

REVISITING FLEXIBLE INTEGRATION IN TIMES OF POST-ENLARGEMENT AND THE LUSTRATION OF EU CONSTITUTIONALISM

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Summary: With an eye on the changes of immense if not radical proportions that European integration has undergone in the past five years, are there any grounds for revisiting the process of flexible integration and using some of its potentials for the benefit of integration in the future? This is the main question of this article, the purpose of which, in contrast to the bulk of the literature in this field, is not so much to describe or conduct a textual analysis of the flexibility clauses of various treaties, but to understand the deeper or background reasons why flexibility in the EU has developed as it has. The article consists of three parts. The first part traces the historical development of flexible integration. This is followed by a study of the reasons why flexibility has remained on the margins of the integration process. Finally, having examined the EU's relatively non-flexible past and the reasons for this, the focus moves to its present and future.

The main focus of this article is the question of what to make of flexible integration in the EU after the big bang enlargement and the failure of documentary constitutionalisation? The purpose, in contrast with the bulk of the literature in this field, is not so much to describe or conduct a textual analysis of the flexibility clauses in the various treaties, but to understand those deeper or background reasons why flexibility in the EU has developed as it has. The discussion will be broadly broken down into three parts. In the first part, we will trace the historical development of flexible integration. This will be followed by a study of the reasons why flexibility has remained on the margins of the integration process. Finally, having examined the EU's relatively non-flexible past and the reasons for it, we will turn to its present and future. With an eye on the changes of immense if not radical proportions that European integration has undergone in the past five years, are there any grounds for revisiting

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the process of flexible integration and using some of its potentials for the benefit of integration in the future?

Three Orders of Flexibility

What is flexible integration? This is a preliminary, definitional question that must be answered before embarking on a more detailed examination of its historical evolution in the context of European integration. Following the definition crafted by de la Serre and Wallace, we suggest understanding flexibility as a means of organising diversity between the constituent entities in European integration.¹ Flexibility should therefore be best imagined as a continuum of different instances in which not all Member States are subject to uniform rules within the scope of EU competences. These instances can be of a different intensity subject to the scope and depth of exceptions established in favour of one or more Member State. Progressing from the least to the most flexible solutions, one can distinguish between three different orders of flexibility.

First-order flexibility covers a range of legislative, executive and judicial regulation techniques, both formal and semi-formal, within a uniform primary EU law, the regulatory outcomes of which (intentionally) fall short of requiring and establishing uniformity. They are normally explicitly, but also implicitly, authorised at the level of primary EU law and are usually executed in the form of secondary EU law. Those explicitly authorised by primary EU law firstly comprise legislative acts of different regulatory intensity. These are regulations and directives, the purpose of which is either unification or merely harmonisation of national laws. Secondly, there are specific flexible legislative techniques known as minimum or partial harmonisation² that take place within the secondary legislative acts themselves. These can also provide for even further means of flexibility, such as options, derogation clauses and different transitional periods of implementation for different Member States, though naturally within the limits and hence with the implicit authorisation of primary EU law. These formal flexible regulatory techniques also include interpretative solutions, both legislative as well as judicial, whereby the construction of a particular term in secondary EU legislation is left to Member

¹ F de la Serre and H Wallace, 'Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea' (1997) Notre Europe Research and Policy Paper No 2.

² Minimum harmonisation is provided for in art 137(5) EC (social policy), art 153(3) EC (consumer protection), art 176 EC (environmental protection), and in (the rather different) art 95(4)-(9) EC (internal market). Minimum harmonisation may also be based on Community secondary legislation, either expressly or by implication. On the latter possibility see Case C-11/92, *ex p Gallaher*, [1993] ECR I-3545. For more, see Francesco de Cecco, 'Room to Manoeuvre? Minimum Harmonization and Fundamental Rights' (2006) 43 CML Rev 9-30.

States. Finally, first-order flexibility also encompasses so-called soft law, ie semi-formal regulation with whose help the Commission, in particular, co-ordinates Member States and steers their activities towards good practice without proposing binding legislative or executive acts, either because the latter is inopportune or, in the light of existing differences between Member States, simply impossible.³

Second-order flexibility is already more intense, as it occurs, in contrast with first-order flexibility, at the level of primary EU law in the form of derogations from it. Typical examples, which will be presented in detail below, comprise so-called safeguard clauses, often notorious instances of various opt-outs with potential opt-ins and other usually protocol-based derogations in favour of a selected Member State. Partly relying on a classification of flexibility provided by Tuytschaever,⁴ second-order flexibility can be accordingly best described as specific, as it is established in favour of a particular, very rarely more than one, Member State; narrow in scope, since it is limited to a single and narrowly defined policy exception; negative, as it exempts a Member State from otherwise uniformly valid primary EU rules; permanent, as, in principle, it is unlimited in time; and ultimately of an exceptional nature, since it is not anticipated that it will be followed by other Member States, and is therefore without an organised procedure for coming into being.

