFOR ALTHEA), *Factsheet Althea/28*, 13 February 2013.

³³ Council Decision 2010/199/CFSP of 22 March 2010 on the signing and conclusion of the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), *Official Journal of the European Union*, L 88/1, 8 April 2010.

³⁴ European Union Police Mission in Bosnia and Herzegovina (EUPM), *Factsheet*, June 2012.

³⁵ Agreement between the European Union and the United States of America on the participation of the United States of America in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *Official Journal of the European Union*, L 282/33, 25 October 2008.

³⁶ Political and Security Committee Decision DRC 2/2003 of 11 July 2003 on the setting up of the Committee of Contributors for the European Union military operation in the Democratic Republic of Congo (2003/529/CFSP).

interested in, and capable of contributions to a given joint security enterprise under the EU' banner and direction.

The composition and number of additional participants varies from case to case depending on the nature, location and timing of EU security undertakings. The practical and functional form of cooperation with third states contributing to concerted security endeavours evolved as a response to the demands of civilian as well as military CSDP missions of diverse length and complexity.³⁷ The rise of an *occasional coalition* of states (manifested by their participation in the Committee of Contributors as their platform of operational coordination) for a particular civilian or military undertaking signals their readiness to combine elements of their capabilities and commit sufficient resources to assemble the necessary means for the conduct of tasks (within the "Petersberg Plus" repertoire³⁸) on behalf of the Union.

7.3.3 *Implementation of CSDP tasks by a designated group*

As mentioned above, an acting occasional coalition may also be identified and empowered as a distinct subset of EU countries for the purpose of the implementation of a certain CSDP mission. On the ground of a preliminary indication of intentions to commit the necessary capabilities, a designated combination of member states can be determined by a Council decision as the "EU task force" entrusted with the execution of a joint security enterprise in the name of the Union.

Although the objectives and the general conditions for implementation of a civilian or military mission are defined in the relevant CFSP decision that provides the identified subset of members with the license to act, the operational decisions are left to the consideration and choices of the participants. In the pertinent provisions, the TEU explicitly confers the responsibility for implementation on the group of member states identified and authorised for that particular CSDP engagement.³⁹ When a coalition of "willing and able" members of the Union is mandated to carry out an assignment expressly entrusted to their group, the contributing states are entitled to enjoy the benefits of autonomy in executive decisions because their acting cluster is allowed to "agree among themselves on the management of tasks".⁴⁰

Even if not all EU countries are directly involved, it remains an EU mission sustained by the underlying mandate and the "association" of the High Representative of the Union for Foreign Affairs and Security Policy with the execution of the operation. Consultations must be conducted not only with the High Representative, but also with the non-participating section of member states at their request or on the initiative of the acting coalition.⁴¹ The legal basis for their action, or its revision, is

³⁷ More details of the establishment, composition and operation of these coalitions may be found in C. Törő, "External state partners in ESDP missions: third country participation in EU crisis management", *European of Foreign Affairs Review*, Vol. 15, 2010, pp. 325–345.

³⁸ Article 43, TEU.

³⁹ Article 42(5), TEU.

⁴⁰ Article 44(1), TEU.

⁴¹ Article 44(2), TEU.

contained in decisions subject to unanimous approval in the Council. If the completion of the tasks undertaken by the acting coalition requires change to the objectives, scope or conditions of the mission, the necessary adjustment must be authorised in another decision of the Council adopted in accordance with the prescriptions of CDSP decision-making.⁴²

The designation of a certain cluster of states for a particular mission may be based on the initiative and indication of willingness to act by one of the member states that stands ready to mobilise its resources and lead the given CSDP operation as its “framework nation”.⁴³ With the help and contribution of other EU countries and possible external partners (third states), an occasional association of partners can coalesce around the framework nation to form a joint security enterprise for the purpose and duration of a particular mission. The lead member of the group entrusted with the discharge of the mission mandate performs the role of the gravitational centre of the occasional coalition by orchestrating the execution of tasks and exercising the command and control responsibilities of the operation. In the past decade of CSDP missions, an early example of an express identification of a member state as the framework nation of a CSDP mission emerged in the instance of the first ESDP military undertaking in Africa (in Eastern Congo) when France was entrusted to lead the implementation of Operation Artemis in 2003.⁴⁴

Although it may seem that the Lisbon Treaty merely formalised an already rehearsed option of designation of tasks to an occasional, but distinct set of EU members⁴⁵, the provisions holding the possibility to expressly invest a cluster of member states with the execution of specified assignments should be read in combination with the reference to jointly established “multinational forces” of EU countries.⁴⁶ Besides their willingness, the other reason for the designation of a particular combination of member states can be drawn from their capabilities adequate and available for the envisaged mission in the name of the Union. The necessary means of action could be either assembled to discharge a particular operation or assigned to tasks to be carried out collectively through recourse to a standing framework of operation. Existing frameworks of cooperation, preparation and operation among EU members could demarcate conceivable circles of participants as identifiable groups presenting possible options to be chosen and entrusted with suitable tasks. Accordingly, the EU treaty invites the connection of standing military formations of certain member states to the aims and tasks of the entire Union in its international security enterprises. Regardless of their origin, whether established inside or outside the Union, these

⁴² Ibid.

⁴³ EU Framework Nation Concept, Council Doc. 11278/02, 25 July 2002.

⁴⁴ Article 2, Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo.

⁴⁵ Marise Cremona, “Enhanced cooperation and the European Foreign and Security and Defence Policy”, in Jose Maria Beneyto (ed.), *Unity and flexibility in the future of the European Union: the challenge of enhanced cooperation*, Madrid: CEU Ediciones, 2009, p. 85.

⁴⁶ Article 42(3), TEU.

multinational forces may be made “available to the common security and defence policy.”⁴⁷

Combined or joint military capabilities outside the Union have long been maintained by various groups of EU MS that created multinational formations for specific purposes under different command arrangement. The Franco-German Brigade as the core element, with units from Spain, Belgium and Luxembourg as national contributions to the EUROCORPS is the most prominent example of a permanent European multinational military co-operation outside both EU and NATO structures. Deployment in the course of an EU crisis-management mission was declared among the conceivable aims of its operational uses.⁴⁸

In addition to the EUROCORPS, several other initiatives exemplify the variety of multinational military force configurations within select groups of EU members outside the Union, such as the EUROMARFOR (naval forces bringing together France, Italy, Spain, Portugal),⁴⁹ the European Air Group (Germany, Belgium, Spain, France, Italy, the UK)⁵⁰ and the German-Netherlands First Corps (Germany, the Netherlands, the UK)⁵¹.

Besides these instances of military force packages of EU members in small groups outside the Union, certain other European formations could also be mentioned as combined multinational forces, but without joint headquarters (HQ). The Spanish-Italian Amphibious Force⁵² stands out as an illustration of units composed of forces from different European countries without multinational command capability.

The military skills and the capability potential inherent in the abovementioned multinational force configurations represent attractive and valuable external operational means to be requested for objectives defined and set out on a broader political basis within the Union.

However, “multinational forces” established and maintained by some EU members, which could be usefully deployed in operations of the entire Union, are not confined to military units and equipment. Another potentially valuable and efficient set of capabilities may be provided by constabulary (gendarmerie) forces equally useful in military or civilian (police) operations. These forces are available only in some EU member states that already set up a framework for possible joint deployment and operation of their units.⁵³ Although created and sustained outside the Union, the

⁴⁷ Ibid.

⁴⁸ EUROCORPS – A force for the European Union and the Atlantic Alliance, 2009 (www.eurocorps.org).

⁴⁹ <http://www.euromarfor.org/euromarfor>

⁵⁰ <http://www.euroairgroup.org>

⁵¹ <http://www.1gnc.org>

⁵² <http://www.marina.difesa.it/attivita/operativa/Pagine/SIAF.aspx>

⁵³ Treaty between the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands and the Portuguese Republic, establishing the European Gendarmerie Force (EUROGENDFOR), 18 October 2007 (<http://www.eurogendfor.org/eurogendfor-library/download-area/official-texts/establishing-the-eurogendfor-treaty>).

EUROGENDFOR (EGF)⁵⁴ represents the multinational formation that may be mobilised to supply the necessary specific contribution to an EU mission where these kinds of skills and operational capacity are required.

7.4 Beyond ad hoc flexibility: permanent structured co-operation

7.4.1 PESCO as standing platform for the accommodation of diverse commitments and capabilities in CSDP

In addition to the frequently chosen solution of occasional coalitions, the Lisbon Treaty introduced the perspective for consolidation of acting coalitions of ready and capable member states into permanent formations of closer co-operation in security and defence matters within the Union. The two rounds (in 2004 and in 2007) of “constitutional revision” of treaty foundations for political integration in the external dimension of the EU presented an opportunity for the definition of an institutionalised form for closer and enduring co-operation in the realm of Common Security and Defence Policy.

The advent of the era of ESDP missions in 2003 understandably directed significant attention to the utility and admissibility of possible modalities of *enhanced co-operation* in foreign and security policy actions, even for the purposes of more effective *military operations*. As the most recent evolutionary stage in the introduction of co-operation in the military aspects of common security policy among EU MS, the limitations placed on this particular dimension of closer and voluntary integration were removed. The possibility of *deeper* and *differentiated co-operation* finally reached every aspect of the CFSP spectrum, eventually including the delicate and complex matter of military coordination and integration. The Lisbon Treaty incorporated military and defence issues into the body of policy areas open to closer integration in accordance with the common objectives and the legal framework of the Union.

In order to facilitate collective actions on behalf of the EU, the current treaty framework expressly encourages member states endowed with suitably advanced military capabilities to set up (“shall establish”) standing organisational edifices for the coordination of the development and preparation of their military means with a view to the “most demanding missions”.⁵⁵ The relevant provision confers the right onto those member states whose “military capabilities fulfil higher criteria and made more binding commitments to one another in this area” to create “permanent structured co-operation within the Union framework”. The reference to the conditions and the foundations – *criteria* and *commitments* – of admissible initiatives highlights that military co-operation of EU MS is expected to rest on verifiable qualities and demonstrated intentions necessary to form standing structures of closer defence cooperation.

The requirements of participation are elaborated in more detail in Protocol No. 10 attached to the Lisbon Treaty on the applicable template for the possible formation of

⁵⁴ <http://www.eurogendfor.org>

⁵⁵ Article 42(6), TEU.

vanguard groups in defence cooperation among select member states.⁵⁶ This specific supplement to the treaty defines the agreeable objectives of closer forms of defence and security policy integration. Their scope covers the development of defence capabilities through national contributions to, and participation in, the composition of multinational forces and the main European armament programmes. The possible recourse to the novel avenue for *institutionalised differentiation* among EU MS with diverse military capabilities and commitments was conceived as an instrument to facilitate collective preparations for even the most complex tasks of crisis management undertakings. Therefore, EU MS participating in a permanent structured co-operation (PESCO) were expected to assemble the capacity to furnish their respective contributions to formations in the shape and size of battlegroups⁵⁷ “either at national level or as a component of multinational force groups” capable of the discharge of any kind of engagement within the agreed range of conceivable CSDP missions. (Originally, potential participants should have reached completion by 2010.⁵⁸) Even if a battlegroup is defined in the Protocol as the preferred and suggested template for the possible formation of “targeted combat units” within a standing and institutionalised closer military cooperation of some member states, the creation of a battlegroup may imply, but in itself does not necessarily amount to the establishment of permanent structured cooperation in CSDP. Any sustained form of combined military capabilities of EU members, either at battlegroup or a different level, could qualify as PESCO only if it “fulfils higher criteria” and the participants make “binding commitments to one another” in order to generate joint capabilities to meet the needs of “most demanding missions”.⁵⁹

These concrete commitments enshrined in the institutionalised and purposefully developed bonds of a permanent structured cooperation can be expected to provide a standing framework and prepared formation that the participating member states are more likely to deploy than formations (of the same size and declared purpose), which exist mainly in concept with announced but never really integrated joint capabilities. The French military intervention in the escalating security crisis of Mali in January 2013 demonstrated the limited use of an EU battlegroup in times of rapid response⁶⁰ even if it stands ready (the French-German-Polish, “Weimar” battlegroup

⁵⁶ Protocol (No. 10) on permanent structured co-operation established by Article 42 of the Treaty on European Union.

⁵⁷ Battlegroups are multinational formations which could be formed by an EU framework nation or by a multinational coalition of member states. Interoperability and military effectiveness are the main expected benefits of these force packages organized in the size of a battalion and reinforced with combat-support and combat service elements. Generally, battlegroups are about 1 500 personnel strong. EU Battlegroups, *Factsheet*, April 2013.

⁵⁸ Article 1, Protocol on permanent structured co-operation.

⁵⁹ Willem F. van Eekelen and Sebastian Kurpas, “The evolution of flexible integration in European Defence Policy: is permanent structured cooperation a leap forward for the Common Security and Defence Policy?”, CEPS Working Document No. 296, Centre for European Policy Studies, Brussels, June 2008, p. 8.

⁶⁰ Andrew Rettman, “French colonel: France better off alone in Mali”, *EUObserver.com*, 25 January 2013 (<http://euobserver.com/defence/118858>).

was activated on 1 January 2013⁶¹) in principle but without the structures, capacity and preparation to be deployed as a multinational contingent for the most demanding tasks of conceivable CSDP missions.

In order to collectively achieve the necessary level of capabilities and organisation matching even those challenging objectives, EU members intent on participating in PESCO must undertake to:

- co-ordinate their defence expenditure on equipment
- harmonise the identification of their military needs by pooling and/or specialising their defence means and capabilities
- take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces
- ensure to correct the shortfalls of previous capability development programmes
- take part in major joint or European equipment programmes in the framework of the European Defence Agency.⁶²

The conditions for participation are also defined by the criteria contained in the Protocol. The procedures for the commencement and suspension of participation in a “standing defence co-operative” are laid down in details in the relevant treaty provisions. The elaboration of objective requirements and expectations towards potential partners in closer military collaboration was meant to mitigate the concerns about the arbitrary rejection of smaller states or late-comers from permanent and institutionalised co-operation. Participation in extensive and durable “defence policy joint ventures” is predicated upon the acquisition of certain military capabilities identified as necessary tools of complex security engagements. The conditionality of active involvement is determined in terms of actual commitments and palpable achievements instead of rhetorical association with declared aspirations and its subjective assessment by other participants.

7.4.2 The significance of PESCO as an institutionalised solution for defence policy differentiation within the Union

Prior to the latest revision of the TEU, the evolution of enhanced co-operation stopped short of the politically most delicate, but indispensable military aspects of CFSP. The applicable solution for the accommodation of divergent defence policy preferences, means and ambitions eventually was laid out in the introduction of a specific version of enhanced cooperation designed for CSDP. The eventual incorporation of the Common Security and Defence Policy into the spheres of closer co-operative configurations – based on capacities and binding pledges – reflected the shared position of EU members already agreed at the “constitutional moment” in

⁶¹ Chairman EUMC’s visit to Poland, 21-23 November 2012, EUMC Activities (<http://www.consilium.europa.eu/eas/security-defence/csdp-structures-and-instruments/eu-military-committee-%28eumc%29/chairman-eumc/eumc-activities/eumc-24-november-2012>).

⁶² Article 2, Protocol on permanent structured co-operation.

2004. Maintained and confirmed in 2007 at Lisbon, the outstanding limitation on the possible creation of vanguard groups of EU countries even in the realm of military affairs was removed in order to open an avenue for closer and sustained collaboration in defence matters inside the Union.

The latest comprehensive revision of the treaty foundations of CFSP brought closer cooperation in military policies and defence programmes of EU members into the range of functional associations for specific common policy purposes within the European Union. To this end, the Lisbon Treaty rendered the possibility for voluntary focused and increased coordination in security and defence issues into another accepted “domestic matter” for the Union as a whole. The insertion of the prospect for permanent security and defence structures not shared by all members, but kept “within the Union framework” marked the ultimate stage in the evolution of flexibility and enhanced co-operation within CFSP. The extension of closer and differentiated co-operation in a specific format to the realm of military affairs signalled the completion of the gradual acceptance of more advanced integration by smaller groups of MS in all areas of EU foreign and security policy.

The adopted treaty provisions underlined the recognition of the need for modalities to accommodate inevitable differences and accept flexibility as the *modus operandi* of effective mobilisation and engagement of capable and willing member states even in the external security functions of the Union. With the insertion of PESCO into the legal fabric of CFSP, closer cooperation, even on military issues through composite clusters of EU MS within the juridical framework of the Union, earned general recognition and institutionalisation as an applicable design for the accommodation of differences among member states across the full range of policy areas.

7.5 Concluding remarks

The legal contours of the operational capacity of the Union within its CFSP dimension in the treaty provide some useful space for the accommodation of divergent interests and uneven motivations among member states in the adoption of CSDP decisions and their implementation. Even if unanimity prevails in CSDP decision-making, the inherent possibility of constructive abstention sustains a narrow, but nevertheless available path to circumvent the pitfall of a missing full accord on the way to an emerging consensus with regard to a deliberated EU action. The formal declaration of distance from the majority position could carry practical significance for member states because their express dissociation from an adopted CSDP decision exonerates them from practical and financial contributions to the resulting measures.

Abstention (with or without express statement) instead of obstruction offers a cooperative and flexible solution in the face of disagreements during CFSP decision-making, as long as the divergent positions of member states can be maintained and national interests preserved without the need to halt an entire process. Since recourse to constructive abstention in any CSDP decision has not yet been revealed, it remains only a possibility prepared in the treaty as an instrument of facilitation to be deployed in case of reconcilable differences.

Similar to abstention as a flexible mode of operation to accommodate differences in decision-making, the recently introduced modality of permanent structured cooperation as a standing framework still has to prove its worth in practice. Although not tested so far, the extension of the possibility of enhanced cooperation into CSDP, previously excluded from deeper and closer integration within the legal and institutional parameters of the Union, opened a potentially and conceptually significant area for differentiated integration within the realm of CFSP.

