Flexibility and the Treaty establishing a Constitution for the European Union

Professor Jo Shaw, Federal Trust for Education and Research and University of Manchester (jo.shaw@man.ac.uk)

‘Flexibility’ is one of the favourite words of a certain type of politician whose first instinct is always to ask how the European Union fits with his or her country, rather than to pose the same question the other way round. Not all of these politicians are British, of course, but a good number of them are. One of the headlines of the September 2004 UK Government White Paper on the Constitution, which fired the long awaited opening shots in what will be a long drawn out ratification (and referendum) debate in the UK, argues that the Constitutional Treaty helps to make the European Union more ‘flexible’. What exactly does this mean? Is the White Paper correct in making this judgement?

Even though it is so frequently used in the EU context, those who adopt the term ‘flexibility’ and seek to apply it to the EU rarely specify precisely what they mean. What exactly do politicians mean when they ask for the EU to be more flexible? It seems unlikely that many politicians actually want to see a wholesale retreat from binding rules guaranteeing freedom of trade or movement between the Member States in favour of a discretionary system of open borders where Member States can pick and choose whether to apply EU law. If this ‘pick’n’mix’ formula were to be adopted for the EU, many observers think this would presage the large scale disintegration of the EU. Consequently it is not widely supported, except by certain eurosceptic voices. Or does the invocation of ‘flexibility’, especially in the UK’s relations with the EU, simply mean that politicians prefer an EU in which the UK can continue to opt out of two key dimensions of the continued integration project, namely Economic and Monetary Union and the single currency, and the Schengen area of open borders? If so, their concerns are probably misplaced, for none of the key parties within the negotiations on the Constitution – whether in the Convention of 2002-2003 or in the subsequent Intergovernmental Conference which concluded in June 2004 – seriously suggested that these opt-outs should be removed as part of the package of changes introduced. This is despite the unpopularity of the Schengen arrangements (given that they differ for the UK/Ireland and for Denmark, and given that they give rise to a high level of complexity in application), especially amongst EU insiders and many close observers of the EU and its workings. For example, in its so-called Penelope paper presenting an alternative schema for constitutional reform to the Convention, the Commission loudly bemoaned the extent of disintegration within the EU legal order and suggested the elimination of key opt-outs. Despite this, economic and political realities at the present time, combined with the essentially immutable facts of physical geography, appear to support the UK’s case in

particular to maintain these elements of differentiation with the EU ‘core’. There are of course additional significant differences in application of EMU and Schengen in the transitional phase of the 2004 Enlargement – although in due course all ten new Member States are expected to join both the euro and Schengen. These forms of flexibility at the point of accession are, therefore, by definition temporary in nature.

In addition to the cases such as Schengen and EMU, often called pre-determined flexibility, the EU Treaties also currently provide for – or allow the existence of – several other types of flexibility. The most important in terms of practical application involve the Member States taking action outside the scope of the Treaties (the original basis for the Schengen agreements on border-free travel) and micro-flexibility through flexible approaches to regulation (e.g. minimum harmonisation of national law through directives and flexible soft governance approaches such as the Open Method of Coordination). In both cases, the overall constitutional framework of the EU sets constraints upon the freedom of action of the Member States and the EU institutions. The Member States are free to conclude treaties under international law, but so far as these lead to obligations or effects which are not compatible with their responsibilities under the EU Treaties, they could be subject to enforcement actions brought by the Commission under Article 226 EC for breach of the EC Treaty. In relation to flexible governance mechanisms, key principles concerned with the internal market and non-discrimination will set limits, especially where the measures in question are justiciable before national courts or the Court of Justice.