These features set second-order flexibility apart from the stronger third-order flexibility, also commonly known as differentiated integration. This, as the ensuing discussion will show, is still a relatively unsettled phenomenon. There are roughly four competing models of third-order flexibility, which renders a general all-inclusive definition more difficult. These include:⁵ the *à la carte* model,⁶ the multi-speed Europe,⁷ the Europe of concentric circles⁸ and the model of enhanced co-operation that

³ Linda Senden, *SoftLaw in European Community Law* (Hart, Oxford 2004).

⁴ Filip Tuytschaever, 'The changing conception of differentiation in European Union Law' (PhD thesis, EUI 1998), in particular chapter 5.

⁵ For the purpose of clarity, especially as the same phenomena have had very different labels attached to them by different authors, the categorisation of differentiated integration designed by Alexander Stubb will be relied on, 'Categorization of Differentiated Integration' (1996) *Journal of Common Market Studies* 285.

⁶ 'Respected Member States are able to pick and choose, as from a menu, in which policy area they would like to participate, whilst at the same time holding only to a minimum number of common objectives.' *Ibid* 285.

⁷ 'The pursuit of common objectives is driven by a core group of Member States which are both able and willing to go further, the underlying assumption being that the others will follow later.' *Ibid* 285.

⁸ 'A model that admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between a hard core and less developed integrative units.' *Ibid* 285.

is currently institutionalised in primary EU law.⁹ These all share a conception of third-order flexibility which is general, for it must involve more Member States; broad in scope, as it is usually conceived for a large policy sector; and positive, since it enables capable or interested Member States to integrate more quickly and further.

Genealogy of Flexible Integration

The described instances of flexible integration have emerged incrementally and at different points of time in the history of European integration. While conventional wisdom locates the origins of flexibility in the early 1970s, this is only partly correct as they in fact date back to the very roots of integration. Some of them were already present in the Treaty of Rome. Besides the distinction between different legislative acts (first-order flexibility), this Treaty also contained a number of safeguard clauses and at least six of the ten protocols annexed to it dealt with derogations.¹⁰ While the latter provided for exceptions at the level of primary law, they should not be equated with strong instances of flexibility, such as the opt-outs of a later date, as they were limited to certain very specific national trade-based peculiarities.¹¹ At the outset of integration, flexibility thus occupied a rather narrow scope and did not play a major role. This is understandable as priority was given to means contributing to further integration and hence to increased uniformity. In the context of the relative homogeneity of the six founding Member States and the rather narrow original scope of Community competences, this appeared both feasible as well as desirable.

However, it did not take long for this situation to begin to change. With the first wave of enlargement at the beginning of the 1970s, the old homogeneous Community came to an end. With three new Member States, the number of divergent political and economic interests complicated the existing, by and large, still unanimous decision-making in the Union and made political stalemates part of its daily reality. It was in 1974, during one of the particularly fierce stand-offs caused by Britain's staunch opposition to the harmonisation of banking legislation and company law,¹² that the first open political call for differentiated integra-

⁹ Currently Title IV of the TEU Lisbon.

¹⁰ D Hanf, 'Flexibility Clauses in the Founding Treaties, from Rome to Nice' in de Witte, Hanf and Vos (eds), *The many faces of differentiation in EU law* (Intersentia, 2001) 7.

¹¹ Ibid 8. These, for example, included the Protocol on German Internal Trade which absolved the then West Germany from instituting the EU required customs regime with Eastern Germany; the Banana Protocol, the Protocol on Luxembourg, etc.

¹² CD Ehlermann, 'Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty' (1998) 4 (3) *European Law Journal* 246-270; SM Colino, 'Towards greater flexibility or a deadlock' *The Federal Trust Online Paper* 24/04.

tion as the strongest means of flexibility was launched by the German Chancellor Willy Brandt. He introduced the idea of a multi-speed Europe according to which the Union would be divided into two groups of more and less advanced Member States, so that the former could achieve their common objectives more quickly and effectively, while the latter would follow when ready or willing to do so.¹³ Only a year later in 1975, the proposal was seconded by the Belgian Prime Minister Leo Tindemans and elevated to the level of the European Council. In his Report, while admittedly taking a very cautious and hence rather conservative stand on differentiated integration, he pointed to the growing social and economic differences between Member States and warned that simply disregarding them and insisting on a synchronised pace of integration could put the overall process of integration in peril.¹⁴