8. MUCH ADO ABOUT OPT-OUTS? THE IMPACT OF VARIABLE GEOMETRY IN THE AFSJ ON THE EU AS A GLOBAL SECURITY ACTOR

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8.1 Introduction

The development of the EU as an Area of Freedom, Security and Justice (AFSJ) has always been characterised by differentiation and, since the Lisbon Treaty, the AFSJ comprises two main models of 'variable geometry'. While the model chosen by the UK and Ireland differs formally from that in Denmark, the result is the same: the three countries abstain from the policies that make up the AFSJ by way of opt-out. The entry into force of the Lisbon Treaty in 2009 has solidified the position of Denmark, Ireland and the United Kingdom in relation to their non-participation to AFSJ initiatives.¹ The relationship of these three countries to the AFSJ is thus characterised by a complex system of rules contained in four different protocols that have expanded the scope of differentiation, but have failed to clarify the substantive and procedural effects of the opt-out regimes.² The current status of the opt-out regimes thus leaves unanswered questions of coherence, consistency and compatibility between national prerogatives and EU integration. These questions are particularly sensitive because of the impact that AFSJ measures may have on human rights. Yet, while variable geometry within the AFSJ has posed constitutional³ and substantive questions,⁴ the impact of variable geometry has not been detrimental to the substantive development of the AFSJ as a whole: the AFSJ is the first objective mentioned in Article 3 (2) TEU and its development is marked by the adoption of ambitious legislative plans.

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¹ On this topic, but with a focus on EU-US relations, see the contribution by Santos Vara and Fahey to this volume.

² S. Peers, "In a world of their own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon", *Cambridge Yearbook of European Legal Studies*, Vol. 10, pp. 383-412.

³ For an analysis of differentiated integration in relation to variable geometry in relation to the AFSJ, see C. Billet, "Cohérence et Differentiation dans le Cadre de l'Espace de Liberté, Sécurité et de Justice", *Revue du Marché Commun et de l'Union Européenne*, No. 523, 2008, pp. 680-684 and S. Peers, *EU Justice and Home Affairs Law*, 3rd ed., Oxford: Oxford University Press, 2011, pp. 136 ff.

⁴ Suffice here to remind two cases decided by the Court of Justice in relation to the UK opt-out regime: C-77/05 UK v Council ECR 2007 p. I-11459 and C-482/08, ECR 2010 p. I-10413.

Parallel to the internal developments concerning the EU as an AFSJ and its rules on variable geometry, the EU has also developed an external dimension to the AFSJ. While the exact definition of this development has not yet been agreed upon, it can be said that this type of external action emerged as a corollary to internal AFSJ developments.⁵ For instance, the doctrine on the parallelism of competences now codified in Article 216(1) TFEU explains the conclusion by the EU of Mutual Legal Assistance Agreements (MLA) as well as extradition agreements as a corollary to internal measures on judicial cooperation in criminal matters. However, the external dimension of the AFSJ goes beyond mere parallelism and presents a plurality of links with external action so as to cover the whole spectrum of EU external relations instruments; and indeed the latter aspect emerges from the relevant policy documents adopted by EU institutions such as the European Security Strategy⁶ and the Stockholm Programme.⁷ Indeed, if one had to identify two characteristics of the AFSJ after the entry into force of the Lisbon Treaty, these could be the consolidation of variable geometry on the one side and the growing emphasis on external relations on the other.

The extent to which the regional and global security ambitions of the EU can be reconciled with the legal constraints affecting the AFSJ from institutional and substantial perspectives is open to question, however.⁸ While others have addressed the institutional aspects of combining variable geometry with external action in detail,⁹ this paper will consider the extent to which the global AFSJ ambitions of the

⁵ For the debate concerning the definition of the external dimension of the AFSJ, see, inter alia, M. Cremona, "EU External Action in the JHA Domain. A Legal Perspective", in M. Cremona, J. Monar and S. Poli (eds), *The External Dimension of the European Union's Area of Freedom Security and Justice*, Brussels: Peter Lang, 2011, pp. 77-115; R.A. Wessel, L. Marin and C. Matera, "The External Dimension of the EU's Area of Freedom, Security and Justice", in C. Eckes and T. Konstadinides (eds), *Crime within the Area of Freedom*, Oxford: Oxford University Press, 2011, pp. 272-300; J. Monar, "The EU's growing external role in the AFSJ domain: factors, framework and forms of action", *Cambridge Review of International Affairs*, 2013, pp. 1-20; and J. Monar, *The External Dimension of the EU's Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon*, SIEPS, 2012 (<http://www.sieps.se/en/category/f%C3%B6rfattare-redakt%C3%B6rer/monar-j%C3%B6rg>).

⁶ A secure Europe in a better World. European Security Strategy, 12 December 2003 (www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf).

⁷ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, in OJ C 115/1, 4.5.2010.

⁸ The constitutional challenges that the EU as a global security actor in the fields of the AFSJ must face are many; see P. van Elsuwege, "EU External Action After the Collapse of the Pillar Structure: In Search of a New balance Between Delimitation and Consistency", *Common Market Law Review*, Vol. 47, pp. 987-1019 and C. Matera, "The European Union Area of Freedom, Security and Justice and the Fight Against New Security threats. New trends and old Constitutional Challenges", in M. Arcari and L. Balmond (eds), *La Gouvernance globale face aux défis de la sécurité collective- Global Governance and the Challenges of Collective Security*, Napoli : Editoriale Scientifica, 2012, pp. 69-87.

⁹ P. Garcia Andrade, "La Geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia, in justicia", in J. Martín y Pérez de Nanclares (ed.), *La dimensión exterior*

EU can be reconciled with the Area's variable geometry. This paper is structured in the following manner: section ii) discusses the external implication of variable geometry for the AFSJ and section iii) looks at the role that the AFSJ is expected to play in the fight against security threats. In this way the first two sections should build the framework for the subsequent part of the paper. Sections iv) and v) will bring together the discussions on the external AFSJ and variable geometry by mapping-out the ways in which the external dimension of the AFSJ and variable geometry coexist. Thus, section iv) analyses the impact of variable geometry on the conclusion of AFSJ-based agreements while section v) looks at the impact of variable geometry on the use of AFSJ clauses and elements in other external instruments. The final part of the paper assesses the findings and the different sections to draw some conclusions.

8.2 The external implications of variable geometry within the AFSJ

The development of the EU as an Area of Freedom Security and Justice (AFSJ) has always been characterised by fragmentation and differentiation. AFSJ differentiation 'avant la lettre' took place at the time of adopting the Schengen convention in 1985. The system setting up common rules on external border checks as well as the abolishment of internal border controls was developed by some member states outside the framework of the EEC treaty; thus leaving behind the other members of the Community.¹⁰ With the entry into force of the Maastricht Treaty, differentiation in relation to the policies now belonging to the AFSJ came with the very introduction of the Justice and Home Affairs (JHA) pillar under the TEU treaty and, as a consequence of this, belonged to a separate governance method but under a common institutional framework.¹¹

The subsequent entry into force of the Amsterdam Treaty brought divergent elements in this respect: while *some* of the policies falling within the AFSJ were finally communitarised – thus ending differentiation from a governance perspective; the entry into force of the Amsterdam Treaty also brought differentiation in relation to the territorial applicability of AFSJ law. In relation to the latter issue, the Amsterdam Treaty meant in the first place that the division between Schengen members and non-Schengen members became an internal differentiation for the EU legal system¹² and, secondly, it also introduced the opt-out regime of Denmark in relation to non-Schengen policies such as judicial cooperation in civil matters, thus representing the country's opposition to the supranational method. In relation to the former issue, the outcome of Amsterdam was more nuanced: while some policies

del espacio de libertad, seguridad y justicia de la Unión Europea, Madrid: Iustel, 2012, pp. 85-120 and G. Vernimmen-Van Tiggelen, "Exercice et conséquences des 'opt-outs'", in M. Dony (ed.), *L'Espace de liberté, sécurité et justice dans les accords extérieures de l'Union Européenne*, Editions de l'Université de Bruxelles, 2012, pp. 223-251.

¹⁰ For an institutional and substantive analysis see Peers, *op. cit.*, note 3, pp. 136 ff.

¹¹ See Articles A and C of the Treaty on European Union, OJ C 191, 290 July 1992.

¹² See E. Wagner, "The integration of Schengen into the framework of the European Union", *Legal Issues of Economic integration*, Vol. 25, No. 2, pp. 1-60.

were brought under the realm of the EC Treaty, this translation came with a number of rules that sought to preserve some intergovernmental features, either by means of temporal regimes or by the use of the unanimity rule.¹³ All in all, it is at this moment in time that differentiation within the AFSJ became synonymous with the positions of Denmark, Ireland and the UK; this is because while the AFSJ is confronted with a number of institutional settings that can be considered elements of differentiation, such as the participation in the Schengen system of three countries that are not EU member states, only the position of Denmark, Ireland and the UK constitute examples of variable geometry in the sense of structural derogations established by the treaties, pertaining to certain policies and for an indeterminate period of time.¹⁴

As noted above and elsewhere more in detail,¹⁵ the first and main innovation that the Lisbon Treaty brought about is the extension of the opt-out regimes to cover to cover the whole of the AFSJ, i.e. including police and criminal law. In this perspective the assumption that the main factor leading to differentiation is the supranational method of governance seems to be reinforced. However, while this innovation could have brought clarity and uniformity to the relationships between policies, measures and non-participation, the implications of the opt-out regimes remain problematic and difficult to interpret. Thus, while in essence the three member states in question do not participate in the AFSJ, the reality is more nuanced and fragmented and the regulation of these member states' participation in the AFSJ is to be found in four distinct protocols: Protocol No. 19 on the Schengen *acquis*; Protocol No. 20 on the relationship between the common travel area of Ireland and the UK and their right to conduct border checks; Protocol No. 21 on the position of Ireland and the UK in respect of the AFSJ and, lastly, Protocol No. 22 on the position of Denmark in respect of the AFSJ. This part of the paper will give a brief account of the main features of the opt-out regimes to pinpoint the external repercussions that these may have. It does not aim to provide a sound analysis of the variable geometry within the AFSJ.¹⁶

Protocol 19 to the treaties contains the rules pertaining to the integration of the Schengen *acquis* in the framework of the EU. Articles 3 and 4 of this Protocol govern the relationship between the Schengen *acquis* and Denmark, Ireland and the UK. However, while Article 3 on Denmark refers to the discipline contained in the ad hoc

¹³ Moreover, restrictions also occurred in relation to some specific powers of the Commission, the COREPER and the ECJ. For an analysis, H. Labayle, "Un espace de liberté, sécurité et de justice", *Revue trimestrielle de droit européen*, Vol. 33, No. 4, 1997, pp. 151 ff and Peers, op. cit., note 3, pp. 73 ff.

¹⁴ For an overview of the different acceptations of variable geometry/differentiation, see B. de Witte, D. Hanf and E. Vos (eds), *The Many Faces of Differentiation in EU Law*, Antwerp: Intersentia, 2001; in relation to the AFSJ, see B. Martenczuk, "Variable geometry and the External Relations of the EU: The Experience of Justice and Home Affairs", in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty, Security : New Challenges for EU External Relations*, Brussels: VUB Press, 2008, pp. 465 ff and Vernimmen-Van Tiggelen, op. cit., note 9, pp. 223-251.

¹⁵ See Peers, op. cit., note 3.

¹⁶ For an in-depth analysis of the UK and Irish regimes, see the contribution by Santos Vara and Fahey to this volume.

Danish protocol, Articles 4 and 5 contain the discipline in relation to the UK and Ireland. Article 4 of Protocol 19 on the Schengen *acquis* maintains the opportunity for the UK and Ireland to take part in some, or all, of the measures of the Schengen *acquis*. In this respect, the position of the two countries was clarified with the adoption of two decisions by the Council: the first in relation to the UK in 2000 and the second in relation to Ireland in 2002.¹⁷ Article 5, for its part, deals with the participation of the two countries in measures *building upon* the Schengen *acquis* and in this respect this provision contains the thorny paragraph that allows any of the two countries in question to step back, i.e. opt-out from the *acquis* they had previously adhered to.

In relation to the other policies falling within the AFSJ, the position of Ireland and the UK is regulated in Protocol 21. Here, Article 3 regulates the participation of the two countries to the adoption or the simple 'accession' to measures of the AFSJ, i.e. the right to opt in. Moreover, as in the case of the Schengen Protocol, the two countries in question are given the right to choose whether they wish to participate in the amendments of existing measures by which they are bound. Thus, in case one of the two member states wishes to opt out; a procedure has been created to ensure legal consistency within the EU legal order. Finally, whereas Ireland is given the faculty to abandon the protocol system and join the other member states, the protocol does not envisage such a faculty for the UK; moreover, according to Article 9 of Protocol 21 on the AFSJ, the opt-out/opt-in regime does not apply to Ireland in relation to counter-terrorism measures based on Article 75, TFEU. Thus, Ireland takes full part in the adoption and execution of administrative measures (smart sanctions system) that are not linked to CFSP, whereas the UK has obtained the right to choose whether to do so under the general opt-in/opt-out regime created by the protocol.¹⁸ As a result, and in light of the Judgment of the Court of Justice in *Parliament v. Council C-130/10*,¹⁹ in the area of countering terrorism through administrative measures, such as freezing capital and other types of smart sanctions, Article 215, TFEU will apply for sanctions founded upon a CFSP measure and will have all the member states participating. Measures based on Article 75, TFEU, however, will be adopted by all the member states minus the United Kingdom (but with an option to opt in) and Denmark. Lastly, Article 10 of Protocol No. 36 on temporary measures confers to the UK the faculty to opt out from the whole AFSJ *acquis*. This provision has the purpose of allowing the UK to withdraw from changes regarding the jurisdiction of the Court of Justice and the powers of the Commission in relation to acts of the AFSJ adopted prior to the entry into force of the Lisbon Treaty. In this respect, should such faculty be exercised²⁰ by the UK, this could be understood as to apply not only to internal

¹⁷ Council Decision 2000/365/EC OJ L 131, p. 43 and Council Decision 2002/192/EC OJ L 64, p. 20.

¹⁸ See in this respect Declaration No. 65 on Article 75 TFEU made by the UK.

¹⁹ Judgment 12.07.2012 in case C-130/10 *Parliament v. Council*, not yet reported.

²⁰ The UK has until June 2014 to decide. At the time of writing UK representatives have confirmed the intention to make use of this faculty, but the list of measures that would then

measures such as Framework Decisions, but also to agreements concluded before the entry into force of the Lisbon Treaty, such as the MLA agreement with the USA. This is because the provision in question in Protocol 36 speaks of ‘acts’ so as to include, presumably, any act adopted before the Lisbon Treaty and founded upon any AFSJ legal basis.

The position of Denmark is regulated in Protocol No 22. Since the entry into force of the Lisbon Treaty Denmark enjoys a general opt-out from Justice and Home Affairs law. However, contrary to the positions of Ireland and the UK, Denmark does not have an opt-in right, except in relation to measures building upon the Schengen *acquis*. Thus, in the latter case Denmark can decide within six months since adoption on measures building upon the Schengen *acquis* to implement unilaterally the EU measure in its national law. Moreover, Article 2a of the Protocol on Denmark affirms that Denmark is not bound by EU rules on processing and sharing personal data collected and shared in relation to Police and Judicial Cooperation in Criminal Affairs. Furthermore, by making reference to Articles 26(1), 42 and 43-46, TEU the Danish protocol affirms in Article 5 that Denmark does not participate in the elaboration and implementation of decisions and actions of the Union that have defence implications. Contrary to the positions of Ireland and the UK, Denmark does not take part in measures adopted under Article 75, TFEU, but does so in relation to Article 215, TFEU.

A common trait of the different protocols containing the rules on the AFSJ’s opt-outs is the wording chosen to assert the actual opt-out.²¹ The different provisions affirm:

[N]one of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the [United Kingdom / Ireland/ Denmark]; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to the [United Kingdom / Ireland/ Denmark].²²

Therefore, each protocol expressly includes in the opt-out international agreements concluded *on the basis* of a provision contained in Title V Part Three TFEU. As a consequence, the protocols could be understood to cover only external action in the AFSJ field and do not mention any other type of external action instrument. Thus, because of this silence one might wonder about the real scope of the opt-outs in relation to the external dimension of the AFSJ: should the opt-outs cover *any* clause (no matter how broadly phrased) of *any* agreement that is related to a policy of the AFSJ? Moreover, while this issue poses the question of the extent to which the three member states can benefit from their opt-out in the context of external relations, the

be ‘re-acceded to’ is still not known. However, international agreements pertaining to the AFSJ have not been the object of specific declarations yet (<http://euobserver.com/justice/120810>).

²¹ Article 2 of Protocol 22 on Denmark and Article 2 of Protocol 21 on the Ireland and the UK.

²² Article 2 Protocol No 21 and similarly, Article 2 Protocol 22.

situation in relation to Ireland and the UK poses more questions. Indeed, because these countries have also obtained the right to *opt in*, one might wonder how the opting-in could work concretely in relation to external relations instruments.

From a material perspective, the opt-in possibilities for the UK and Ireland cover internal and external police cooperation, judicial cooperation in criminal matters and judicial cooperation in civil matters, as well as migration policies and asylum. In relation to border controls, the position of the UK and Ireland has to be read in the light of the judgments delivered by the Court of Justice in the Frontex and Visa Information System (VIS) cases,²³ in which the court indicated how to distinguish measures that constitute a development of Schengen and measures that do not constitute a development of Schengen. This is relevant because the UK and Ireland can *opt in* to a measure (including international agreements) that constitutes a development of the Schengen *acquis* only if the two countries already participate in the relevant pre-existing internal measure(s).²⁴ An immediate consequence of this is that Ireland and the UK do not take part in any visa-related agreement such as visa-facilitation agreements and visa-waiver agreements; whereas Denmark, in spite of its participation in the Schengen system has adhered only to minor instruments such as visa-waiver agreements for holders of diplomatic passports²⁵ and maintains its independent approach to visa-related agreements.

From a procedural perspective, Article 3(1) of Protocol 21 affirms that the *opt-in* declaration from either the UK or Ireland must be made within three months since the day on which a legislative proposal has been presented within the Council; moreover Article 4 of Protocol 21 affirms that Ireland and the UK can “any time after the adoption (...) notify the intention to accept a measure”. However, the *opt-in* mechanisms valid internally cannot be applied *sic et simpliciter* in relation to international agreements. For instance, even though the procedure for the conclusion of international agreements codified in Article 218 TFEU is composed of three main steps,²⁶ reasons of legal certainty and public international law should not allow the two member states to manifest their intention to *opt in* at the moment of the conclusion without expressing their interest at the time of the opening of negotiations. Conversely, the two member states should not be able to withdraw from the ‘opt-in’ after the conclusion of the agreement. Moreover, reasons of legal certainty and good faith run against the interpretation provided by the British government and according to which, because of the distinct function of the three steps of Article 218 TFEU, the intention to participate can be manifested at any of the three stages, and with the last being ‘the binding one’.²⁷ Although there is no

²³ Op. cit., note 4.

²⁴ For an in-depth analysis, see Garcia Andrade, op. cit., note 9, p. 100 et seq. and Vernimmen-Van Tiggelen, op. cit., note 9.