The Treaties also provide for so-called ‘enhanced’ or ‘closer’ cooperation under which groups of Member States are given formal consent by the Council of Ministers to pursue a path of closer integration in certain spheres of EU law and policy, provided this does not undermine the core values of the European integration process, such as non-discrimination or the operation of the internal market. Three different structures and conditions exist for the three pillars of the Treaty on European Union – under the EC Treaty, in relation to police and judicial cooperation in criminal matters, and in relation to the common foreign and security policy. These mechanisms, although widely discussed by academics and practitioners alike, have never in fact been used, although they were introduced by the Treaty of Amsterdam back in 1999 and further ‘tweaked’ by the Treaty of Nice in 2003 to make them more usable as instruments of EU governance. Sometimes the use of enhanced cooperation has been threatened by the majority of Member States in order to obtain agreement on the part of reluctant Member States to measures which require a unanimous vote (e.g. in the case of Italy and the European Arrest Warrant in late 2001). It will be interesting during the latter part of 2004 and early 2005 to see whether preliminary studies amongst a working group of Member States in favour of creating a common base for corporate taxation (a move opposed by the UK, Ireland, Slovenia, Estonia and Malta) will result in the first practical application of the enhanced cooperation provisions.  

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However, despite the importance of these diverse cases of flexibility to the EU, the subject was not at the forefront of the reform and renewal debates which triggered the work of the Convention and the subsequent IGC. It was the topics of simplification and ‘closeness of the EU to the citizen’ which dominated the debates about the future of the EU which intensified after the conclusion of the (unsatisfactory) Treaty of Nice and the adoption of the Declaration on the Future of the Union, as well as the subsequent Laeken Declaration which led to the establishment of the Convention. Indeed, when preparing some suggestions on how flexibility might be treated in what was then the proposed Constitutional Treaty at the beginning of 2003, I found that there had been almost no treatment of the question within the workings of the Convention up to that point (whether in plenary or in the working groups), and almost no external commentary upon the question in the specific context of the process of renewal offered by the Convention and the IGC which was to follow. Consequently, my contributions to this topic necessarily consisted in reflection from first principles about what role flexibility might play in a reorganised and simplified treaty. In fact, the first substantial contribution on flexibility – and specifically on the mechanism of enhanced cooperation – was not issued by the Praesidium of the Convention until late May 2003, well into the last two months of the Convention’s life span of nearly eighteen months. Yet despite this initial neglect of the topic within the formal confines of the Convention, flexibility did still emerge as a rather significant leitmotiv of the proposed Constitutional Treaty and the debates which have surrounded it. This was in part because, in the end, the draft prepared by the Convention – and largely approved by Intergovernmental Conference in this as in other respects – did make some small but significant steps towards the further constitutionalisation of flexibility within the EU. These involved further changes to the Amsterdam/Nice enhanced cooperation provisions, and a significant extension of the types of flexibility that can be applied in relation to the emergent European Security and Defence Policy (‘ESDP’), and especially in relation to defence. However, the overall structure for flexibility under the Treaties remains the same.

The other reason for the emergence of a rather strong theme of flexibility concerned the evolution of the political debate, especially at the end of the first failed phase of the IGC from October to December 2003, under the Italian Presidency. Those Member States (and their politicians) which had felt particularly thwarted in their political objectives as a result of the collapse of the talks, which resulted from what appeared to be irreconcilable differences between France, Germany, Poland and Spain over the question of the definition of what constitutes a qualified majority vote in the Council of Ministers, (re)turned to the debate about a flexible Europe. As often occurs at moments of crisis and turmoil regarding the possible stalling of the integration process, politicians turned in their rhetoric to invoking the possibilities of a hard core proceeding with further

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6 Conv 723/03, 23 May 2003.
integration as a reaction to failure to achieve consensus amongst the twenty five Member States. The idea of such a re-formed Union often engages speculation about leaving behind Member States which are both unwilling and unable to proceed more quickly with integration, and the creation of a leaner, fitter hard core. In the context of the failure of the IGC, Grevi describes these moves as tactical rather principled, concerned with pushing all Member States back to the bargaining table, rather than raising real possibilities of dramatic change.\(^7\) Indeed, flexibility in that form disappeared from the debate once again later in 2004, as all Member States displayed public pleasure and relief when their differences were resolved in no small measure as a result of the work of a skillful and diplomatic Irish Presidency. This resulted in a successful conclusion to the IGC in June 2004. The Treaty establishing a Constitution for Europe will be signed by the Heads of State and Government in November 2004.\(^8\) Thus debates about a hard core have largely disappeared again since early 2004, even though the Treaty itself is still lauded as a triumph of flexibility. It is very likely that they will resurface again in a similar tenor in the event that there are difficulties with the ratification process, especially if the UK were to be alone in voting ‘no’ in a referendum.