However, both of these appeals for differentiated integration fell upon the deaf ears of Member States as well as EU institutions and were consequently, together with the entire idea of flexible integration, set aside for a couple of years only to resurge even more strongly in the 1980s. This decade saw two landmark events. One was the enlargement of the EU with three further Member States,¹⁵ while the other, which was certainly not unrelated to the first, was the adoption of the Single European Act (hereinafter SEA) amending the founding Treaties.¹⁶ The latter introduced two major institutional reforms which *inter alia* contained clear moves towards flexible integration. In this respect, the provisions of Article 100a (4) and 130t TEC¹⁷ should especially be pointed out. Departing from the established case law of the ECJ, these allowed Member States, subject to prescribed conditions, to adopt or retain different regulatory standards even when a given field was already harmonised.¹⁸ In addition, a number of more “flexible” legislative techniques, which are designated above as first-order flexibility techniques, were laid down in the text of the Treaty.¹⁹

In the 1980s, the genie of flexibility was let out of the bottle. Its consequences were felt in the SEA, but this only paved the way for the Treaty of Maastricht (hereinafter ToM) where flexibility was recognised to a degree unseen before. The ToM, first of all, represented a break with the pre-existing supranationally driven Community method by creating

¹³ Walker, ‘Sovereignty and Differentiated Integration in the European Union’ (1998) 4 (4) European Law Journal 364; Colino (n 12) footnote 8, referring to Nomden (1998).

¹⁴ *Ibid.*

¹⁵ Greece joined the Union in 1981 whereas Spain and Portugal followed five years later.

¹⁶ SEA came into force in 1987.

¹⁷ Now art 95 and 176 TEC.

¹⁸ Hanf (n 10) 10.

¹⁹ *Ibid* 10-11.

the (in)famous pillar structure. This latter introduced so-called structural variability,²⁰ whereby different policy sectors are governed by different decision-making rules. However, these do not discriminate between Member States and must consequently be distinguished from flexible integration in the classical sense as defined here. However, the latter was not absent from the ToM. On the contrary, preserving the established first-order flexibility, the ToM introduced new instances of second-order flexibility²¹ and, moreover, took integration to the very brink of third-order flexibility. Indeed, with the creation of EMU in which not all Member States participated, due to either objective or subjective reasons, with the British opting out from the Protocol on Social Policy, and finally with the conclusion of the Schengen Agreement by only some Member States outside the Community framework, the lines of different regulatory regimes in larger policy fields with necessarily adjusted institutional solutions were drawn up, foreshadowing the advent of fully-blown differentiated integration.

This possibility again stirred the political imagination of European stake-holders, who soon produced an avalanche of political visions of possible models of third-order flexibility. It all began with the Lamers-Schäuble initiative which called for European integration based on variable geometry where EU Member States would be divided between those forming the core, an *avant-garde* of integration, which could also presumably be closed to those delegated to the periphery.²² This provoked an immediate reaction from the head of the French government who promoted integration in the form of three concentric circles which, in contrast with the German model, would be less rigid and more policy-sector rather than state based.²³ These two proposals, while endorsing differentiation, concurrently insisted on the need to preserve a common European integration architectural whole.²⁴ This was, however, absent from the British proposal of integration *à la carte*, defended by the then Prime Minister John Major, who advocated a very small scope of shared European policies. Beyond this, Member States could freely choose to participate in those policy sectors which they found opportune.²⁵

²⁰ Robert Harmsen, 'A European Union of Variable Geometry: Problems and Perspectives' (1994) 45 (109) *N Ir Legal Q.*

²¹ Hanf (n 10) 16-18. The most notorious were the protocol on the acquisition of second homes in Denmark and the Irish abortion protocol.

²² Lamers and Schauble, 'Reflections on European Foreign Policy' Document of the CDU/CSU in the German Bundestag (1994). Academics differ as to whether their proposal was an example of variable geometry, Ehlermann (n 12) or concentric circle, Walker (n 13).

²³ Balladur's proposal, Walker (n 13), Ehlermann (n 12), Gillespie, 'The Promise and Practice of Flexibility', in Tonra (ed), *Amsterdam, What the Treaty Means* (Dublin 1997).

²⁴ Ehlermann (n 12).

²⁵ Federal Trust Report on flexible integration in the EU, 'Flexibility and the Future of the European Union', October 2005.