²⁵ See, for instance, the Agreement with Brazil on short-stay visa waiver for holders of diplomatic, service or official passports OJ 12.03.2011 L 66, p. 21.

²⁶ Opening of negotiations and definition of the mandate; decision authorising the signature of the agreement; decision concluding the agreement.

²⁷ The UK government however, thinks otherwise: “The UK notifies the Council of its opt-in to JHA elements of certain third country agreements (i.e. agreements between the EU and

consistent praxis on the matter²⁸ it seems preferable to interpret the *opt-in* right of Ireland and the UK as having to be manifested at the time of the opening of the negotiation and definition of the mandate (so as to clarify the territorial application of the agreement *ab initio*) and subsequently confirmed (at the moment of signature).

The observations of the previous paragraphs reflect the complexity of the regimes of variable geometry present in the AFSJ; and the complexities pertain not only to material aspects of the AFSJ, but also to procedural ones. While the external dimension of the AFSJ is almost absent from the different AFSJ protocols, it emerges nonetheless that there may be difficulties for the EU in preparing and conducting negotiations for agreements with third countries because the ambitions of the EU will have to be balanced with the intentions of the two countries benefiting from the *opt-in* regime. Yet, recent examples in which the EU has managed to find procedural solutions respectful of the third countries involved as well as of the member states benefiting from differentiation exist: for instance, the readmission agreement with Georgia²⁹ contains a provision that allows the subsequent *opt-in* by Ireland and extends the agreement to Irish-Georgian relations by the means of a unilateral declaration that the EU would send to Georgian authorities.³⁰

All in all, while recent developments suggest that the material and procedural hurdles associated with variable geometry in the AFSJ can be overtaken by coordination in the spirit of the loyal cooperation principle,³¹ the effects of variable geometry may nonetheless hinder the global approach that the EU has chosen to fight transnational security threats. This is because even though the policy objective of enhancing security within the EU calls for the admixture of AFSJ elements into all the instruments available to the external action of the Union, variable geometry requires the EU to act on a case-by-case approach so as to accommodate all the different instances of the three member states benefiting from derogations. The next section will attempt to clarify the scope of the external dimension of the AFSJ and the role of the EU as a global security actor.

8.3 The external dimension of the AFSJ as a tool to address new security threats

Since the entry into force of the Amsterdam Treaty and the conclusions of the Tampere summit in 1999, the external dimension of the AFSJ has considerably

another non-EU country such as Korea). (...)For the purposes of this report such agreements are counted as a single *opt-in* decision, with the final decision on UK participation in such agreements being the one which counts toward the total"; from "Report to Parliament on the Application of Protocols 19 and 21" (<http://www.official-documents.gov.uk/document/cm80/8000/8000.pdf>).

²⁸ For an analysis, see Martenczuk, *op. cit.*, note 14, pp. 515-516 and Garcia Andrade, *op. cit.*, note 9, pp. 108-111.

²⁹ Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, OJ L 52 25.2.2011.

³⁰ *Ibid.*, Articles 21(2) and 23(3).

³¹ See the contribution by Herlin-Karnell and Konstadinides to this volume.

developed and, as recently observed, amounts to 19% of AFSJ output.³² The plurality of policies composing the AFSJ and the wording of most AFSJ provisions do not appear, *prima facie*, as vehicles for external action. Indeed, as has been observed elsewhere,³³ the AFSJ is primarily concerned with the establishment and development of bridges, links and instruments to promote intra-EU cooperation for the purpose of developing and guaranteeing, parallel to the internal market, freedom, security and justice to EU citizens. In this respect, the external dimension of the AFSJ emerged as a corollary to internal objectives and measures and, as a consequence, has been developed by making use of the implied powers doctrine of the ERTA³⁴ judgment, now codified in Article 216 (1) TFEU. On top of this, Title V Part III TFEU also contains a couple of provisions that confer an express external competence to the EU in the fields of partnership and cooperation agreements in relation to extraterritorial management of asylum applications (78(2)(g) TFEU) and on the conclusion of readmission agreements (article 79 (3) TFEU). In both cases not only the EU is conferred an express competence to conclude agreements, but the very conclusion of the envisaged instruments appears as the necessary (and only) means to attain the objective envisaged by the treaty provisions. However, the two provisions constitute an exception within Title V Part III TFEU and do not explain or justify the growing importance of the AFSJ in the external relations of the Union.

As has been argued in this contribution and more in detail elsewhere,³⁵ the external dimension of the AFSJ results from the combination of 'driving factors'³⁶ with the existence of 'internal enabling tools'.³⁷ In this perspective the external dimension of the AFSJ has emerged as a reaction to external challenges³⁸ that triggered the use of the EU's implied powers in order to allow the EU to respond to its the security threats.³⁹ Yet, the context in which the external dimension of the AFSJ has been developed is broader than the traditional 'justice and home affairs' perspective that, *prima facie*, one would assign to it. Indeed, it has been observed elsewhere⁴⁰ that the security parcel embedded within the AFSJ is to be understood as belonging to the broader context of the European Security Strategy (ESS).⁴¹ Since 2003 and the

³² J. Monar, "The EU's Growing external role in the AFSJ domain: factors, framework and forms of action", *Cambridge Review of International Affairs*, 2013, p. 1.

³³ Among others Wessel, Marin and Matera, *op. cit.*, note 5.

³⁴ Case 22/70 Commission v. Council (ERTA) [1971] ECR 263.

³⁵ See Wessel, Marin and Matera, *op. cit.*, note 5 and J. Monar, "The EU's Growing external role in the AFSJ domain: factors, framework and forms of action", *Cambridge Review of International Affairs*, 2013, p. 1.

³⁶ See Monar, *Ibid*, p. 2.

³⁷ *Idem*.

³⁸ On this point see Wessel, Marin and Matera, *op. cit.*, note 5, pp. 276-278.

³⁹ *Idem*.

⁴⁰ See Matera, *op. cit.*, note 8, pp. 69-87.

⁴¹ In relation to the inter-linkages between different policies in relation to the security of the EU, see F. Longo, "Justice and Home Affairs as a New Dimension of the European Security Concept", *European Foreign Affairs Review*, Vol. 18, No. 1, 2013, pp. 29-46, as well as the special issue of the *European Foreign Affairs Review*, Issue 2/1, 2012. From a legal perspective,

adoption of the ESS⁴² the EU has emphasised how security threats have shifted from a traditionally military paradigm to a new one, in which factors such as (transnational) organised crime, terrorism and other humanitarian crises should also be considered as security threats.

Since the adoption of the ESS the EU has promoted a holistic⁴³ understanding of security that requires that the use of “[all] powers available to the Union, including external relations, should be used in an integrated way”⁴⁴ so as to develop a single external policy in relation to the security of the Union. Thus, because of this shift in the notion of security threat, also the external dimension of the AFSJ is considered to be a vehicle to promote the fight against new security threats beyond the borders of the EU. As an example of the widening scope the external dimension of the AFSJ, suffice here to remember the emphasis placed on the relation between the AFSJ and the CSDP of the EU crystallised in the Stockholm Programme⁴⁵ first, and second in a policy paper of 2011.⁴⁶

All in all, it follows from the foregoing that the external dimension of the AFSJ has two main components: the first is immediately linked to the internal establishment of the AFJS such as in the case of readmission agreements; the second is linked to the new notion of security threats as developed in the ESS⁴⁷ and in this respect the provisions contained in Title V TFEU constitute only one element of a broader policy horizon that requires the use or the combination of a plurality of external action tools. Indeed, since the adoption of the Tampere conclusions in 1999 the scope of the external dimension of the AFSJ has been developed together with the evolution of other EU external policies and in the light of global events such as 9/11. Other than the CSDP nexus mentioned in the previous paragraph, there are other examples that testify to this expansion of the AFSJ into other external policies. One example could be the nexus with the CFSP in the context of the fight against international terrorism and in relation to the transatlantic relations of the Union with the USA: here the EU acts on the basis of an agreed global strategy to fight against a global security threat

see M. Cremona et al. (eds) (2011), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, College of Europe Studies, Brussels: P.I.E. Peter Lang.

⁴² A secure Europe in a better World. European Security Strategy, 12 December 2003.

⁴³ F. Longo, “Justice and Home Affairs as a New Dimension of the European Security Concept”, *European Foreign Affairs Review*, Vol. 18, No. 1, 2013, pp. 29-46.

⁴⁴ The Hague Programme: Strengthening freedom, security and justice in the European Union, 13.12.2004, Council Document 1605/04, p. 33.

⁴⁵ Op. cit., note 7.

⁴⁶ Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors. Proposals for a Way Ahead, Sec (2011) 560 final, 05 May 2011. *Infra*, section V) ii)

⁴⁷ But also in other policy documents of other International Organisations such as In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005; for a commentary of the UN document, see D. Fischer (ed.), *United Nations Reform and the New Collective Security*, Cambridge, 2010.

that has triggered a number of controversies such as the PNR and SWIFT affairs.⁴⁸ Parallel to this, the external dimension of the AFSJ has been predominantly attached to the neighbouring policies of the EU: that is to say pre-accession mechanisms and the European Neighbourhood Policy. In this respect, suffice here to mention recent policy documents that aim to strengthen this dimension of the external AFSJ such as the “EU–Russia Cooperation in Criminal Matters” of October 2012⁴⁹ or the Communication by the Commission “On Cooperation in the Area of Justice and Home Affairs within the Eastern partnership” of September 2011.⁵⁰

The search for unity in the external action of the EU to attain its security objectives must be looked at while taking into account the constitutional complexities and hurdles that affect the external action of the EU.⁵¹ The main challenge for the AFSJ in this respect is represented by the choice of the proper legal basis; an issue linked to questions of distribution of competences between treaties (TEU/TFEU) and between policies (AFSJ legal basis *or* Association Agreement pursuant to Article 217 TEFU). While the criteria that should guide the choice are known⁵² and potentially allow the use of multiple legal bases,⁵³ this is impossible when the procedural rules are absolutely incompatible: which could occur, for instance, in relation to the TEU/TFEU dichotomy.⁵⁴ On top of these issues comes variable geometry. To what extent does or could variable geometry affect the international projection of the AFSJ? This largely depends on how we interpret the scope of the opt-out regimes in relation to external action, but it also depends on how we interpret the relationship between the AFSJ and the panoply of instruments at the disposal of the EU to carry out its external relations. In the following sections, the different dimensions of the external AFSJ will be taken into consideration in order to evaluate the impact of variable geometry on them.

⁴⁸ For an analysis of the EU–US relations in the fields of the AFSJ, see the contribution by Santos Vara and Fahey to this volume; for an appraisal of the EU policy on counter-terrorism, see C. Eckes, “The legal framework of the European Union’s counter-terrorism policies: full of good intentions?”, in C. Eckes and T. Konstadinides (eds), *Crime within the Area of Freedom*, Oxford: Oxford University Press, 2011, pp. 127-158.

⁴⁹ Council Doc 14316/1/12 of 3.10.2012.

⁵⁰ COM (2011) 564 final, 26.9.2011.

⁵¹ In this respect, see B. De Witte, “Too Much Constitutional Law in the European Union’s Foreign Relations?”, in M. Cremona and B. De Witte, *EU Foreign Relations Law. Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 3-15 and G. de Baere, *Constitutional Principles of EU External relations*, Oxford: Oxford University Press, 2008, p. 10.

⁵² Internally: *Commission v. Council*, Case 45/86, [1987] ECR 1493, para. 11 and externally, *inter alia*, *Opinion 2/00 on the Cartagena Protocol*, [2001] ECR I-9713. On external relations and legal basis, see P. Koutrakos, “Legal Basis and Delimitation of Competence”, in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law*, Oxford: Hart Publishing, 2008, p. 171.

⁵³ *Commission v. Council (Rotterdam Convention)*, C-94/03 [2006] ECR I-22, para. 36.

⁵⁴ In this respect, the decision of the Court of Justice in *Opinion 1/08* does not seem applicable in the TEU-TFEU case because the constitutional rationale at the basis of the different provisions are opposed, whereas the *Opinion 1/08* only dealt with different decision-making procedures...belonging to the same policy (the Common Commercial Policy). For a short overview of this problem, see Matera, *op. cit.*, note 8, p. 34.

8.4 The impact of variable geometry on AFSJ-based agreements

As has been submitted elsewhere⁵⁵ the AFSJ is a label that brings unity to a plurality of policies with distinctive features and, as a consequence, also the external dimension of the AFSJ follows different patterns for each type of policy. Moreover, the AFSJ has also emerged as a parcel of broader policies, such as the ENP, or as a single policy, such as the EU's fight against terrorism. However, in a context dominated by the constitutional necessity to individuate the proper legal basis it becomes imperative to better individuate *-a priori-* the main policy rationales so as to avoid *ex post* conflicts such as the one currently pending between the European Parliament and the Council concerning the choice of the proper legal basis for the conclusion of extradition agreements of pirates arrested in the framework of operation ATALANTA.⁵⁶

Yet, the identification of international agreements that *must* be based on an AFSJ as opposed to international agreements that can be concluded on other provisions of the treaties is not only necessary for reasons pertaining to the rule of law, but is also necessary in order to understand whether Denmark, Ireland and the UK can benefit from their opt-out regimes and eventually participate or not in the conclusion of an international agreement. As it has been observed in a previous paragraph,⁵⁷ the different protocols on variable geometry within the AFSJ contain a common provision that refers to measures adopted on the basis of Part Three, Title V, TFEU and on 'international agreements'.⁵⁸ It emerges that the opt-outs are envisaged so as to apply first and foremost to any measure based on Part Three, Title V, TFEU; i.e. agreements such as Mutual Legal Assistance and Extradition, Readmission agreements, VISA-facilitation, VISA-waiver agreements and so forth.⁵⁹ The table

⁵⁵ See Wessel, Marin and Matera, *op. cit.*, note 5.

⁵⁶ Case C-658/11, pending. Operation Atalanta was set up with Council Decision 2008/918/CFSP, in *OJ L* 330/19, 9.12.2008. For a recent analysis of the different ways the UE is involved to fight piracy in Somalia, E. Petretto, "The EU, the Somalia Challenge, and Counter-piracy: Towards a Comprehensive Approach?", *European Foreign Affairs Review*, Vol. 17, 2012, pp. 261-284.

⁵⁷ See paragraph 2.

⁵⁸ Article 2, Protocol No. 21 on the UK and Ireland and similarly, Article 2 Protocol No. 22 on Denmark.

⁵⁹ AFSJ provisions have been used to conclude a relatively wide range of international agreements. In relation to border checks the EU has concluded by the means of its agency FRONTEX a number of agreements with a view to cooperate on border controls and has also authorized the conclusion of 'Local border traffic agreements' whereas in relation to migration the main (soft-law) instrument used is the one of 'mobility partnerships'. In relation to criminal law and police measures the EU has conducted a number of bilateral agreements with a view to prevent and fight transnational organized crime and notably, international terrorism: these are the so-called 'PNR agreements'; moreover the Union's agencies Europol and Eurojust also conclude agreements with a view to fulfil their tasks. Lastly, in the field of private international law and judicial cooperation in civil matters, the Union has concluded agreements on conflicts of jurisdiction and recognition of judgments as well as other instruments pertaining to its participation to the Hague Conference on Private International Law.

below provides an overview of AFSJ-based agreements with a view to showing the extent to which member states benefiting from variable geometry take part in these initiatives.

External instrument/ Member state	MLA/ Extradition	PNR 2012 & TFTP 2012	Readmission agreements	Visa facilitation	VISA waiver	Lugano Conven- tion
UK	✓	✓	✓ Except Cape Verde, Armenia	X	X	✓
IE	✓	✓	✓ Except: Georgia, Ukraine, Pakistan, Armenia	X	✓	✓
DK	✓/USA (pre-Lisbon) X Japan	X	X	X	X	X

At the time of writing, the relationship between international agreements based on the AFSJ and the countries benefiting from variable geometry seems consistent with the purpose of the different opt-out regimes: the UK and Ireland do not participate in agreements related to border controls such as VISA issues, and Denmark does not participate (any longer) in any agreement, except those strictly linked to its membership in the Schengen club such as VISA-waiver agreements; but with the caveat that the participation of Denmark in relation to VISA agreements does take place on the basis of public international law. Moreover, even though Denmark takes part in the *acquis* of Schengen, it is noteworthy that this country does not participate to readmission agreements concluded by the EU, because from a formal perspective readmission agreements and the return policy of the EU are solely connected to the Schengen system and do not constitute part of the Schengen *acquis*. However, most readmission agreements concluded in recent years contain a special clause inviting Denmark and a third country to conclude a bilateral agreement that mirrors the one concluded by the EU; thus, for instance the recent EU-Cape Verde⁶⁰ readmission agreement includes the following joint declaration:

Joint Declaration concerning the Kingdom of Denmark⁶¹

The Contracting Parties take note that this Agreement does not apply to the territory of the Kingdom of Denmark, nor to nationals of the Kingdom of Denmark. In such circumstances it is appropriate that the Republic of Cape Verde and the Kingdom of Denmark conclude a readmission agreement in the same terms as this Agreement.

⁶⁰ Agreement signed on 18 April 2013 (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/136840.pdf).

⁶¹ The text of the agreement has not yet been published on the Official Journal. The text is available from the website of the Council (<http://register.consilium.europa.eu/pdf/en/12/st14/st14759.en12.pdf>), p. 48.

In relation to the joint declaration concerning Denmark and Cape Verde for the purpose of concluding a readmission agreement it should be added that this type of clause is also used in relation to the Schengen associated states, i.e. Iceland, Lichtenstein, Norway and Switzerland.⁶² Interestingly, this type of declaration is present only in relation to Denmark and not Ireland or the UK: this distinction is a good example of the different approaches and political choices that characterise the different regimes of variable geometry within the AFSJ. Thus, while Denmark does not take part in agreements because of its opposition to the supranational decision-making applicable in the AFSJ, it nonetheless looks on favourably at the policy developments and wishes to be somehow included in the different actions, the position of the UK and Ireland reflects a different position. Indeed the approach of the UK and Ireland appears to reflect a utilitarian approach where the UK and Irish exercise of their opt-in/opt-out faculties is purely linked to reasons of national interest. In general, post-Lisbon agreements include either a territorial clause or a clause in the preamble so as to explicitly mention which EU member states are participating in the adoption of the texts. For instance, the short-stay visa waiver agreement with Brazil for holders of diplomatic, service or official passports includes a clause on the UK and Ireland in its preamble; conversely, the EU-Australia PNR agreement⁶³ makes reference to the Danish, Irish and British situation in a specific provision on territorial application.⁶⁴ However, there is no consistency in the use of these clauses and, in relation to Denmark, there is no information concerning the conclusion of separate bilateral agreements; thus the current situation can create legal uncertainties that should be remedied.