This presentation highlights the protean nature of the ‘flexibility’ concept, which often provides a language for politicians with dramatically differing conceptions of both the ends and the means of European integration to converse with each other within the confines of European institutions such as the European Council, the Convention or the IGC, whilst maintaining the purity of their respective positions especially with a view to reassuring national political audiences. Flexibility in the EU context speaks more often to a pragmatic tradition of problem solving on a collective basis than it does to questions of principle about the nature of the integration project, although there is no reason why it could not be related in important ways to the latter.\(^9\) Overall, flexibility plays an important role – but one which is often difficult to pin down – in the equally pragmatic ‘constitution composée’ of the European Union, a constitution comprising hitherto ‘bits and pieces’ of Treaty provisions, judgments of the Court of Justice, and a variety of other constitutional documents which will largely be gathered together and codified in the event that the Constitutional Treaty comes into force if it is ratified by all current twenty five EU Member States.

The most prominent provision on flexibility in the Constitutional Treaty (‘CT’) comprises the general framework for enhanced cooperation (Article I-44). It is notable that this is the only substantial reference to flexible frameworks for the development of policy and practice which appears in Part I, the section which purports to set out the most important constitutional principles for the EU. This is ironic given that enhanced cooperation has never (yet) been used. The important practical instances of flexibility, especially the arrangements on EMU and Schengen, are not regulated in the main body of the CT, but


\(^8\) See the final agreed (and renumbered) text: CIG 87/04, 6 August 2004.

in protocols and other annexes which essentially reproduce the existing EU acquis. The only reference to the fact that the euro is not the single currency for the whole EU appears in Article I-13(1)(c) which states that monetary policy is a form of exclusive competence only for those Member States which ‘have adopted the euro’. Article I-18 is headlined ‘flexibility clause’, but closer inspection shows that it is in truth the familiar residual legal basis provided in the current EC Treaty by Article 308, allowing measures to be taken by unanimous vote in the Council of Ministers where no other legal basis is available, provided the measure to be adopted falls within the overall competences of the Union and is necessary to attain one of the objectives of the Treaty. Traditionally EU law scholarship has subsumed the discussion of this under the headings of competence and implied powers, not flexibility.

Article I-44 stands alone in a separate chapter III of Title V on the Exercise of Union Competence. Thus it is not treated as a separate form of competence, but as an addendum to the normal exercise of competence. It is in turn subject to those normal conditions, such as the new typology and hierarchy of legal acts established in the CT. Enhanced cooperation effectively allows the sub-groups of Member States to borrow the institutions, procedures and practices of the EU in order to pursue their common objectives, namely closer integration. Subject to specific conditions laid down in relation to CFSP and ESDP, enhanced cooperation can now be applied in the same manner and under the same conditions to all areas of EU policy-making, provided the basic conditions are applied. There are no separate rules for justice and home affairs. It can only be applied in areas of non-exclusive competence (i.e. shared competences and areas where the Union’s action is supporting or complementary in relation to that of the Member States). Only bare details can be found in Article I-44, and in truth it really must be read in conjunction with the more elaborated provisions of Articles III-416 to III-423 which set out procedures and conditions. It is also important to read in addition the specific provisions on flexibility in relation to ESDP.

It is arguable that the topic of enhanced cooperation is one of the fields in which the Convention’s objective of making Part I a stand-alone and comprehensible statement of constitutional principles is simply not achieved (and probably could never be in relation to what is necessarily a complex idea of allowing sub-groups of Member States to go it alone without the rest). ‘Enhanced cooperation’, like ‘legal personality’ perhaps, is simply not a commonsense idea. Thus, general readers of the constitution, and indeed many lawyers, are unlikely to be greatly illuminated by what they read in Article I-44, any more than they would be by the bare statement in Article I-7 that the Union ‘shall have legal personality’.