All this political ado exercised in the lead-up to the Amsterdam IGC had little direct effect on the national delegations until the joint Franco-German intervention which put forward an official proposal to incorporate a general clause opening up the possibility of differentiated integration in certain policy fields.²⁶ The proposal was met with approval and the Treaty of Amsterdam (ToA), while scrapping the British opt-out from the social protocol and preserving the EMU and Schengen opt-outs,²⁷ under the title of closer co-operation furnished a legal basis to enable a certain number of Member States which were both able and desired to integrate in chosen policy fields further and more quickly than the others, to do so.²⁸ Politically mooted but crushed at its birth in the early 1970s, it had become a tangible treaty-based option 20 years later. This has led some to announce that the ToA had made differentiated integration an intrinsic part of Europe's constitutional structure.²⁹ A certain plausibility was lent to this belief by the fact that both the Treaty of Nice, whose negotiation was again conducted amid appeals for more flexibility from top national officials and other wise men,³⁰ and also the failed Constitutional Treaty both preserved the legal basis for enhanced co-operation and even eased the conditions for the launch of the process and enlarged the scope of policy fields in which this type of flexibility is possible.³¹

Finally, the Treaty of Lisbon, as the latest product of the semi-permanent process of Treaty revision,³² remains rather ambivalent as far

²⁶ Ehlermann (n 12) 250.

²⁷ With the ToA, Schengen was integrated within the Treaty framework and made part of the *Acquis*. It was introduced (partly) in the first pillar title IV, which provided for a judicial review by the ECJ in the form of preliminary rulings subject to the Member State's prior agreement. The ToA thus effectively also introduced judicial flexibility. Hanf (n 10) 19.

²⁸ Core states, ready and willing to go further; less advanced Member States and accession countries.

²⁹ Hanf (n 10) footnote 88.

³⁰ For example, see the Wise Men's (also known as Dehaene) report '*Institutional implications of enlargement*' submitted by Jean-Luc Dehaene, Richard von Weizsäcker and Lord David Simon, available at <http://europa.eu.int/igc2000/repoc99_en.htm>; Joschka Fischer's famous Humboldt University speech 'Quo vadis Europa?' <<http://www.auswaertigesamt.de/diplo/en/Infoservice/Presse/reden/2000/000512-FromConfederacyto.html>>; Chirac's 'Our Europe' response <<http://www.bundestag.de/geschichte/gastredner/chirac/chirac1.html>>; and Tony Blair's intervention on 'Europe's political future' <<http://www.fco.gov.uk/resources/en/speech/2002/06/-europe-s-political-fut-new04913>> all last accessed 20 August 2008.

³¹ Pursuant to the ToA, the proposal to launch closer co-operation had to be made by a majority of Member States. Moreover, closer co-operation was excluded from the 2nd pillar (common foreign and security policy), where a mechanism of positive abstention was used instead.

³² B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in Beaumont, Lyons and Walker (eds), *Convergence and Divergence in European Public Law* (Hart, 2002).

as recognition of flexibility is concerned. On the one hand, it presents a significant departure from it. It merges the pillar structure and the two heads of Community and Union into a single legal and institutional framework of the European Union, putting its structural differentiation to an end. On the other hand, it does not just keep the existing examples of second-order flexibility but multiplies them by allowing opt-outs from policy fields where an exception to one-size-fits-all solutions would have been hardly imaginable before. The most conspicuous examples of this kind are certainly the British and Polish opt-outs from the Charter of Fundamental Rights, ie from a long awaited document which contains EU human rights that have been traditionally represented as universal, being common to all Member States and stemming from their shared constitutional traditions.³³ This and indeed the overall number of derogations claimed by the UK at the level of primary EU law has already led some to wonder whether a critical mass of opt-outs has perhaps already been reached if not surpassed.³⁴ As far as eventual third-order flexibility is concerned, the Treaty of Lisbon has basically kept the regime established by the Treaty of Nice untouched.

Four Defining Features of Flexible Integration

Having conducted a genealogical analysis of the process of flexible integration, what we are interested in next is whether certain elements can be singled out which define it and can be treated as constitutive of it on the basis of its evolution over the last five decades. What are the common features of the flexibility process? Has it been a coherent enterprise or can it only be regarded, as has been powerfully argued, as a non-project with an obvious lack of coherence that has mainly been driven by contingency, ambiguity and disagreement?³⁵ In our view, the process of flexible integration can be coherently structured around four defining features.

First, the process has been underlined by a very explicit *telos* that has acted as its unifying force and has brought all the different practical instances of flexibility within a single objective of finding the most appropriate means for managing diversity in European integration. Secondly, the origins of the flexibility process can be equally accounted for in a coherent manner. Three main, so-called, triggers of flexibility can

³³ For more on ECJ case law on human rights protection, see M Avbelj, 'European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movements of Goods', Jean Monnet Working Paper No 06/04 <<http://www.jeanmonnetprogram.org/papers/04/040601.html>>.