The table above also shows clearly how the internal opt-out regimes are mirrored in their external projections. The table shows in the first column on the left the three member states that have obtained derogations from the AFSJ and in the top row the table considers the different types of agreements that the EU has concluded and that are directly or indirectly linked to AFSJ provisions. Yet the table also shows that member states benefiting from variable geometry use their opt-in/opt-out faculty depending on their national interest, an option that other member states cannot take advantage of. This is reflected, for instance, in the (shifting) British policy concerning readmission: while the UK has participated in all the pre-Lisbon readmission

⁶² Ibid.

⁶³ OJ L186 14.07.2012, p. 4.

⁶⁴ Article 28: 1. Subject to paragraphs 2 to 4, this Agreement shall apply to the territory in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applicable and to the territory of Australia. 2. This Agreement will only apply to Denmark, the United Kingdom or Ireland, if the European Commission notifies Australia in writing that Denmark, the United Kingdom, or Ireland has chosen to be bound by this Agreement. 3. If the European Commission notifies Australia before the entry into force of this Agreement that it will apply to Denmark, the United Kingdom or Ireland, this Agreement shall apply to the territory of such State on the same day as for the other Member States of the European Union bound by this Agreement. 4. If the European Commission notifies Australia after the entry into force of this Agreement that it applies to Denmark, the United Kingdom, or Ireland, this Agreement shall apply to the territory of such State on the first day following receipt of the notification by Australia.

agreements, the UK is now using a more flexible approach and has decided to stay out of the agreement with Cape Verde,⁶⁵ but decided to make use of the opt-in for the negotiations and conclusion of the agreement with Turkey.⁶⁶ All in all, the data emerging from the table and an analysis of the different agreements in which the UK and Ireland participate suggest that the entry into force of the Lisbon Treaty has reinforced an isolationist approach of these countries to the developments of the ASFJ, whereby their participation is not conditioned by issues such as human rights standards, accountability or preservation of the intergovernmental method; rather the position emerging from the behaviour of the UK and Ireland appears to be solely based on national priorities and interests. In this respect, the leeway left to these two countries, as well as their behaviour, seem to reflect a veritable ‘à la carte’ approach to their participation in EU initiatives.

In relation to the expanding effect that the entry into force of the Lisbon Treaty has had for variable geometry, the case of the Mutual Legal Assistance agreement with Japan reflects the different regimes of variable geometry: even though the agreement itself was negotiated before Lisbon, Denmark withdraw from it because the agreement came into force after the 1st of December 2009; conversely, the UK and Ireland could opt in and thus participate in this agreement. A similar conclusion can be made in relation to the thorny PNR and TFTP agreements concluded with the US: Ireland and the UK have decided to opt in to these texts and Denmark is not excluded from them because of the impact of its new, post-Lisbon regime. In relation to the participation of the UK and Ireland it is worth mentioning that while the UK has expressed its intention to participate *ab initio* pursuant to Article 3 of Protocol 21 and thus took part in the Council’s work, Ireland made use of Article 4 of protocol 21 and joined the international agreement *ex post*⁶⁷ and as a consequence renounced its voting rights and its influence in the process.⁶⁸

All in all the analysis conducted shows that in spite of some procedural issues that require an effort so as to develop more consistent clauses concerning the position of the three member states in relation to each AFSJ-based agreement, the external projection of the AFSJ as in Title V, TFEU does not pose substantive problems in relation to the EU’s role as a security actor: this is because the UE has and still is managing to conclude agreements pertaining to most of its AFSJ priorities with most of targeted partners. Moreover, the insertion of clauses pertaining to the participation of, or to the conclusion of, separate agreements with the three member states benefiting from variable geometry suggests that in spite of their reluctance the three countries in question recognise that the added value and/or the power that the EU as a whole is capable of exercising in the AFSJ domain globally.

⁶⁵ <https://www.gov.uk/government/speeches/eu-readmission-agreement-with-cape-verde>

⁶⁶ <https://www.gov.uk/government/speeches/eu-readmission-agreement-with-turkey>

⁶⁷ On the position of Ireland, see B. Purcell, “Criminal justice cooperation and Ireland’s Opt-in Protocol”, in E. Regan (ed.), *European Criminal justice post Lisbon: An Irish perspective*, Dublin: Institute of international and European Affairs, 2012, pp. 38-44.

⁶⁸ For a detailed analysis of the impact of variable geometry in the transatlantic relations of the EU, see the contribution by Santos Vara and Fahey to this volume.

The capacity of the EU to pursue and attain AFSJ-related objectives is strengthened if the EU can mix its security agenda into broader contexts. For this reason the next section analyses AFSJ clauses in the broader context of Association Agreements and other instruments of external action.

8.5 The impact of variable geometry within the AFSJ on other international agreements

The previous section looked at the interrelation between the external AFSJ and variable geometry and in that respect it could be argued that the previous section looked at the ‘autonomous’ side of the external AFSJ. Indeed, the present author submits that the external projection of the AFSJ can be broken down into a plurality of scenarios; the first scenario being the one in which the external dimension of the AFSJ is not mixed with other policies or instruments of EU external relations. Yet, this does not exclude the idea that AFSJ objectives could also be integrated and pursued within the context of other external policies. Indeed, this is what has been happening since the late 90s in the context of Partnership and Cooperation agreements, as well as Association Agreements. The first part of this section will look into international agreements with AFSJ clauses concluded on the basis of provisions belonging to the TFEU; the second part of this section will turn to agreements concluded in the framework of external actions based on the TEU.

8.5.1 Variable geometry and the conclusion of international agreements based on the TFEU

The table below provides an overview of different types of external contractual instruments that contain AFSJ clauses;⁶⁹ the agreements have been selected to provide recent examples of the four types of instruments. However, not every recent agreement concluded by the EU contains AFSJ clauses: thus while the Free Trade Agreement with South Korea⁷⁰ and the Partnership Agreement with the Pacific States⁷¹ do not contain AFSJ –related provisions, the recent Partnership and Cooperation Agreement with Iraq does so.⁷²

⁶⁹ The table and the analysis do not take into account the action plans and/or financial instruments adopted and pertaining to the selected agreements.

⁷⁰ OJ 14.05.2011 L 127, p. 6, Council Decision 2011/265/EU of 16 September 2010 on the signing of the Free trade Agreement with the Republic of Korea.

⁷¹ Council Decision 2009/729/EC of 13 July 2009.

⁷² Agreement signed in May 2012. The text is available via the website of the Council (http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150084.pdf).

Type of external instrument/Clauses	Stabilisation and Association Agreement Albania 2009 OJ 28.04.2009 L107 p.166	Euromed Agreement Algeria OJ 10.10.2005 L265, p. 2	EU – Central America Political Dialogue and Cooperation	Partnership and Cooperation Agreement Tajikistan OJ 29.12.2009 L350, p.3	Partnership and Cooperation Agreement with Iraq Signed on 11 may 2012
Readmission	✓ Article 81	✓ Article 84	✓ Article 49	✓ Article 70	✓ Article 105 (3)
Visa	✓ Article 80	✓ Article 83	✓ Article 49	✓ Article 70	✓ Article 105 (2) (f)
Criminal law matters (cooperation +substantive)	✓ Article 85, 82	✓ Article 86-91	✓ Articles 47-48 on Drugs and money laundering	✓ Articles 67-69	✓ Articles 7 ,103, 106 and 107
Information exchange	✓ Article 84	✓ Article	Terrorism	Terrorism	Article 4 (in relation to terrorism) and data protection clause in Article 104
Special clause concerning the States benefitting from Variable geometry in either the agreement or in the decision concerning the conclusion of the agreement.	The Preamble refers to the different protocols	The Preamble refers to the different protocols	Special declaration annexed to the agreement, but without substantive innovations compared to clauses inserted in preambles.	X	The Preamble refers to the different protocols

From a constitutional perspective the different agreements mentioned in the table are examples of mixed agreements concluded on a plurality of legal bases and signed by the EU as well as by the member states; moreover, most of them were negotiated before the entry into force of the Lisbon Treaty, but at a time when variable geometry already existed and in the case of Tajikistan the agreement came into force after the 1st December 2009.⁷³ In this respect three elements appear noteworthy: first, if one takes into account the latest Stabilisation and Association Agreements (SAAs) with Albania, Bosnia-Herzegovina, Montenegro and Serbia it is striking that these agreements do not merely mention the existence of variable geometry for those clauses related to the AFSJ; secondly, neither does the recent Partnership and Cooperation Agreement with Iraq shape relations between the targeted third country

⁷³ Because the texts were adopted before the entry into force of Lisbon, this study has not taken into account the SAA with Serbia and Montenegro and has used the one with Albania as a recent example of SAA with western Balkan countries.

and the member states benefiting from variable geometry; lastly, recent developments such as the Korea agreement on trade or the Partnership Agreement with Pacific States seem to reinforce the idea that the EU is a prominent security actor regionally rather than globally. This observation would confirm the strength of the European Neighbourhood Policy context, which allows the EU to combine economic and commercial activities with security concerns. Conversely, in a geostrategic context where the leverage of the EU as an economic and security actor is not as strong (Pacific Countries and Asia), the inclusion of AFSJ clauses appears more difficult. Thus, if the success of the EU to insert AFSJ clauses is strictly linked to the geographical proximity of third countries, it comes as no surprise that the agreement with Iraq contains AFSJ clauses.

Thus, the first impression emerging from the table suggests that the EU has developed a capacity to insert clauses pertaining to the AFSJ in different policy contexts. Parallel to this, three out of five agreements refer to the opt-out regimes so as to comply with the relevant protocols. However, and even though some of the texts were adopted before Lisbon, it must be emphasised that the most recent agreements should have contained a sounder discipline of the opt-out regimes: for instance, not only do the agreements fail to address the scope of possible bilateral instruments between the third countries involved and the countries benefiting from variable geometry, but they also fail to address issues pertaining to the (substantive) coherence and consistency between EU initiatives and bilateral initiatives of the three member states. Instead, while the agreement with Albania merely contains a reference to the opt-outs in its preamble, the most recent agreement with Tajikistan makes no mention of them. As argued in the previous section, and taking into consideration the interests at stake linked to the AFSJ, the lack of clarity and certainty should be remedied. Yet, one could argue the extent to which AFSJ clauses such as the ones contained in the four agreements above actually pose a problem in relation to the different opt-out regimes existing within the AFSJ.

Indeed, a common trait of the different AFSJ clauses contained in non-AFSJ agreements is their broad formulation. For instance, clauses on readmission do not contain the discipline of readmissions and returns between the EU and the targeted country; rather, readmission clauses only affirm that the objective of readmission operates reciprocally and that in order to give execution to the common intent of fighting illegal migration, the parties agree to negotiate bilateral agreements in the future.

For instance, Article 84(2) of the Association Agreement with Algeria affirms:

Desirous of facilitating the movement and residence of their nationals whose status is regular, the Parties agree to negotiate, at the request of either Party, the conclusion of agreements on combating illegal immigration and on readmission.

Parallel to this, the recent PCA agreement with Iraq affirms that in relation to illegal migration and readmissions, the Parties:

agree to conclude, upon request by either Party as defined in the Article 122 and as soon as possible, an agreement on preventing and controlling illegal migration and regulating the specific procedures and obligations for readmission, covering

also, if deemed appropriate by both Parties, the readmission of nationals of other countries and stateless persons.⁷⁴

It emerges from the foregoing that in all the types of agreements examined for the purpose of this contribution the clauses pertaining to the AFSJ are not self-executing clauses, but merely habilitating clauses, i.e. clauses that mark the first step towards the establishment of future means of cooperation. Moreover, while the examples mentioned here cover the Union's readmission policy, a similar observation can be made in relation to judicial cooperation in criminal matters, i.e. MLAs and extradition agreements.⁷⁵ Similar considerations could be put forward in relation to Partnership and Cooperation Agreements, such as the one concluded with Tajikistan in 2009. Again, taking as an example the clause on readmission cooperation,⁷⁶ which is phrased exactly like the one on the EU-Central American Agreement on Dialogue and Cooperation, the reader cannot but observe that the applicability of any of the opt-out regimes would be, from a material perspective, disproportionate if not irrelevant.

Therefore, it follows from the foregoing that external action tools such as association agreements provide a platform for future cooperation in the fields of the AFSJ, but do not constitute, strictly speaking, an external projection of the AFSJ itself. As a consequence, one might ask whether the common clause of the protocols is applicable to agreements such as those analysed here. Indeed, because the scope of the opt-out is to exclude the applicability of AFSJ-based measures to the three member states in question, one could argue that this exemption should only be valid in relation to substantive clauses and not to habilitating clauses because habilitating clauses do not, per se, affect sovereign prerogatives and could be formulated so as to expressly distinguish the position of Denmark, Ireland and the UK vis-à-vis the position of the other member states.

The current praxis of mentioning the opt-outs in the preambles appears redundant if coupled with the actual content of the AFSJ clauses contained in the different agreements; the current praxis should be replaced by the insertion of sounder provisions in which, depending on the type of AFSJ policy at stake, the position of Denmark, Ireland and the UK is expressed. Alternatively, and again taking into consideration the scope of AFSJ clauses in existing agreements, one could even question the extent to which the toll for differentiation poses a threat to the attainment of EU objectives if the Union cannot even insert clauses on "*the establishment of a comprehensive dialogue and cooperation on, inter alia, the return of persons residing illegally and their readmission on the basis of reciprocal rights and duties*"⁷⁷ without having to spell out the territorial and normative force of such intentions.

⁷⁴ Article 105 (5).

⁷⁵ See for instance Article 85 on judicial cooperation of the Association Agreement with Algeria or Article 103 (3) of the Partnership cooperation with Iraq.

⁷⁶ Article 70 (e).

⁷⁷ Article 49 of the EU-Central American Dialogue and Cooperation Agreement; emphasis added.

Because clauses such the one just mentioned do not create any operative or institutional obligation on readmission between any of the contracting parties, the application of the opt-out regimes for this type of clauses would go beyond a *reasonable* understanding of the scope of the opt-outs. Therefore, whenever an international agreement is not capable of actually hindering the sovereign prerogatives protected by the opt-outs, there should be no room for their application. In this respect it is submitted that EU-based agreements such as the one with Central American states only creates the political and legal premise for (a possible) future collaboration in the field of returns and readmissions; the clause itself does not constitute a readmission agreement and is therefore not operational. Consequently, it does not constitute any attempt against the sovereignty that according to the opt-outs regimes, Denmark, Ireland and the UK have sought to preserve.

Contrary to what has emerged from the agreements analysed thus far, the Stabilisation and Association Agreement (SAA) with Albania contains a provision on readmission that denotes a more detailed discipline, because after having affirmed the general commitment that “the Parties agree that, upon request and without formalities, Albania and the member States (...) shall readmit nationals”,⁷⁸ Article 81 of the SAA with Albania can make express reference to the separate Readmission agreement concluded between the parties in 2005.⁷⁹ Contrary to the other clauses thus far analysed, Article 81 of the agreement with Albania would justify the applicability of the opt-outs regimes because, for instance, imposes the readmission of third country nationals whereas this issue is normally treated as an item for future cooperation and discussion, like in the case of Article 84 of the agreement with Algeria where it is held that if either Party considers it necessary the readmission agreement should also cover third country nationals’ repatriation.

However, the differences between the SAA with Albania from other agreements is very likely due to the fact that the SAA was concluded *after* the readmission agreement⁸⁰ and the incisiveness of the readmission clauses within the SAA are probably a mere result of the ‘ad hoc’ agreement. Moreover, other AFSJ clauses present in the SAA with Albania such as the one in relation to illicit drugs confirm the non-executing nature of AFSJ clauses in SAA agreements.⁸¹ Nonetheless, the SAA with Albania seems to differ from other agreements analysed in this section and appears to contain deeper AFSJ clauses that would justify the use of the opt-out regimes by Denmark, Ireland and the UK. However, also in this case the current

⁷⁸ Article 81 of the Stabilisation and Association Agreement with Albania, OJ 28.4 2009, L 107, p. 188

⁷⁹ Agreement between the Union and Albania on the readmission of persons residing without authorisation, OJ 17.05.2005, L124, p. 2

⁸⁰ EU-Albania readmission agreement OJ 17.5.2005 L 124, p. 22

⁸¹ 1. Within their respective powers and competences, the Parties shall cooperate to ensure a balanced and integrated approach towards drug issues. Drug policies and actions shall be aimed at reducing the supply of, trafficking in and the demand for illicit drugs as well as at a more effective control of precursors. 2. The Parties shall agree on the necessary methods of co-operation to attain these objectives. Actions shall be based on commonly agreed principles along the lines of the EU Drug Control Strategy.

praxis of merely referring to the different Protocols does not provide a clear discipline for the relations between the associated country and the member states benefiting from opt-outs.

All in all, from the analysis conducted in this section it is possible to affirm that the relevance of variable geometry depends on the scope of the different agreements. Thus, while deeper commitments such as the SAA with Albania probably justifies the presence of derogatory clauses based on the different opt-out regimes, this is not equally valid in relation to other agreements where AFSJ clauses would not affect the prerogatives that the opt-out regimes are meant to protect. Moreover, it also emerged that there is no consistency in opt-out clauses; while this could be explained by the fact that the agreements were concluded before Lisbon, future agreements should pay more attention to the relationship between the opt-out regimes and the parties involved. Unfortunately, recent agreements such as the one with Iraq or the one currently under negotiation with Ukraine do not provide a satisfactory solution to this issue.

Moreover, even though the different agreements analysed in this section reflect different political, geographical, economic and societal considerations, one could ask whether having to accommodate the positions of the member states benefiting from the opt-out regimes jeopardises the attainment of deeper and more effective clauses in the framework of association agreements. In this perspective, the need to accommodate variable geometry could be seen as a factor that prevents the EU from obtaining more at the negotiating table. Yet, variable geometry works the other way round too: thus, it also allows for the EU to insert deeper clauses connected to the AFSJ without having to compromise for less in order to keep Denmark, Ireland and the UK on board.

8.5.2 *Variable geometry and the interactions between the AFSJ with the CFSP and the CSDP*

Section III of this contribution highlighted the emphasis with which the external dimension of the AFSJ is presented not only as a projection of Title V, Part III, TFEU, but also as an essential parcel of the broader Security Strategy of the Union. As a consequence of this, AFSJ objectives may also be sought and attained by the means of instruments belonging to the CFSP/CSDP pillar. With the entry into force of the Lisbon Treaty the rule of precedence between external actions pursued on the basis of the CFSP/CSDP and external actions based on TFEU instruments previously codified in Article 47 TEU (ante-Lisbon) has been abrogated and, as observed elsewhere,⁸² the combined reading of Article 40 TEU with Article 218 TFEU does not clarify the extent to which TEU and TFEU elements can be combined in the external relations of the Union.⁸³ However, other than questions pertaining to the proper legal basis and the decision-making process, the combination of AFSJ objectives with CFSP

⁸² See van Elsuwege, *op. cit.*, note 8.