The key principles to be found in Article I-44 are that enhanced cooperation is a last resort mechanism, requiring the participation of at least one third of the Member States, which must aim to further the objectives of the Union, protect its interests, and reinforce its integration process. It must be open to all Member States at all times. Authorisation is given by the Council in the form of a European decision, indicating that the Constitutional Treaty’s default decision-making formula of qualified majority voting will

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10 Article I-8 CT states that the euro is the currency of the Union.
apply. Measures adopted within the framework of enhanced cooperation will be decided upon only by the participating Member States, although the non-participants may deliberate alongside the participants in the Council. Article I-44(4) makes it clear that acts adopted in the context of enhanced cooperation are not part of the *acquis* which a new Member State must adopt on accession.\(^{11}\) It is significant that this core statement of enhanced cooperation *does not* include any reference to the role of the European Parliament and the Commission. In fact, closer inspection of Articles III-416 to III-423 make it clear that these two institutions are in fact given significant roles in relation to enhanced cooperation, a point which is important because they act as crucial binding elements within the institutional structures of the EU.

Article III-416 specifies further conditions for enhanced cooperation, such as the obvious point that it must comply with the Constitution and with other provisions of EU law. Enhanced cooperation must not undermine the internal market or economic, social and territorial cohesion, it must not constitute a barrier to or discrimination in trade between Member States, and it must not distort competition between them. Article III-417 keeps the participating and non-participating Member States apart by requiring the former to respect the competences, rights and obligations of the latter, and the latter not to impede the implementation of enhanced cooperation by the former. These are in essence simplified statements of principles originally articulated in the Amsterdam and Nice Treaties. One novelty of the CT provisions, as compared to those earlier versions of enhanced cooperation, is a reference in Article III-418 to possible conditions of participation in an instance of enhanced cooperation. This seems for the first time to open the door to enhanced cooperation being used by Member States which are willing *and able* to proceed with further integration in particular areas (e.g. environmental policy), with the door closed as a result of objectives conditions to those Member States which are willing *but not able*. No reference is made to countervailing measures of assistance which might be used to enable those who are willing but not able to pass the threshold for participation. On the contrary, access will be policed both at the point of initiation, and at subsequent points of potential entry by non-participating Member States, with regard to whether such ‘conditions’ are satisfied. This could be a divisive force within the future (and ever more diverse) EU. On the other hand, it is none the less the clear task of both the Commission and the participating Member States to promote participation in any instance of enhanced cooperation.

The procedure for triggering enhanced cooperation (Article III-419) requires a request by the Member States want to cooperate to the Commission to submit a proposal. Thus the Commission can block enhanced cooperation because authorisation can only be given by means of a European decision adopted by the Council on the basis of a proposal from the Commission. The Commission does not have to accede to the request for make a proposal. The European Parliament likewise has blocking powers as it must give its consent before the decision can be adopted. In contrast, in the normal case no individual

\(^{11}\) It should be noted that in Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335 the Court of Justice concluded that a measure adopted within the framework of the UK’s Maastricht social policy opt-out by the other Member States was a ‘normal’ part of Community law for the purposes of the application of general principles.
Member State has blocking powers, as the Council must act by a qualified majority. This is in contrast to the original position under the Amsterdam Treaty where every Member State was able to apply an emergency brake. That requirement was dropped already in the Treaty of Nice.\textsuperscript{12} The Commission also has significant gateway powers in relation to a subsequent request by a Member State to join in an existing instance of enhanced cooperation (Article III-420).

In common with the general tendency of the Constitutional Treaty to remove major distinctions between the old ‘Maastricht’ pillars of the EU, the instances of special procedures for the triggering of enhanced cooperation are reduced to a minimum. In the case of Common Foreign and Security Policy, the request to proceed with enhanced cooperation is forwarded to the Council. The Union Minister of Foreign Affairs is asked for an opinion as to whether it would be compatible with the Union’s common foreign and security policy, and the Commission is asked for an opinion on whether it is compatible with the Union’s other policies. The European Parliament is merely informed. Authorisation is given by the Council acting unanimously.\textsuperscript{13} The Council also polices subsequent entry of non-participating Member States into an existing instance of enhanced cooperation.