⁸³ For a recent analysis see S. Blockmans and M. Spornbauer, "Legal obstacles to comprehensive EU External security action", *European Foreign Affairs Review*, 2013, Special Issue, pp. 7-24.

and CSDP instruments leaves open the question of the impact that variable geometry may have on CFSP and CSDP actions. Moreover, it should be borne in mind that the combination of CSDP actions with the AFSJ is characterised by a double degree of differentiation: this is because Denmark does not participate in either policy.⁸⁴

In light of the ongoing initiatives and on the basis of the Stockholm Programme⁸⁵ and the working paper on 'Strengthening ties between CSDP and FSJ Actors – Proposals for a New Way Ahead'⁸⁶ it is possible to individuate a number of initiatives that fall simultaneously under the objectives of the AFSJ and of the CFSP. For instance, the thematic priorities of the Stockholm Programme identify three themes that can fall within the scope of actions carried out in either the CFSP/CSDP context or the TFEU one. These priorities are: security⁸⁷, information exchange,⁸⁸ justice⁸⁹ and disaster management.⁹⁰ The thematic priorities identified by the Stockholm Programme are reflected in the CSDP/FSJ working paper of 2011 whereby the rule of law, the fight against transnational crime, operational cooperation in the JHA fields as well as crisis management figure among the 'suggestions' for further cooperation between AFSJ and CSDP actors.⁹¹ Lastly, the specific context of the fight against international terrorism has played a prominent role in the definition of the spheres of competence between the CFSP and the AFSJ; a saga that from the institutional perspective has recently been brought to an end by the Court of Justice with its decision on the case *Parliament v. Council C-130/11*.⁹²

⁸⁴ See Article 5 of Protocol 22 on Denmark: "(...)Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications(...)".

⁸⁵ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, in OJ C 115/1, 4.5.2010.

⁸⁶ Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors. Proposals for a Way Ahead, Sec (2011) 560 final, 05 May 2011.

⁸⁷ Defined as "engaging with third countries to combat serious and organised crime, terrorism, drugs, trafficking in human beings and smuggling of persons, inter alia, by focusing the Union's counter-terrorism activities primarily on prevention and by protecting critical infrastructures, internal and external security are inseparable. Addressing threats, even far away from our continent, is essential to protecting Europe and its citizens", The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, in OJ C 115/1, 4.5.2010, p. 35.

⁸⁸ I.e. the exchange of data in a secure, efficient and with an adequate data protection standard between the EU and third countries, *idem*, p. 35.

⁸⁹ I.e. the promotion of "the rule of law and human rights, good governance, fight against corruption, the civil law dimension, promote security and stability and create a safe and solid environment for business, trade and investment", *idem*, p. 35.

⁹⁰ I.e., "to develop capacities of prevention and answers to major technological and natural catastrophes as well as to meet threats from terrorists", *idem*, p. 35.

⁹¹ Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors., *supra* note 100, p. 9.

⁹² In relation to the implications of the judgment for variable geometry, *Ibid.*, p. 5.

Instrument/ Specific policy objective	Classified information (Montenegro, USA, FYROM Australia) 24TEUa.L or 37 TEU	Council Joint Action 2009/475/CFSP EUJUST LEX Iraq OJ L156, 19.06.2009, p. 57	Council Joint Action 2004/523/CFSP EUJUST Themis OJ 29.06.2004 L228, p. 21	Council Decision 2011/640/CFSP On the signing of the EU- Mauritius Agreement on the transfer of suspected pirates on the basis of article	Council Decision 2012/392/CFSP on the EU mission in Niger EUCAP Niger OJ 17.7.2012, L 187,p. 48	Council Joint Action 2008/124/CFSP establishing EULEX Kosovo OJ 16.02.2008, L 42, p. 92
Security	✓	Article 2(2)	Article 2 (a), (c) & (d)	✓	Article 3 (a) and (b)	Article 3 (d)-(g)
Information exchange	X	Possible release of classified information ex article 13, but no mention of other data exchange mechanisms.	Article 12 only refers to the possible exchange of classified information, no mention of other types of data.	X	Possible release of classified information by the head of mission after delegation by the High representative of the EU (article15)	Article 18 refers to Classified information only
Justice	X	Article 2 (1)	Article 2 (b)	X	Article 3 (c)	Article 3 (a)-(c), (h)
Transfer or surrender of suspected criminals	X	X	X	✓ Agreement was concluded on the basis of article 37 TEU	X	X
Participation of MSs benefitting from opt-out regimes	DK IE UK	IE UK DK	IE UK DK	IE UK Article 5 protocol 22 on Denmark Applies	IE UK Article 5 protocol 22 on Denmark could apply ⁹³	DK IE UK

⁹³ No official data was retrieved.

The identification of common strategic goals for the CSDP and the AFSJ shows that the development of a single, coherent external policy for the EU is possible. However, also in this case the policy goals have to coexist in a highly complex constitutional context.⁹⁴ The table that follows provides an overview of recent CSDP and CFSP actions that contain AFSJ elements. More precisely, the table aims to show how different CSDP and CFSP actions (top row) implement parcels of the Stockholm Programme (left column); the bottom row, on the other hand indicates which opt-out is participating in the different actions or agreements. The table take into consideration four CSDP missions and two different types of agreements: the first type on classified information and the second on the transfer of suspected pirates arrested in the framework of operation Atalanta.

What the different CSDP missions have in common is that they exemplify capacity-building and aim to improve the application of the rule of law, reform the judicial system with and fight serious criminality in order to strengthen security.⁹⁵ As such, these objectives clearly fall within the scope of activities mandated to the Union by the Stockholm Programme; the similarities between the CSDP missions and the scope of the Stockholm Programme mandate in relation to the external AFSJ beg the question for individuating the separating line between actions legitimately based on the TEU and actions legitimately based on the AFSJ. One way to proceed is to find the objectives pursued by the action and then determine whether such action belongs to either the TEU or the TFEU in a manner similar to what was argued by A.G. Bot in his opinion in the case *Parliament v. Council C-130/10*.⁹⁶ In that case A.G. Bot held that while Article 21 (2) TEU codifies objectives common to the whole EU external action, some of those can be understood as traditionally belonging to the CFSP: namely, letter (a) to (c) of paragraph (2) or that article.⁹⁷ For the purpose of this contribution, the argument of the Advocate General would confirm the choice of the CSDP legal basis because Article 21(2) (b) TEU confers the EU a mandate to “consolidate and support democracy, the rule of law, human rights and the principles of international law” and, in this respect, the relationship between the CSDP and the AFSJ competence is one of complementarity, whereby the technical expertise of the EU in the AFSJ fields should be made available for the execution of

⁹⁴ *Ibid.*, p. 9.

⁹⁵ For an analysis, see P. Koutrakos, “The external Dimension of the AFSJ and other external policies, An Osmotic Relationship”, in M. Cremona, J. Monar and S. Poli (eds), *The External Dimension of the European Union’s Area of Freedom Security and Justice*, Brussels: Peter Lang, 2011, pp. 139-162.

⁹⁶ Paragraph 60 et seq.

⁹⁷ Article 21 (2) TEU: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders(...) See paragraph 63 of the Opinion.

the CSDP missions.⁹⁸ Moreover, these missions are either based on UN Security Council Resolutions and initiatives or stem from crises whereby the local political authorities call for the support of the EU; these external political elements reinforce the choice of a TEU anchorage.⁹⁹ Yet, while the combination of AFSJ with CSDP objectives triggers a number of constitutional questions that go beyond the scope of this contribution,¹⁰⁰ the combination of the two policy domains also raises questions in relation to variable geometry.

The TEU anchorage of these missions has significant repercussions in relation to the scope of the opt-out regimes of Denmark, Ireland and the UK. Indeed, the TEU anchorage of these actions brings the different activities outside the scope of the protocols with the result that, even though the different actions pertain substantially to the AFSJ, variable geometry does not apply – but with the caveat that Denmark would not participate in case of military-related missions.¹⁰¹ The possibility for the EU to act in these domains without having to insert specific clauses in relation to variable geometry solidifies the position of the EU on the one side, but also confirms that the three member states have obtained their opt-out regimes so as to maintain their sovereign prerogatives. In this last respect, one might question the extent to which the CSDP missions can benefit from the synergies with AFSJ institutions and tools without raising tensions related to variable geometry. For instance, it is difficult to imagine the participation of institutions and the use of data gathered in the framework of the AFSJ if the member states not participating to the internal instruments are involved.¹⁰²

As with the observations presented in relation to the different missions with a ‘rule of law’ objective, the EU-Mauritius agreement¹⁰³ is also anchored to the CSDP and, more precisely, the existing legal framework of Operation Atalanta.¹⁰⁴ As a consequence of this the AFSJ element of these agreements could be read as being complementary and, as such, should not raise issues of compatibility with the ‘opt-out’ protocols and the participation of Denmark, Ireland and the UK; however, because of the military nature of Operation Atalanta, Denmark is in fact out of this Agreement by virtue of Article 5, Protocol 22. Contrary to the other CSDP actions

⁹⁸ See the “General Suggestions” section of the Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors, *supra* note, 100, p. 9.

⁹⁹ EUJUST Lex Iraq stems from United Nations Security Council Resolution 1546 of 8 June 2004; EULEX Kosovo stems from United Nations Security Council Resolution 1244 of 1999, whereas the missions to Georgia and to Niger do not.

¹⁰⁰ For a recent analysis see Blockmans and Spornbauer, *op. cit.*, note 83.

¹⁰¹ Article 5, Protocol 22 on Denmark.

¹⁰² See, for example, the interoperability of data, personnel and know-how as envisaged by the Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors, *supra* note 100, pp. 11-14.

¹⁰³ Two other such agreements have been concluded: one with Seychelles (OJ L315, 02/12/2009, p. 37) and one with Kenya (OJ L79, 25/03/2009, p. 49); they all have been concluded using a TEU legal basis.

¹⁰⁴ Council Joint Action 2008/851/CFSP, OJ 12.11.2008 L301, p. 33.

considered in this contribution, however, the choice of a CSDP legal basis to conclude agreements pertaining to the transfer and trial of suspected pirates appears to go beyond a reasonable understanding of the scope of TEU-based external activities in as much as these agreements directly affect the fundamental rights of individuals in the framework of criminal trials; a sphere that is traditionally anchored to the realm of democratically elected instances.

While the question pertaining to the choice of the right legal basis is still pending before the Court of Justice,¹⁰⁵ the external activities based on CSFP/CSDP provisions suggest once more that the EU is capable of acting as a global security actor in spite of variable geometry and in spite of the constitutional constraints that affect its actions. This finding is also valid in relation to the last type of agreements mentioned in the table and analysed here: agreements concluded by the EU with third countries with a view to sharing classified information. The definition and use of classified information in the EU have been recently addressed by Council Decision 2011/292/EU,¹⁰⁶ in this document the EU has adopted a very broad definition of what constitutes 'classified information' so as to cover

any information or material designated by an EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or of one or more of the Member States.¹⁰⁷

In spite of this definition provided by the Council, it is possible to argue that the Decision wishes to cover any type of information stemming from any agency or office within the EU and its member states: thus including military, police and judicial information.¹⁰⁸ Prior to the entry into force of Council Decision 2011/292/EU, the EU had concluded a number of agreements with a view to exchange classified information with third countries. For instance the EU concluded in 2005 an agreement with the Former Yugoslav Republic of Macedonia¹⁰⁹ and it did so by means of articles 24 and 38 TEU (before Lisbon); i.e. on the basis of the express competence conferred to the Union for the conclusion of agreements pertaining to police and criminal law; and because the agreement was concluded before the entry into force of Lisbon, Denmark, Ireland and the UK took part in the conclusion.¹¹⁰ Since the adoption of the Lisbon Treaty, however, the praxis of the Council has shifted and agreements on classified information have been concluded on the sole basis of Article 24 TEU, i.e. on the basis of the CFSP pillar.¹¹¹ Because the content of the agreements has not substantially changed, it is difficult to pinpoint a legal reason for this shift. While the ambivalent nature of these agreements could warrant the

¹⁰⁵ Case Parliament v. Council C-658/11.

¹⁰⁶ OJ 27.05.2011 L141, p. 17.

¹⁰⁷ *Idem*, Article 2(1).

¹⁰⁸ This reading is confirmed, *a contrario*, by looking at the list of authorities taken into consideration by the Decision.

¹⁰⁹ OJ 13.04.2005 L94, p. 39.

¹¹⁰ Other agreements pertaining to the exchange of classified information were also concluded on the basis of articles 24 and 38 TEU (before Lisbon).

¹¹¹ See, e.g., agreement on classified information with Australia (OJ 30.01.2010 L 26, p. 31).

shift, it is equally true that the ambivalent nature of these agreements provided a material subterfuge to circumvent not only the constitutional hurdles connected with the new Article 40 TEU, but also to circumvent the applicability of the different opt-out regimes.

8.6 Conclusion

This paper aimed to evaluate whether the external dimension of the AFSJ and the global security agenda of the EU could be jeopardised by the existence of variable geometry and the derogatory regimes of Denmark, Ireland, and the UK. While the paper has confirmed that variable geometry poses procedural hurdles in relation to the external dimension of the AFSJ, the substantive impact of variable geometry does not appear to be significant.

This contribution has shown that in relation to agreements concluded on the sole basis of AFSJ provisions, the clauses and references to the different opt-out regimes are inconsistent and this may create legal uncertainties. Moreover, this section has highlighted that the some member states benefiting from variable geometry take full advantage of the '*à la carte*' opportunities that the Lisbon Treaty has conferred on them. Yet, in spite of these observations, the section on AFSJ-based agreements affirmed that the EU has become a security actor – albeit regionally rather than globally, thanks to the conclusion of a growing number of agreements.

However, the development of the EU as a security actor also benefits from the conclusion of other types of international agreements such as AAs, SAAs and PCAs. In this respect, two main findings must be emphasised. First, AFSJ clauses in broad external action instruments are mostly 'habilitating clauses' and not executive provisions; AFSJ clauses in these types of instruments could therefore be interpreted as the first step before the conclusion of sector-specific agreements. Secondly, also in this case it was noted that from a procedural perspective the member states involved and the institutions have not developed a consistent and clear regulation of the opt-outs in the context of AFSJ clauses in other external action instruments. It was also noted that, taking into consideration the non-executive nature of AFSJ clauses, the actual applicability of the various protocols on variable geometry should depend on the scope of the different AFSJ clauses in each agreement and should not necessarily constitute an automatism.

Lastly, the analysis turned to the relationship between the AFSJ and the CSFP/CSDP pillar. Again, also in this case the EU appears to have successfully concluded agreements and executed actions without being negatively affected by variable geometry. However, it was also argued that the recent calls for strengthening the ties and synergies between actors and instruments of the AFSJ with the CSDP could, in the future, raise issues about the participation of Denmark Ireland and the UK in missions with a strong AFSJ connotation.

All in all, the analysis confirms that the different opt-out regimes create more procedural, internal difficulties than substantive external ones. Yet, it should also be remembered that variable geometry has contributed to the difficulties encountered in relation to the of the United Nations Conventions against Transnational Organised

Crime (UNTOC) and its two protocols against people trafficking and against the smuggling of migrants. At the time of concluding the different instruments the EU had to dissect the different parts of the texts so as to adopt decisions on the conclusions for the agreements on the basis of Development cooperation, Economic, Financial and Technical Cooperation and separate decisions in relation to the parts on migration.¹¹² However, if one looks at the wording of the different provisions of UNTOC and of its protocols, also this example – together with the ones mentioned in this contribution, appears more linked to the excessive weight that constitutional law has in the field of external relations¹¹³ rather than a matter of substance of variable geometry.

¹¹² See Council Decision 2004/579/EC of 29.4.2004 on the conclusion of UNTOC, OJ 6.08.2004 L261, p. 69, Council Decision 2006/616/EC of 24.07.2006 on the conclusion of the Protocol against the smuggling of migrants, OJ 22.09.2006 L262, p. 24 and Council Decision 2006/618/EC of 24 July 2006 on the conclusion of the protocol to prevent, suppress and punish trafficking in persons, OJ 22.09.2006 L 262, p. 44.

¹¹³ B. de Witte, *Too much constitutional law in the European Union's Foreign Relations?*, op. cit., note 51.

9. TRANSATLANTIC RELATIONS AND THE OPERATION OF AFSJ FLEXIBILITY

JUAN SANTOS VARA* AND ELAINE FAHEY**

9.1 Introduction

The Stockholm Programme placed much emphasis on ensuring that its external dimension would be fully coherent with all other aspects of EU foreign policy.¹ It should come as no surprise that the Stockholm Programme emphasised the relevance of the external dimension given the ever-greater importance of the external dimension of the AFSJ to the global actions of the EU. The Union and the member states increasingly work in partnership with third countries and international organisations in ways that directly and indirectly affect the external dimension of the AFSJ.² One of the programme's key objectives was the coherence and the unity of EU law, yet the last major Treaty revision at Lisbon appeared to deepen and widen the nature of variable geometry in the EU.

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¹ *Stockholm Programme Mid-term review*, Council Doc. 15921/12; *Stockholm Programme Towards a Citizens Europe in the Area of Freedom, Security and Justice*, O.J. 2010, L 115/1. See "Delivering an area of freedom, security and justice for the Europe's Citizen Action plan implementing the Stockholm Programme", COM (2010)171.

² On the external dimension of the AFSJ, see, inter alia, M. Cremona, "EU External Action in the JHA Domain: A Legal Perspective", European University Institute Working Paper No. 2008/24, EUI, Florence, 2008; J. Monar, "The EU as an international actor in the domain of justice and home affairs", *European Foreign Affairs Review*, Vol. 9, 2004; P. Pawlak, "The External Dimension of Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-pillarization?", *Journal of European Integration*, Vol. 31, 2009 and "The EU's Externalization of Internal Security Objectives: Perspectives after Lisbon and Stockholm", *The International Spectator*, Vol. 45, 2010; J. Santos Vara, "The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty", *European Journal of Law Reform*, Vol. 10, 2008; and S. Wolff, N. Wichmann and G. Mounier (eds), "Special Issue: The External Dimension of Justice and Home Affairs? A Different Security Agenda for the EU", *Journal of European Integration*, Vol. 31, 2009.

Variable geometry may constitute an entity that appears to be constantly evolving through the Treaties, but the UK and Ireland, together with Denmark, appear to be its principal beneficiaries, having obtained positions that new accession states are unable to achieve and thus generating lopsided contours to the phenomenon. The opt-out/in provisions ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and *seem* to have generated much legal and even political incoherence. The increased variable geometry accorded to them in the Treaty of Lisbon seemed disproportionate to its effectiveness as a matter of EU constitutional law. The limited case law of the Court of Justice on the provisions for Ireland and the UK as to the Schengen Protocol, delivered close to the entry into force of the Treaty of Lisbon, appeared hostile to the objective of variable geometry.³ As explained below in detail, the Court of Justice laid down clear limitations to the right to opt-in in the AFSJ.

According to the Protocol on the Position of the UK and Ireland in respect of the AFSJ, these countries do not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. This phenomenon of exclusion is not new. The UK and Ireland also did not take part in the measures adopted within the framework of Title IV of the former EC Treaty on visas, asylum, migration and other policies related to the free movement of persons. However, the Treaty of Lisbon complicated this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.⁴ At the same time, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.⁵ The sphere of territorial application of acts adopted by the EU in the area of police and judicial cooperation in criminal matters has actually been reduced in comparison with the

³ Cases C-77/05, *UK v. Council of the European Union*, [2007] ECR I-11459; Case C-137/05, *UK v. Council of the European Union*, [2007] ECR I-11593. See J. Rijpma, annotation of Case C-77/05, *UK v. Council* and Case C-137/05, *UK v. Council*, *Common Market Law Review*, Vol. 45, 2008, p. 835; Select Committee on European Union, *UK Participation in the Schengen Acquis*, 5th Report, Session 1999-2000, HL Paper 34; M. Fletcher, "Schengen, the European Court of Justice and Variable geometry under the Lisbon Treaty: Balancing the UK's 'Ins' and 'Outs'", *The European Constitutional Law Review*, Vol. 5, 2009, p. 71; E. Fahey, "Swimming in a sea of law: Reflections on water borders, Irish(-British)-Euro Relations and opting-out and opting-in after the Treaty of Lisbon", *Common Market Law Review*, Vol. 47, No. 3, 2010, p. 645; S. Peers, "Statewatch Analysis EU Lisbon Treaty, (No. 4) UK and Irish opt-outs from European Union Justice and Home Affairs Law" (www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf).

⁴ According to Article 9 of the Protocol, the opting-out of Ireland would not apply to the freezing of financial assets or funds of entities or individuals suspected of having links with terrorism (see Article 75 TFEU).

⁵ The Protocol on the Position of Denmark applies former opting-out of Denmark regarding Title IV of the TCE on "Visas, asylum, migration and other policies related to the free movement of persons" to the whole AFSJ. The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the other member states.

situation before the Lisbon Treaty.⁶ In spite of the troublesome appearance of variable geometry for EU integration through law, especially in the AFSJ, this paper will consider how Ireland and the UK have opted-in in the vast majority of circumstances where they had the benefit of variable geometry since the entry into force of the Treaty of Lisbon. Thus, it appears that the operation of variable geometry has proceeded without much formal legal ‘fallout’. One specific manifestation of variable geometry in the AFSJ is in the area of the international relations of the EU, constituting an important case study. Accordingly, it provides a specific insight into the understanding of flexibility in this domain as well as the nature of coherence in the practices of the AFSJ.

This contribution assesses the practical effects to date of the British, Irish and to a much lesser extent, the Danish Protocols, whereby variable geometry in the AFSJ is examined on the basis of the practice that has developed since the entry into force of the Treaty of Lisbon. The paper also considers in detail the impact of the Protocols on the international relations agreements of the EU, particularly their operation in the specific case of EU-US relations. The paper examines firstly, the key legal provisions shaping variable geometry in the AFSJ (section 1), followed by an analysis of the provisions for parliamentary scrutiny of these provisions in a domestic context in the UK and Ireland (section 2). Then, the operation of scrutiny provisions in the area of transatlantic relations is considered in Ireland and the UK (section 3), followed by an assessment of the external implications of variable geometry for the negotiation of international agreements (section 4) and the practical consequences for pre-Lisbon agreements of a UK ‘mass’ opt-out (section 5).

9.2 Key legal provisions shaping variable geometry in the AFSJ

According to Protocol 21 on the Position of the UK and Ireland in respect of the entire AFSJ, these countries will not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. Given its esoteric nature, Protocol 21 is perhaps not the epitome of variable geometry in contemporary EU law. The reasons commonly asserted for the need for a striking provision relate firstly, to the Common Travel Area shared by Ireland with the UK and secondly, the common law tradition also shared by both countries, a tradition that is asserted to require special treatment in this regard.⁷ Consequently, its effect is that “no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable to the UK or Ireland”.⁸

The provisions of Articles 3 and 4 of Protocol 21 provide for the practical operation of the opt-in procedure, while Article 4a provides for penalties for the financial

⁶ See the contribution by Matera to this volume.

⁷ See J. Donoghue and C. Heinl (eds), *Making sense of European Justice and Home Affairs Policy: Ireland and the Lisbon Treaty*, Institute of International and European Affairs, Dublin, March 2009; Fahey, *op. cit.*

⁸ Article 2, Protocol 21, A similar provision is included on Article 2 of Protocol 22 on the Position of Denmark.

consequences of non-participation, to the detriment of the states seeking to avail themselves of constitutional variable geometry. Article 3 of Protocol 21 accepts that these countries may notify the Council, within three months after a proposal or initiative has been presented to the Council that they wish to opt into the adoption and application of the proposed measures. Furthermore, the British-Irish Protocol not only allows an opt-in *ex ante*, but also *ex post*, as either the UK or Ireland may notify to the Council and the Commission at any time after the adoption of an act that it wishes to accept it.⁹ The *ex post* opt-out has to be approved by the Commission and the Council and the Commission can impose conditions. In that case, the procedure provided for in Article 331(1) of the Treaty on the Functioning of the European Union (TFEU) shall apply *mutatis mutandis*.

On the other hand, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.¹⁰ The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the other member states. The Danish Protocol provides that this country may decline to avail itself of all or part of this Protocol. A novelty introduced by the Treaty of Lisbon is the possibility that Denmark could have an opt-in mechanism similar to the one that applies to the UK and Ireland. Denmark has only to notify the other member states in accordance with its constitutional requirements.¹¹

Notably, the Council may urge the UK or Ireland to participate in areas where they are not participating, which, as Peers suggests, may operate as an incentive to opt-in and also co-extensively giving Ireland or the UK an opportunity to free themselves of obligations.¹² However, when viewed overall, the opt-in mechanism in the Protocol does not necessarily balance out or neutralise the impact of the extensive opt-outs obtained, given the practical difficulties involved in opting out or, alternatively, in not being part of the decision-making process generally. Pursuant to Article 8 of the Protocol, Ireland may notify the Council that it no longer wishes to be covered by the terms of the Protocol, in which case, the normal Treaty provisions will apply to Ireland by way of parliamentary ratification only and not by referendum. Article 8, however, has to be construed along with the Declaration (No. 56) annexed to the Treaty of Lisbon such that in three years' time, the position of Ireland was to be subject to review, i.e. in late 2012 prior to the Irish presidency of the Council in 2013, a review that does not appear to have yielded any formal outcome yet.¹³ The other

⁹ Article 8, Protocol 21.

¹⁰ The Protocol on the Position of Denmark applies to the opting-out of Denmark regarding Title IV of the former EC Treaty on "Visas, asylum, migration and other policies related to the free movement of persons" to the whole AFSJ.

¹¹ Article 4, Protocol 21.

¹² See Peers, *op. cit.*

¹³ See Declaration (No. 56) by Ireland, annexed to the Lisbon Treaty on Article 3 of the Protocol on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice, CIG 3/1/07 Rev 1; see the account in Fahey, *op. cit.*

significant feature of Declaration No. 56 is its provision that Ireland would seek to participate as much as possible in the AFSJ, perhaps borne out in practice, as detailed below. More significantly, it must be construed alongside Protocol 36, the UK's mass opt-out from the AFSJ, considered below.

The situation of the UK, Ireland and Denmark overtly introduces great complexity and diversity into the development of these policies.¹⁴ Ostensibly, this was the price that had to be paid in order to achieve the 'communitarisation' of the third pillar. As some have stated, "allowing the possibility of too many 'speeds' going in too many different directions might have helped to end the pillarisation but [might have created] an Area of Freedom, Security and Justice too prone to 'differentiation' and 'exceptionalism'".¹⁵ Accordingly, Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches, which has been a feature of the third pillar since it was introduced and throughout the successive reforms of the Treaties. However, practice may suggest otherwise. Ireland and the UK may be said to have participated in a majority of AFSJ measures since the entry into force of the Treaty of Lisbon.¹⁶

The high rate of participation has been said to demonstrate Ireland's commitment to advancing all forms of criminal justice cooperation within the EU, approaching all as an opt-in scenario unless a countervailing reason of merit pertains.¹⁷ Statistics on Council voting in civil liberties, justice and home affairs from 2009 to 2013 indicate, out of a total of 24 votes cast, that the UK had voted for measures on 22 occasions out

¹⁴ Ireland may notify the Council that it no longer wishes to be covered by the Protocol on the Position of the UK and Ireland in respect of the AFSJ (Article 9 of the Protocol) and Denmark may decide to adopt an opt-out position similar to that of the UK and Ireland (Article 8 of the Position of Denmark).

¹⁵ S. Carrera and G. Florian, "The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice", CEPS Policy Brief No. 141, Centre for European Policy Studies, Brussels, 2007, p. 8.

¹⁶ The UK maintains a comprehensive listing of all JHA opt-ins and Schengen decisions since 1 December 2009, which at 83 items is considerably more detailed than the equivalent published by Purcell in May 2012 (see www.homeoffice.gov.uk/publications/about-us/legislation/jha-decisions). By May 2012, Ireland was said to have opted into 18 out of 22 AFSJ proposals: B. Purcell, "Criminal Justice Cooperation and Ireland's Opt-In Protocol", in E. Regan (ed.), *European Criminal Justice Post Lisbon: An Irish perspective*, Dublin: Institute of International and European Affairs, October 2012, pp. 35-47 (<http://www.iiea.com/publications/european-criminal-justice-post-lisbon-an-irish-perspective>) and when this list of measures is cross-referenced (by the present authors) against the official UK database, similarly opted out of the European Protection Order and the Access to a Lawyer Directive. By contrast, Ireland had opted into the Justice Programme and Internal Security Fund unlike the UK, whereas the UK opted into the European Investigation Order, unlike Ireland. See also HM Government, Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2009-30 November 2010), January 2011 (Cm 8000) and Report to Parliament on the Application of Protocols 19 and 21 TEU and TFEU in Relation to EU JHA Matters (1 December 2010-30 November 2011), January 2012 (Cm 8265).

¹⁷ See Purcell, *Ibid.*

of a total of 25 votes cast, had voted against measures on two occasions and abstained once.¹⁸ Similarly, Ireland had voted for measures in 23 occasions, voted against measures on zero occasions and abstained on one occasion. Thus the two states behaved similarly, both politically and legally, in this domain since the entry into force of the Treaty of Lisbon. While on balance it is said that from a legal and administrative perspective the opt-in experience has benefited both Ireland and other EU member states,¹⁹ the amount of legislative measures has been modest, rendering a definitive judgment more difficult.

9.3 Provisions for parliamentary scrutiny of variable geometry in the AFSJ in the UK and Ireland

The UK's European Union Act 2011 is a controversial and far-reaching effort to increase UK parliamentary control over EU decision-making. It creates a dramatic series of 'dual locks' and referenda requirements supposedly inspired by provisions found in German Constitutional Law. The Act introduces many new scenarios which may trigger a referendum, many of which relate to the AFSJ and are listed in s. 6(5), including the UK's participation in a European Public Prosecutors office, the extension of its powers in the case of participation and a decision to remove any border control of the UK in respect of the Schengen Protocol.²⁰ The provisions on parliamentary control of the ASFJ in the UK are considerably more stringent than those existing under Irish law. However, as Craig states,²¹ it is entirely possible that similar measures would be adopted in any other member state, despite its impact upon the EU decision-making process through its generation of a pause mechanism for national approval.

The Act of 2011 makes specific provision in S. 9 thereof for parliamentary approval of many aspects of the UK's involvement in measures relating to the shift from the special legislative procedure to the ordinary legislative procedure pursuant to Article 81(3) TFEU concerning family law; the identification of further aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate pursuant to Article 82(2(d) TFEU; and the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate pursuant to Article 83(1) TFEU. It is perceived to be a particularly tough set of executive controls accorded to parliament and it purports to empower an already well-equipped Parliament. A minister cannot give notification under Article 4 of the AFSJ Protocol that the UK wishes to accept a measure unless the notification has been approved by an Act of Parliament. Prior to this, Parliament must approve the

¹⁸ UK, Ireland: voting in minority in the Council of Ministers from 14 July 2009 to 11 March 2013. See *Votewatch Europe*, How often the UK voted in the minority in the Council of Ministers of the EU (www.votewatch.eu).

¹⁹ See Purcell, *op. cit.*

²⁰ P. Craig, "The European Union Act 2011: Locks, Limits and Legality", *Common Market Law Review*, Vol. 48, 2011, p. 1811; M. Gordon and M. Dougan, "The European Union Act 2011: three questions", *European Law Review*, Vol. 37, No. 1, 2012, p. 3.

²¹ Craig, *Ibid.*

Government's intent to give notification in respect of a specific measure. It is a considerably more stringent regime than its Irish counterpart, considered next.²²

The 28th Amendment to the (Irish) Constitution (Treaty of Lisbon) Act 2009 was enacted to amend domestic constitutional provisions relating to EU affairs and to ratify the Treaty of Lisbon. The revised Article 29.4.7 of the Constitution is an enabling provision that permits the state with the approval of Parliament to engage in enhanced cooperation and to take part in the Schengen Area and the Area of Freedom, Security and Justice. It provides:

...under Protocol 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas....

Thus mere parliamentary approval is needed to opt in pursuant to Article 8 of Protocol 21. This is a unique constitutional provision in so far as a split of divided Supreme Court decision from the 1980s governs the relationship between Ireland and the European Union and mandates a test of "transfer of sovereignty" to warrant a referendum.²³ The decision is much criticised in legal and political circles, given that it has been liberally interpreted and applied to all EU treaties since the Single European Act so as to warrant a referendum, despite the costs, financially and even politically.²⁴ These specific provisions, in Article 29, have their origins in the Treaty of Amsterdam ratification and opt for a stronger parliament role in this specific policy domain. The nature of the scrutiny taking effect to date may be said to be haphazard or less than rigorous in the manner in which the Government is held to account.²⁵ Nonetheless, procedures have been adopted where the Joint Committee of the Houses of the Oireachtas discuss the proposals with the minister prior to approval, which while similar to the UK provisions perhaps as regards 'locks' alone, fall short of a similar form of review.

The account next considers the practical operation of the above provisions in the context of EU-US relations, in the two specific countries.

²² The first use of the European Union Act 2011 was in October 2011, in respect of the amendment of the EU treaties and the European Stability Mechanism, where it was concluded that no referendum was warranted (see www.gov.uk/government/news/minister-for-europe-comments-on-first-use-of-the-european-union-act-2011).

²³ *Crotty v. An Taoiseach* [1987] IR 713; See E. Fahey, *EU Law in Ireland*, Clarus Press, 2010, chs. 1 and 5.

²⁴ See G. Barrett, "Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence", *European Constitutional Law Review*, Vol. 5, 2009, p. 32.

²⁵ E. Fahey, "Reflections on the Legal Role of the Irish Parliament (Oireachtas) in EU Affairs After Lisbon", *EUI Max Weber Working Paper No. 2010/20*.

9.4 Parliamentary scrutiny of transatlantic relations in the UK and Ireland since the Treaty of Lisbon

Cooperation with the US in the fight against terrorism and other serious crimes in the post 9/11 decade led to the conclusion of several agreements in the area of justice and home affairs.²⁶ The table below provides an overview of agreements concluded between the US and the EU.

Table 1. Agreements between the US and the EU in the JHA area, 2004-2012

<i>Agreement</i>	<i>Reference</i>
EU-US Agreement on Extradition	OJ 2006, L 181/27
EU-US Agreement on Mutual Legal Assistance	OJ 2006, L 181/34
Agreements between the United States of America and the European Police Office of 6.12.2001 and 22.12.2001	
Agreement on intensifying and broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation on container security and related matters	OJ 2004, L 304/34
Agreement between the United States and Eurojust	6.11.2006
Agreement on the security of classified information	OJ 2007, L 115/30
EU-US Passenger Name Records (EU-US PNR) Agreement	OJ 2012 L 215/5
EU-US Terrorist Finance Tracking Programme (EU-US TFTP) Agreement	OJ 2010 L 195/5

The place of variable geometry within EU-US relations remains particularly curious and constitutionally ambiguous, in so far as it undermines the ostensible unity or coherence of EU foreign policy post-Lisbon. EU-US relations may lack much legal coherence potentially but the legal and political options to opt-out have never been exercised, with the UK and Ireland opting-in instead, “acting” thus in legal terms “coherently” as a matter of EU policy. There are many EU security policies still being pursued that have clear imprints of EU-US policies: for example, an EU PNR and an EU Terrorist Finance Tracking Programme (TFTP), mirroring EU-US PNR and EU-US TFTP, although the precise future of the latter is uncertain.

Stronger EU-US cooperation is presently under consideration in the UK as part of its ‘balance of competences review’ to assess the exercise of EU competences and their impact and application in the internal legal order of the UK.²⁷ It is stated that the UK

²⁶ See J. Santos Vara, “The role of the European Parliament in the conclusion of Transatlantic Agreements on the transfer of personal data after Lisbon”, CLEER Working Paper No. 2013/2, The Centre for the Law of EU External Relations.