An important gesture to those Member States which felt that the Constitutional Treaty as a whole has been unambitious in relation to the extension of qualified majority voting is that the enhanced cooperation provisions contain a passerelle clause allowing the Member States participating in an instance of enhanced cooperation to decide by unanimity to shift to qualified majority voting and to the ordinary legislative procedure for policy-making (Article III-422). This obviously by-passes the full Treaty amendment procedure. The application of the passerelle clause is excluded in the case of measures having military or defence implications (Article III-422(3)). These provisions mirror a similar passerelle clause applicable to CFSP as a whole under Article I-40(7), as well the simplified revision procedure in relation to amendments to Part III CT, set out in Article IV-444. However, in contrast to the latter, no provision is made in Article III-422 for national parliaments to enter objections to the application of the revision procedure, as is possible under Article IV-444.

The provisions which the Constitutional Treaty introduces in relation to possible flexible solutions to some of the complex and divisive issues raised by defence and security policy would on their own merit separate treatment if they were to be considered in full. There are additional specific provisions on the possibility of (permanent) ‘structured cooperation’ for groups of Member States whose military capabilities fulfil higher criteria and which wish to make binding commitments to each other (Article I-41(6) and Article III-312) and on the possibility of the Council entrusting the implementation of defence-


\textsuperscript{13} The text prepared by the Convention was somewhat ambiguous on this matter: Article III-325(2), OJ 2003 C169: see F. Dehousse and W. Coussens, ‘Flexible Integration: What could be the potential applications?’, in Integrating Europe, above n.7 at p12.
related tasks (e.g. peace-keeping or conflict prevention) to specific groups of Member States (Article I-41(5) and Article III-310). Flexible participation in the new European Armaments Agency is also provided for, and general provision is made for so-called constructive abstention where by a Member State’s failure to vote does not preclude the adoption of a measure where unanimity is required to apply within CFSP generally, and in particular in the context of security and defence policy. This is to prevent blockages in decision-making whilst at the same time respecting national sovereignty and distinctive national interests.

The proliferation of provisions in these areas in the Constitutional Treaty is testimony to the fertile nature of the field of security and defence policy for flexible solutions to the challenge of proceeding further in this field, given the very diverse interests and approaches of the Member States (some are members of NATO, some are not; a minority are neutral states, etc. etc.). However, under the Treaty of Nice failure to resolve the disagreements amongst the Member States meant that areas with military and defence implications were completely excluded from the possible application of enhanced cooperation. The changes introduced in the Constitutional Treaty represent an important achievement of the Convention and the IGC, and it is clear from developments from mid-2003 onwards, with the EU’s Security and Defence Strategy and rapid moves to establish an armaments agency that the Member States are set on a pre-emptive and anticipatory application of these particular provisions of the Constitutional Treaty, without waiting for the formalities of ratification.

A generally warm welcome must be given to the endeavours of those who drafted the CT to ‘improve’ the existing arrangements in relation to flexible integration, without completely altering the conditions under which – for example – enhanced cooperation could operate. The CT does not provide a revolutionary change in the balance between the integrative and disintegrative elements of the enhanced cooperation mechanism. It no more attempts to define or encapsulate the concept of flexibility than do its predecessors as the founding Treaties of the EU. It continues to recognise flexibility as a pragmatic response to the challenges of both widening and deepening in the EU context. It is bizarre, of course, to see that the enhanced cooperation provisions might end up being amended twice before they are ever used in practice. However, it is one of the ironies of most of the provisions of the EU Treaties that they appear in general to be more easily amendable if they are of more recent vintage. It is some of the key provisions dating from the 1957 Treaty of Rome which are perhaps most in need of amendment, which are in turn the most resistant to change.

It would be good to think that the flexibility elements of the Constitutional Treaty might indeed strengthen the case for ratification in the context of the upcoming UK debate. In fact, the UK White Paper quite soberly points up the precise areas in which it sees flexibility being offered by the Constitutional Treaty, although some of the features it identifies have in fact existed within the Treaties for some time. Sadly, it seems unlikely that the UK referendum debate will be conducted in the sober terms of the White Paper; rather the heightened and often misleading rhetoric of the UK’s tabloid press will predominate. In that context, the niceties of enhanced cooperation seem unlikely to
feature prominently in the debate, even if they now offer some subtle and interesting governance possibilities for the future EU.