²⁷ Review of the Balance of Competences between the UK and the European Union presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command

is sometimes concerned that stronger EU-US cooperation will come at the expense of Britain's bilateral dealings with Washington.²⁸ The ability to negotiate with the US on the principle of equality is one of the central benefits of EU-US relations but this only takes place on those issues where the EU has full competence. The Obama Administration made a forceful attempt to intervene in the UK's recent deliberations over its referendum on its future in the European Union.²⁹ By contrast, the Irish perspective on transatlantic relations is a more singular vision of partnership.³⁰ For example, the Irish Presidency of the EU in 2013 made great play on the advancement of the Transatlantic Trade and Investment Partnership (TTIP).³¹

We next examine three specific instruments in non-legislative and legislative areas – two bilateral EU-US Agreements in security and one internal EU Directive, the latter of which was largely inspired by one of the former, perhaps indicating the stance of the member states generally on the content of transatlantic relations as applied internally within the EU.³²

9.4.1 EU-US Terrorist Finance Tracking Programme

As is known, the EU-US TFTP Agreement arose out of a controversy whereby the US Central Intelligence Agency (CIA) was revealed to be running a secret programme from which it obtained financial messaging data, in order to track terrorist financing.³³ An EU-US TFTP Agreement was entered into so as to meet legal concerns surrounding the US extraction, use and transfer of financial messaging data without a warrant. The Council Decisions on the Terrorist Finance Tracking Programme (TFTP) were adopted in the summer of 2010³⁴ and the UK opted into

of Her Majesty July 2012 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf). See "David Cameron snubbed as Germany and France ignore UK survey on Europe" *The Guardian*, 1 April 2013.

²⁸ R. Korteweg, "The EU and transatlantic relations", Centre for European Reform, March 2013 (www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/bal_comp_rk_eu_trans_15march13-7087.pdf).

²⁹ "Britain should stay in European Union, says Obama administration", *The Guardian*, 10 January 2013. This view was echoed by Ireland, which held the Presidency of the EU at the time of the most recent public controversy and discourse (www.guardian.co.uk/world/2013/jan/09/us-warns-uk-european-union).

³⁰ See J. Carroll and J. Travers (eds), *An Indispensable Partnership: EU-US Relations from an Irish Perspective*, Institute of International and European Affairs, Dublin, 2004.

³¹ See for example, "Agreement of draft mandate for EU-US trade talks will be a key step - Minister Bruton", 12 March 2013 (www.eu2013.ie/news/news-items/20130312eu-ustradetalks).

³² See Irish Presidency Council agendas and Trio Presidency Council agendas, in legislative and non-legislative areas.

³³ "Bank data is sifted by US in Secret to Block Terror", *New York Times*, 23 June 2006.

³⁴ Council Decision of 28 June 2010 on the signing on behalf of the Union of the agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the

them immediately, thus becoming bound by the agreement. The Financial Secretary to the Treasury emphasised the significance of UK involvement from the outset.³⁵ The UK opted in to the Agreement with the US pursuant to Article 3 of Protocol 21 from the outset, whereas Ireland exercised its opt-in pursuant to Article 4 of Protocol 21, becoming the country's first opt-in under this article to date. Ireland informed the Presidency that it was prepared to waive its three-month opt-in period and instead would opt-in post-adoption.³⁶ The Article 4 opt-in is stated to have arisen because Ireland had, in the interests of facilitating early Council approval for the Agreement, waived the right to exercise its option under Article 3, demonstrating perhaps rather curiously the underlying coherence and unity at the heart of the operation of these provisions. Recently, however, Article 4 has been deployed by Ireland in its opt-in to the EU-US PNR Agreement, which is considered next. Finally, on a practical note, usual practice in draft AFSJ directives is to include a recital stating that either the UK and/or Ireland have notified their intention to participate or will not participate/be subject to or bound by the instrument.³⁷ The practice is otherwise in international agreements that do not envisage anything other than legal coherence, or only minimally reflect actual practice. Thus, for example, Article 22 of the Terrorist Finance Tracking Programme Agreement provides:³⁸

2. This Agreement will only apply to Denmark, the UK, or Ireland if the European Commission notifies the United States in writing that Denmark, the UK, or Ireland has chosen to be bound by this Agreement. 3. If the European Commission notifies the United States before the entry into force of this Agreement that it will apply to Denmark, the UK, or Ireland, this Agreement shall apply to the territory of such State on the same day as for the other EU Member States bound by this Agreement...

Accordingly, this indicates a very particular vision of coherence in EU international relations, whereby all member states will participate, arguably rather top-down in its vision of coherence. It is a formula that does not appear to capture the reality of the legal provisions operating as a backdrop to the EU's international relations.

purposes of the Terrorist Finance Tracking Programme (TFTP) 2010 /411/EU 2010 OJ L 195 1.

³⁵ See House of Commons, Terrorist Finance Tracking Program Session 2010-11 European Committee, 8 February 2011, Column 7 (www.publications.parliament.uk/pa/cm201011/cmgeneral/euro/110208/110208s01.htm).

³⁶ See Purcell, *op. cit.*

³⁷ See e.g. Proposal for a Directive of the European Parliament and Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, COM (2010)517 final, recital 17.

³⁸ Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme, 2010 OJ L 195/5. For background, see K. Archick, "EU-US Cooperation Against Terrorism", Congressional Research Service 7-5700, 21 May 2012; M. Cremona, "Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement", Institute for European Integration Research Working Paper No. 2011/4, Institute for European Integration Research, Austrian Academy of Sciences.

9.4.2 *The EU-US PNR Agreement, 2011*

Another high profile example worth considering here is the EU-US PNR Agreement which has its origins in US legislation passed in the wake of the 9/11 atrocities, requiring airline carriers flying into the US to provide US authorities with passenger data. An agreement was eventually reached in 2004 between the EU and US requiring EU airlines flying into the US to provide US authorities with PNR data and was struck down by the Court of Justice in 2006 and replaced by an interim agreement. The most recent EU-US PNR Agreement replaces the EU-US PNR Agreement provisionally applied from July 2007.³⁹ The Council Decisions to sign and conclude the Agreement were deposited on 28 November 2012. The UK opted into the Negotiating Mandates of the Council to authorise the Commission to open negotiations with Australia, Canada and the US in December 2010, decisions which were also announced to the UK Parliament at this time.⁴⁰ The minutes of the Justice and Home Affairs meeting on 2-3 December 2010 simply indicated that the Council of Ministers had agreed a negotiation mandate with the US without noting any specificities regarding the UK or Ireland.⁴¹ This mandate was said not to be capable of being deposited before Parliament on account of the possibility of the EU negotiating position being prejudiced or restricted.⁴²

The UK opted into the Agreement initially through its negotiation with the President of the Council on 9 February 2012. However, on 15 December 2011, the European Scrutiny Committee of the House of Commons had expressed considerable reservations over the haste with which an early opt-in decision necessitated and suggested that compliance with an eight-week scrutiny period for an opt-in would not prejudice UK participation in the new EU-US Agreement, reflected itself in the Agreement in Article 27.⁴³ Instead, the Committee drew attention to the earlier dissatisfaction expressed by the Committee in its 35th report, regarding the 20 days between the publication of the earlier EU-Australia PNR Agreement and the date proposed by the Presidency for the adoption of the draft Council decision to provide

³⁹ Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security 2012 OJ L215/5.

⁴⁰ See "Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) ('the Treaties') in Relation to EU Justice and Home Affairs (JHA) Matters", 1 December 2009 - 30 November 2010) Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, January 2011, Cm 8000.

⁴¹ By contrast, opt-ins and -outs of the European Investigation Order were expressed in the same document (UK was opting in, Ireland and Denmark opting out: Council Doc. 16918/10).

⁴² See the detailed Written Ministerial Statement (Mr. Damian Green MP), Hansard, 20 December 2010, Column 157WS, (www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101220/wmstext/101220m0001.htm).

⁴³ 48th Report of Session 2010-12 European Scrutiny Committee EU PNR Agreement with the USA, 15 December 2011 (www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xliii/42806.htm).

its signature, whereby the Committee agreed to waive its scrutiny reserve in return for assurances on fundamental rights. Of significance then is the fact that the EU-US PNR Agreement contained provisions that were arguably more far-reaching than the Australia Agreement as regards data retention limits and effective judicial redress. The subsequent UK Ministerial statement on the decision of the UK Government to opt-in to the EU-US PNR Agreement was laid before the House of Commons and House of Lords on 27 February 2012.⁴⁴ The statement emphasised the importance of working with partners outside the EU, also noting the added value of the collection and analysis of PNR data.

Ireland has more recently also sought to invoke Article 4 so as to participate in the EU-US PNR Agreement, again in contrast to the approach of the UK. The Houses of the Oireachtas adopted a procedure whereby the option proposal was first referred to the Joint Committee of the Oireachtas, which considered the proposals at a public meeting with the Minister thereafter. Similar concerns to those expressed in the UK Parliament were expressed in the Irish Parliament as to fundamental rights, to lesser avail.⁴⁵ Thereafter, on 24 May 2012, the Irish Minister for Justice proposed that Ireland would exercise its option pursuant to Article 4 of Protocol 21, seeking the prior approval of both Houses of the Oireachtas pursuant to Article 29.4.7° thereof for Ireland to participate, motions which were passed.⁴⁶

The third instrument considered is a legislative one, namely the Passenger Name Records Directive.

9.4.3 *The Passenger Name Records Directive*⁴⁷

An EU Directive on the use of Passenger Name Record (PNR) Data for the prevention, detection, investigation and prosecution of Terrorist Offences and serious crime was proposed in 2011. The Directive explicitly shares the nomenclature and form of EU-US PNR rules and its controversy given its implications for fundamental rights. The Directive would apply to air carriers flying into and out of EU member states. The possibility of monitoring of EU internal flights had been proposed by the UK as part of its Olympic Games security strategy and did not meet with opposition, but instead evolved into the text that would be adopted by the

⁴⁴ Damian Green MP, Written statement to Parliament: the UK's opt-in to the EU PNR Agreement with the US, 27 February 2012 (www.gov.uk/government/speeches/uks-opt-in-to-the-eu-pnr-agreement-with-the-us).

⁴⁵ Statement by Alan Shatter T.D. Minister for Justice and Equality - Joint Committee on Justice, Defence and Equality, 16 May 2012 (www.justice.ie/en/JELR/Pages/SP12000133).

⁴⁶ Statement by Alan Shatter T. D. Minister for Justice and Equality DáilÉireann, having sought the approval of the Seanad the previous day (lower house), 24 May 2012 (www.justice.ie/en/JELR/Pages/SP12000147).

⁴⁷ Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection investigation and prosecution of terrorist offences and serious crime (COM) 2011 32; EU-PNR Commission Staff Working Paper Impact Assessment COM(2011) 32 final.

Council.⁴⁸ The EU PNR Directive provides that all passengers flying in and out of the EU will have to provide key data which can be checked against national watch lists. Article 17 makes express provision for the possibility of including internal flights within the scope of the Directive to be considered by the Commission, demonstrating the extent to which the UK's position became EU policy.

Accordingly, the House of Lords European Union Committee recommended that the UK should opt-in to the Directive on 7 March 2011 so as to be in a position to play a role in extending the Directive to intra-EU flights and to benefit from the data collected by other member states.⁴⁹ Notably, they expressed some dissatisfaction at the lack of guidance from Government, on the basis of a desire to respect the eight-week scrutiny period prevailing. What is striking about the parliamentary debate in the House of Lords on this legislative instrument is the fulsome support of parliament for the goals of the EU, their reflection on the long-standing objective of the EU to achieve this and the manner in which the UK policy position is promoted centrally within the context of the EU instrument.

On 19 April 2011, the Irish Parliament debated whether Ireland should exercise its options in Article 3 of Protocol 21 to participate in the Directive, stating that any measure assisting the police in their fight against terrorism was to be welcomed and noting that the 3-month period to opt-in expired in May, 2013.⁵⁰ Additionally, the Minister indicated to Parliament Ireland's support for the inclusion of intra-EU flights within the scope of the measure. Since then, Ireland has now exercised its opt-in and in early 2013, the Irish Presidency of the Council sought to advance the Directive on the Justice and Home Affairs Agenda.⁵¹ The broad tendency for Ireland to adopt its position temporally after that of the UK is replicated in its actions in respect of the Schengen Protocol also.⁵² Substantively, the UK and Ireland have exercised largely similar preferences in transatlantic relations and also in similar 'spillover' internal EU legislation. These represent significant practices of coherence and consistency on the part of the countries enjoying considerable flexibility.

9.5 External implications of AFSJ variable geometry for the negotiation of international agreements

The stance adopted by the UK, Ireland and Denmark has a direct bearing on the external dimension of the AFSJ, as the international agreements concluded by the EU

⁴⁸ Note from UK Delegation to Delegations: Council doc. 6359/11. See "Countries rally behind UK on EU Flight data collection", *Euractiv*, 12 April 2011 (www.euractiv.com/infosociety/countries-rally-uk-eu-flight-dat-news-504007).

⁴⁹ European Union Committee 11th Report, *UK opt-into the Passenger Name Records Directive*, 7 March 2011 (www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/113/11303.htm).

⁵⁰ Vol. 730, No. 3, *DáilÉireann Debate* (<http://debates.oireachtas.ie/dail/2011/04/19/00020.asp>).

⁵¹ See "Minister Shatter presents Presidency priorities in the JHA area to European Parliament" (<http://justice.ie/en/JELR/Pages/PR13000021>).

⁵² See Fahey, *op. cit.*

on these issues might not be binding upon the three countries.⁵³ As noted above, the territorial application of this kind of agreement is thus limited to the other member states, constituting an exception to the general rule that the agreements concluded by the EU will become binding on the institutions and the member states as laid down in Article 216.2 TFEU. According to Article 29 of the Vienna Convention on Law of Treaties, “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”. Therefore, it should be explicitly described in the text of agreements concluded by the EU within the framework of Title V of the TFEU the territory to which they shall apply. If an international agreement does not include explicit territorial exclusions despite the existence of an internal opt-out, it is possible that other contracting parties might argue that non-application to the entire territory of the member states amounts to a breach of the agreement.⁵⁴ While previous third-pillar agreements still in force are binding upon all member states, including the UK, Ireland and Denmark, the position of these countries may give rise in practice to a wide range of different situations.⁵⁵

When either the UK or Ireland notifies the Council of their willingness to take part in any proposed internal measure, they are also accepting the external competence to conclude international agreements on the same issue. Otherwise, the effects of the Protocol will extend beyond the framework of the AFSJ, also including opting out of Article 216 TFEU, which reflects Court case law on external competences. In contrast, if the EU concludes an agreement affecting an internal act into which the UK or Ireland have chosen not to opt in, neither country will not be bound by the international instrument.

Protocols 21 and 22 also affect the application of TFEU provisions in which the procedure for concluding international agreements is regulated. Article 218 TFEU, which lays down the procedure for negotiating and concluding international agreements, is affected as regards the voting rules applicable in the Council for the adoption of the negotiating mandate, the signature of the draft agreement and

⁵³ The present contribution does not intend to deal in detail with the external implications of variable geometry within the AFSJ. The analysis of the implications of AFSJ variable geometry for the negotiation of international agreements is the basis for the examination of the consequences of the UK ‘mass’ opt-out in the next section. For a detailed of the external implications of variable geometry within the AFSJ, see the contribution by Matera to the volume, “Much ado about ‘opt-outs’? The impact of ‘variable geometry’ in the AFSJ on the EU as a Global Security Actor”.

⁵⁴ See B. Martenczuk, “Variable Geometry and the External Relations of the EU”, in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels: VUB Press, 2008, p. 508.

⁵⁵ According to Article 9 of the transitional provisions, “the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union”.

conclusion of such agreements.⁵⁶As provided for in the Protocols, decisions adopted by unanimity will require the unanimity of the members of the Council with the exception of those member states opting out.⁵⁷ A qualified majority will be interpreted in accordance with Article 238 (3) TFEU, which refers to those cases in which not all member states participate in the decision-making.

It is important to consider whether the UK and Ireland have an unlimited right to opt-in to any international agreement concluded by the EU under the aegis of the AFSJ. As was stated earlier, in the case of Denmark, the possibility of opting in is not foreseen. A distinction should be made, however, between the Schengen Protocol and Protocol 21 on the position of the UK and Ireland in respect of the AFSJ. The UK and Ireland take part in some aspects of Schengen (in relation to police and judicial cooperation), but they do not accept the border control system.⁵⁸ Article 4 of the Schengen Protocol provides that Ireland and the UK may request to take part in some or all the provisions of the Schengen *acquis*, and according to Article 5, either the UK or Ireland is considered to be participating in any measures that build on those parts of the Schengen *acquis* in which they already take part, unless they notify the Council that they do not wish to be involved in the measure. The judgments of the Court of Justice in the appeals lodged by the UK against Regulation 2007/2004 establishing FRONTEX and Regulation No. 2252/2004 on standards for security features and biometrics in passports and travel documents issued by member states help to provide an answer to this issue.⁵⁹

The Court of Justice held that Article 5 of the Schengen Protocol is not independent from Article 4, but that the former is subordinated to the latter.⁶⁰ Consequently, the UK or Ireland cannot opt in to the measures developing the Schengen *acquis* if they are not bound by those parts of the *acquis* to which those measures constitute a development according to Article 4. Because of this, when the UK or Ireland wishes to take part in an international agreement that the EU plans to conclude, it should be determined whether or not the agreement at stake is a measure that builds upon the Schengen *acquis*. If not, the UK and Ireland may notify the Council that they wish to take part in the international agreement on the basis of Article 3 of Protocol 21. Conversely, if the agreement is a measure that builds upon the Schengen *acquis*, both

⁵⁶ See P. García Andrade, “La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia”, in J. Martín y Pérez de Nanclares (ed.), *La dimensión exterior del Espacio de libertad, seguridad y justicia de la Unión Europea*, Madrid: Tecnos, 2012.

⁵⁷ Article 3.1, Protocol 21 and Article 1, Protocol 22.

⁵⁸ See Council Decision of 29 May 2000 concerning the request of the UK of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ 2000, L 131/43 and Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, OJ 2002, L 64/20.

⁵⁹ Council Regulation No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L 341/1 and Council Regulation No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ 2004, L 385/1.

⁶⁰ Judgments of 18 December 2007, C-77/05 and C-137/05.

countries will only be entitled to opt in if they have been previously authorised to participate in those parts of the *acquis* to which the international agreement constitute a development according to Article 4.⁶¹

The most prominent examples of this are the international agreements on visa facilitation. Since Ireland and the UK do not participate in the common visa system, equally they cannot take part in any of the visa facilitation agreements concluded by the EU. In the agreements concluded thus far it is clearly stated that these constitute a development of the provisions of the Schengen *acquis* in which the UK and Ireland do not take part.⁶² The same argument may be applied to the agreements on visa waivers that the EU has concluded with third countries, such as the agreement with Brazil on short-stay visa waivers for holders of diplomatic, service or official passports.⁶³

The Danish position as regards this kind of agreements is arguably more complex. Since Denmark is part of the Schengen area, it has a strong incentive to participate in the visa facilitation agreements, and accordingly, every time a new act is adopted that builds upon the Schengen *acquis*, Denmark has to decide within a period of six months whether or not it will implement the new measure. Should it decide to do so, the new act “will create an obligation under international law between Denmark and the other member states bound by the measure”.⁶⁴ However, since the Schengen *acquis* is not binding on Denmark under EU law, international agreements concluded by the EU do not create obligations between Denmark and third states. Consequently, the visa facilitation agreements concluded by the EU are not binding on Denmark and a separate agreement with the respective third country must be signed. In the EU visa facilitation agreements, a declaration is annexed recognising the desirability of Denmark and the third country to conclude a bilateral agreement with similar provisions on visa facilitation.⁶⁵

The fragmentation in the external dimension of the AFSJ may become quite severe, given that the EU may conclude international agreements whose material purpose goes beyond the AFSJ, and also covers other matters falling under EU competencies in which the UK and Ireland fully take part. These kinds of agreements perhaps cause one to recall the former ‘inter-pillar agreements’.⁶⁶ Agreements of this nature

⁶¹ See García Andrade, (note 55 above), 102.

⁶² See Council Decision of 18 January 2011 on the conclusion of the Agreement between the European Union and Georgia on the facilitation of the issuance of visas, OJ 2011, L 52/33.

⁶³ OJ 2011, L 273/2.

⁶⁴ Article 4, Protocol 22 on the Position of Denmark. If this country decides not to implement a measure building upon the Schengen *acquis*, “the Member States bound by that measure and Denmark will consider appropriate measures to be taken”.

⁶⁵ See the agreement concluded with Georgia, which holds that “it is desirable that the authorities of Denmark and of Georgia conclude, without delay, a bilateral agreement on the facilitation of the issuance of short-stay visas in similar terms as the Agreement between the European Union and Georgia”.

⁶⁶ The conclusion of the agreement between the European Union, the European Community and Switzerland on the Schengen *acquis* required two separate Decisions by the EU and EC,

required constant coordination between the EU and the EC throughout the negotiation process and on the part of the EU consent to be bound had to be expressed in two separate legal instruments. As occurred with the 'inter-pillar agreements', the conclusion of these kinds of agreements requires the adoption of two separate decisions, one based on Title V of the TFEU and another based on provisions outside Title V which are not binding on all member states. An example of this can be found in the two protocols to the UN Convention against Transnational Organised Crime on the Smuggling of Migrants by Land, Sea and Air and the Prevention, Suppression and Punishment of Trafficking in Persons.⁶⁷ The need to have recourse to two separate acts in the conclusion of international agreements is another consequence of the variable geometry.

The Protocol on the accession of Liechtenstein to the Agreement between the EU and Switzerland on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* bears a certain similarity to the situation discussed below as to the US. This agreement has allowed Liechtenstein to associate itself with the implementation, application and development of the Schengen *acquis* under similar terms to Switzerland, a possibility that was foreseen in the Schengen agreement concluded with Switzerland. Since the UK and Ireland participate in certain provisions of the Schengen *acquis* as regards police and judicial cooperation in criminal matters, but are not bound by the provisions on the abolition of controls at the internal borders and on the movement of persons, it was therefore necessary to adopt two separate decisions to conclude the Liechtenstein Protocol.⁶⁸

An examination of the practice that has developed in the last years reveals that the UK has notified it wishes to take part in the adoption and application of all international agreements concluded by the EU as regards police and criminal cooperation in criminal matters, namely: the Agreements on the use and transfer of Passenger Name Records to the US and Australia, considered above;⁶⁹ the TFTP Agreement concluded with the US, considered below; the Mutual Assistance Treaty with Japan;⁷⁰ the Agreement with Iceland and Norway on the stepping up of cross-

respectively. On behalf of the EU, Council Decision 2008/149/JHA, OJ L 53, 27.2.2008, p. 50, and on behalf of the EC, Council Decision 2008/149/JHA, p. 50. See G. De Kerchove, "Relations extérieures et élargissement", in G. De Kerchove and A. Weyembergh (eds), *L'espace pénal européenne: enjeux et perspectives*, Brussels: VUB Press, 2002, p. 272.

⁶⁷ The conclusion of the Smuggling Protocol was based on the former Title IV of the EC Treaty, OJ 2006, L 262/24 and 34 and the Trafficking Protocol on the former Articles 177 and 181a EC, OJ 2006, L 262/44 and 51.

⁶⁸ OJ 2011, L 160/1 and 19, In both decisions, it is stated that the conclusion of the Protocol "does not prejudice the position of Denmark under the Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union".

⁶⁹ Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service, OJ 2012, L 186/3.

⁷⁰ Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, OJ 2010, L 2010/3.

border cooperation, particularly in combating terrorism and cross-border crime;⁷¹ the Protocol on the accession of Liechtenstein to the Schengen *acquis*; and the Agreement with Iceland and Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the member states.⁷² The UK Government has decided also to opt-in to the negotiation mandate to the Proposal for the conclusion of an agreement for a simplified extradition arrangement between member states of the European Union and Iceland and Norway.⁷³ Similarly, Ireland has also decided to take part in all international agreements mentioned and also discussed below. The ex-post opting-out of international agreements is, in any case, to be avoided, because the EU may need to renegotiate the agreements if the territory to which they apply is changed. Accordingly, the TFTP Agreement provides that it will apply to countries that have opted out once they notify their wish to be bound by the Agreement.⁷⁴

Variable geometry in the AFSJ has also consequences for the EU readmission agreements. Since the entry into force of the Lisbon Treaty, the UK has continued its traditional policy of taking part in readmission agreements for immigrants. The UK has opted into EU readmission agreements with Georgia,⁷⁵ Turkey⁷⁶ and Pakistan,⁷⁷ although it decided not to opt into the EU readmission agreement with Cape Verde,⁷⁸ and it has opted into most of the negotiating mandates for new EU readmission agreements, with the exception of the cases of Armenia and Belarus. Ireland has so far chosen not to participate in the readmission agreements concluded by the EU,

⁷¹ Council Decision of 26 July 2010 on the conclusion of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto, OJ 2010, L 238/1.

⁷² Council Decision of 7 June 2012 on the conclusion of the Agreement between the European Union, the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, OJ 2012, L 135/1.

⁷³ Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, COM (2009) 0705 final.

⁷⁴ Article 22.2 of the 2010 SWIFT Agreement.

⁷⁵ Council Decision of 18 January 2011 on the conclusion of the Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, OJ 2011, L 52/47.

⁷⁶ European Union Document No. 11743/12, COM (12) 239.

⁷⁷ Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, OJ 2010, L 287/50.

⁷⁸ See COM (2012) 557.

with the sole exception of the agreements with Hong Kong and Ukraine. Denmark, on the other hand, is excluded from readmission agreements, even though all these agreements include a Joint Declaration stating that it is appropriate that both parties should conclude a readmission agreement on the same terms as the EU agreement.

9.6 The practical consequences for pre-Lisbon international agreements of the exercise of the UK 'mass' opt-out

Protocol 36 on Transitional Provisions gives the UK the option to opt out from "the acts of the Union in the field of police co-operation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon".⁷⁹ The UK may notify the Council that it does not accept the new powers of the Commission and the Court of Justice arising from the *communitarisation* of the former third pillar up to six months before the end of the transitional period. Should the UK provide this notification, the pre-Lisbon acts will "cease to apply to it as from the date of the expiry of the transitional period" (1 December 2014). If the UK does choose to opt out, which seems increasingly likely, the decisions on the conclusion of international agreements will inevitably be affected. It is, however, important to point out that if the acts in question have already been amended after the entry into force of the Treaty of Lisbon, there is no possibility to opt out. This situation has not arisen to date in the case of international agreements.

On the one hand, "this opt-out is in principle an all or nothing matter",⁸⁰ and consequently the exercise of this right entails that the acts adopted by the EU in the AFSJ before the entry into force of the Treaty of Lisbon will cease to apply in the UK. It will clearly be necessary to renegotiate international agreements concluded with third countries in order to free the UK from its territorial application. The UK may, however, notify at any moment its wish to take part in measures that have already ceased to be binding on it. In that case, the relevant provisions of Protocols 19 and 21 shall apply,⁸¹ and in either case, the Union institutions and the UK "shall seek to re-establish the widest possible measure of participation of the UK in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence".⁸² Should the UK exercise its right to opt back into agreements it has previously opted out of this may have a negative effect on EU external action, undermining its ability to act as a serious and significant international actor. After all, it might be difficult to understand the need to take part in specific agreements, after receiving the communication that they will cease to apply to the UK.

On other hand, the political debate taking place in the UK on this question does not appear to be giving serious consideration to the negative consequences that obtain from no longer being party to the important measures adopted before December

⁷⁹ Article 10.1 and 5, Protocol 36.

⁸⁰ A. Hinarejos, J.R. Spencer and S. Peers, "Opting out of EU Criminal law: What is actually involved?", CELS Working Paper Series, 2012/1, p. 3.

⁸¹ Article 10.5, Protocol 36.

⁸² *Ibid.*

2009, such as the European Arrest Warrant.⁸³ As was recently argued, “the debate has until now developed on the basis of a misunderstanding, both as to what the opt-out would achieve, and as to the consequences that would follow from its exercise”.⁸⁴ The block opt-out by the UK is viewed by other member states as a precursor to an attempt to renegotiate the country’s EU membership.⁸⁵

Similarly, it does not seem that the negative consequences this decision would entail for the international cooperation with third countries in police and criminal matters, and above all for transatlantic cooperation, have been taken seriously into account. The announcement made by Britain’s Home Secretary, Theresa May, in October 2012, to consider relinquishing most forms of police cooperation and judicial cooperation did not appear to be accompanied by any reflection on these issues.⁸⁶ Instead, she stated that the British Government is considering opting out of all pre-Lisbon acts and negotiating opting back into individual measures that would be in the national interest to rejoin.⁸⁷

The block opt-out would undoubtedly also have negative consequences for relations with other partners. EU agencies, in particular Europol, have intensified their international relations in recent years in order to achieve its foundational objectives. The international relations of Europol are based on Council Decision 2009/934/JHA adopting the implementing rules governing Europol’s relations with partners, including the exchange of personal data and classified information and Council Decision 2009/935, which determines the list of third countries with which Europol is to conclude agreements.⁸⁸ Both acts would cease to apply to the UK, and since the opt-out means that the UK would no longer be a member of Europol, the country would not therefore benefit from the international agreements concluded by the Agency.⁸⁹ The immediate consequence of this would be that the UK would no longer benefit from police cooperation with third countries harbouring threats to the

⁸³ This debate has intensified after the publication of a paper by the think-tank Open Europe (S. Booth, C. Howarth and V. Scarpetta, “An unavoidable choice. More or less EU control over UK policing and criminal law”, *Open Europe*, 2012 (www.europarl.org.uk/ressource/static/files/jha2014choice.pdf).

⁸⁴ See Hinarejos, Spencer and Peers, op. cit., p. 3.

⁸⁵ See H. Brady, “Britain’s 2014 justice opt out. Why it bodes ill for Cameron’s EU strategy”, Centre for European Reform, 2013 (www.cer.org.uk/publications/archive/report/2012/saving-schengen-how-protect-passport-free-travel-europe).

⁸⁶ Oral Ministerial Statement regarding European Justice and Home Affairs Powers by the Home Secretary, House of Commons, Hansard, 15 October 2012. See European Scrutiny Committee 37th Report, “The 2014 block opt-out: engaging with Parliament”, 22 March 2013 (www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news/op-note---2014-block-opt-out/).

⁸⁷ For a detailed examination of the practical implications, see S. Peers, “The UK’s planned, ‘block opt-out’ from EU justice and policing measures in 2014”, *Statewatch analysis* (www.publications.parliament.uk/pa/ld201213/ldselect/ldecom/159/159.pdf).

⁸⁸ OJ 2009, L 325/6 and 12.

⁸⁹ A list of strategic and operational agreements concluded by Europol is available on its web site (www.europol.europa.eu/content/page/external-cooperation-31).

internal security of the UK.⁹⁰ However, if a Europol regulation is adopted to substitute the 2009 Council Decision, as has already been planned, the UK may opt into the new Europol legislation, which also includes international agreements concluded by Europol.⁹¹

Similarly, another consequence of the block-out would be that the UK would cease to be a member of Eurojust, which is one of the most important agencies the EU has developed to fight organised crime. The agreements thus far concluded by Eurojust would cease to apply to the UK.⁹² Given the importance of the external actions of Eurojust, the reform of the agency carried out by way of Decision 2009/426 seeks, among other things, to strengthen Eurojust's capacity to cooperate with third countries and international organisations.⁹³ Another practical consequence of exercising the opt-out would be that the UK would cease to participate in CEPOL (European Police College), whose secretariat in fact is headquartered in the UK at Bramshill. Since the aim of CEPOL is to help train the senior police officers of the member states, leaving this agency would have a less significant impact than opting out of Europol and Eurojust.⁹⁴

In conclusion, the UK's legal status in relation to former third-pillar agencies would be similar to the current situation as regards Frontex. The creation of Frontex was a development of provisions of the Schengen *acquis* in which the UK did not take part, and the working arrangements concluded so far by Frontex are not binding on the UK.⁹⁵ It is certainly possible to envisage practical arrangements that would allow the

⁹⁰ On the external relations of Europol, see C. Kaunert, "Europol and EU Counterterrorism: International Security Actorness in the External Dimension", *Studies in Conflict & Terrorism*, Vol. 33, 2010, p. 652; J.D. Heimas, "The external relations of Europol – Political, legal and operational considerations", in Martenczuk and van Thiel (eds), *op. cit.*, p. 367.

⁹¹ Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM (2013) 173 final, 27.3.2013.

⁹² Eurojust has concluded agreements with the following countries: Norway (in 2005), Iceland (in 2006), the United States (in 2006), Croatia (in 2009), Switzerland (2008) and the Former Yugoslav Republic of Macedonia (in 2010). On the Eurojust's international relations, see M. Coninx and J.L. Lopes da Mota, "The International Role of Eurojust in Fighting Organized Crime and Terrorism", *European Foreign Affairs Review*, Vol. 14, 2009, p. 165; L. Surano, "L'action extérieure d'Eurojust", in *La dimension externe de l'espace de liberté et de justice au lendemain de Lisbonne et de Stockholm: un bilan à mi-parcours*, Brussels: VUB Press, 2012, p. 211.

⁹³ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2009, L 138/14.

⁹⁴ The Commission proposed in the new Europol Regulation to merger Europol and Cepol, but the member states do not seem willing to accept this proposal. See the Discussion Paper on the Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol), 29 May 2013.

⁹⁵ See Council Regulation (2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L 349/1 and Regulation (1168/2011) of the European

UK to continue to benefit from the external action of the former 'third pillar' agencies, but this course of action in no way contributes to the strengthening of the external action of the EU in the AFSJ.

There is, however, a third key group of international agreements that would be affected if the UK were to exercise its opt-out. The EU has concluded agreements with many countries on security procedures for the exchange of classified information and such treaties deal not only with police and judicial cooperation in criminal matters, but also with CFSP matters.⁹⁶ Obviously, only the provisions of these agreements that cover criminal and police cooperation would cease to apply in the UK.⁹⁷

9.7 Conclusions

The aspiration to unify EU external action perhaps is an unrealistic legal and policy goal that the Stockholm Programme could not resolve or remedy in a limited time period. The variable geometry accorded to the UK and Ireland as regards the AFSJ may yet generate negative consequences for the unity and coherence of EU external action. The provisions of Protocol 21 are difficult to comprehend in the context of the aspiration for coherence in international relations. In order to avoid incoherence, the *ex-post* opt-in should ostensibly be avoided in the case of international agreements, and the opt-in for the negotiating mandate should be followed by an opt-in for the final decision concluding the agreement. If the territorial application of an international agreement is altered, the EU may need to renegotiate the agreement, and such variable geometry might have negative consequences even for third countries. However, the specific case of Ireland in the area of transatlantic relations indicates different individual intentions and policies so as to facilitate speedy agreement. The case study of the Passenger Name Record Directive, a spillover provision into EU law of an EU-US Agreement, indicates another curiosity in which countries with the benefit of variable geometry may perhaps seek more far-reaching measures that might not be expected from those perceived to be excluded from or operating on a remote basis within the AFSJ.

Nevertheless, this variable geometry does not appear to have complicated in recent years the negotiation of international agreements dealing with criminal justice and

Parliament and the Council of 25 October 2011 amending Council Regulation (2007/2004) establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011, L 304/1.

⁹⁶ See e.g. Council Decision of 2004/843/CFSP of 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information, OJ 2004, L 362/28; Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information (Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information, OJ 2005, L 94/38.

⁹⁷ See Hinarejos, Spencer and Peers, *op. cit.*, p. 3.

policing measures. Although it is perhaps too early to establish a definite picture on the UK's implications in the external dimension of the AFSJ, it seems clear that the UK is committed to intensify international cooperation in matters dealing with criminal justice and policing measures. The UK has opted into all agreements dealing with police and judicial cooperation in criminal matters that have been concluded since the Lisbon Treaty. Similarly, Ireland has decided to take part in all agreements dealing with criminal justice and policing measures, confirming the relevance of practice-based accounts of flexibility for their theorisation.

While variable geometry has functionally formed part of several agreements between the EU and US to date, it has not impacted on the legal coherence of EU external action in transatlantic relations and does not appear to have complicated the negotiation of transatlantic agreements nor stalled the evolution of the EU's global rule-making objectives. Looking to the future, the matters considered here operate in the context of the negotiations on the Transatlantic Trade and Investment Partnership, bringing transatlantic relations to a new level of cooperation but also parallel negotiations on data protection, privacy and intelligence,⁹⁸ issues that have assumed increased prominence in recent times. It seems that opting out of legal instruments considered essential to address the challenges faced by the EU and the US in the AFSJ will pose intricate problems in the transatlantic relationship. As the account here has demonstrated, the non-application of Mutual Legal Assistance and Extradition treaties between the UK and US will require the application of classic judicial cooperation instruments in relations between the UK and US, but these are not necessarily suitable instruments of the desired level of legal coherence in EU Justice and Home Affairs.

⁹⁸ Statement by President Barroso on the Transatlantic Trade and Investment Partnership, 3 July 2013 (http://europa.eu/rapid/press-release_MEMO-13-660_en.htm).

LIST OF ABBREVIATIONS

AAs	Association Agreements
AFSJ	Area of Freedom, Security and Justice
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
ENP	European Neighbourhood Policy
EUROCORPS	A force for the European Union and the Atlantic Alliance
EUROGENDFOR	European Gendarmerie Force
MoU	Memorandum of Understanding
PCAs	Partnership and Cooperation Agreements
PESCO	Permanent Structured Co-operation
SAs	Stabilisation Association Agreements
TSCG	Treaty on Stability, Coordination and Governance ('Fiscal Compact')