³⁴ 'EU Treaty Negotiations Proceed Slowly' *EuObserver* (19 September 2007).

³⁵ Walker (n 13) 374 and Colino (n 12) 5 have similarly observed that especially in the period preceding Amsterdam the "sightings" of flexibility did not follow any coherent line.

be identified. These have in practice operated both separately as well as jointly. The first of these are the different schemes of justice to which Member States adhere and which are expressed, as Scharpf has argued, in those basic differences in national economic conditions, institutions, policy legacies and normative preferences.³⁶ Flexible integration is ancillary to these differences and hence their function, which means that the bigger they are the greater the need for flexibility. The historical trajectory of different orders of flexibility is the best evidence of this. In the past, every single enlargement contributed to the growing heterogeneity of integration and sooner or later spurred on appeals for flexibility which, as we have seen, usually resulted in certain clear consequences in practice both at the level of secondary and primary EU law.

The second trigger of flexibility is the depth of integration. As we had the chance to observe, following the ToM, which significantly enlarged the scope of EU competences by supplementing what was a predominantly economic dimension of the Community with a number of other policies,³⁷ pressure for stronger, second and even third-order flexibility mounted. The final trigger is qualified majority voting. A shift from the unanimity requirement to a qualified majority in decision-making processes in EU institutions increases the likelihood of demands for second-order flexibility. A Member State which fears that it could be outvoted on certain policy issues, which for various reasons figure large in domestic affairs, might move to secure an appropriate derogation or opt-out to prevent such political surprises in advance.

Thirdly, the flexibility process can also be seen, though perhaps counter-intuitively, as coherent due to its glaringly incoherent results. Especially over the last three decades, we have been able to detect a huge discrepancy between political enthusiasm and ambitions to introduce more flexibility in integration on the one hand, and very modest practical outcomes on the other. This is particularly true of third-order flexibility, which has occupied even the most important political figures in Europe and transformed them into political visionaries, yet ultimately with little practical effect. While first and second-order flexibility have been received with fairly few difficulties and have appeared more and more frequently in EU founding Treaties and other legislative instruments, third-order flexibility has had a rather different fate. Since its explicit formal written recognition in the ToA, it has remained a dead letter. In their decade-long existence, the provisions on enhanced co-operation have never been

³⁶ F Scharpf, 'Problem Solving Effectiveness and Democratic Accountability in the EU', Political Science Series, Feb 2006 <http://www.ihs.ac.at/publications/pol/pw_107.pdf>.

³⁷ These ranged from social policies within the Community pillar to foreign, security, justice and home affairs policies in the two intergovernmental pillars.

applied and, moreover, except in two cases their use has not even been seriously considered.³⁸

Inquiring into the reasons for this kind of situation, which one is logically expected to do, brings us to the fourth, this time exogenous, coherence-enhancing factor of the flexibility process. The process has taken place in an intellectual and political environment which has been openly and more than consistently hostile to the idea of flexibility as such, but especially to its strongest version, ie differentiated integration.³⁹ None of the narratives of European integration, with the single exception of the international law narrative,⁴⁰ could come to terms with or digest flexible integration. This is especially true of those two narratives that have dominated the socio-legal construction of European integration. From the supranational neo-functional perspective, which held a dominant position until the late 1980s, differentiated integration would entail an interruption of the virtuous spill-over effects from one policy sector into another. This would amount to a failure of integration⁴¹ and would potentially even signal a return to the old international voluntaristic state-based paradigm.

However, from the vantage point of the classical constitutional vision⁴² which has replaced the supranational narrative as the dominant narrative, differentiated integration not only represents a breakdown of integration, it is its outright *contradictio in adiecto* for it collides with its very *telos*. European integration, with its formal and double-layered substantive, yet unwritten, constitution, which makes it literally indistin-

³⁸ The literature quotes two attempted uses of enhanced co-operation. The first allegedly happened in 1999 around the time of the Cologne European Council where the proposed adoption of the European Company Statute met opposition from Spain; whereas the second was mooted in 2001 after the initial Italian reluctance to agree on the framework decision instituting the European Arrest Warrant. See JM de Areilza, 'The reform of enhanced co-operation rules: towards less flexibility?' in de Witte, Hanf and Vos (eds), *The many faces of differentiation in EU law* (Intersentia, 2001) 33; and D Thym, "'United in Diversity" ≠ The Integration of Enhanced Co-operation into the European Constitutional Order' 6 (11) German Law Journal 1737.

³⁹ Jo Shaw speaks of an overall orthodoxy of hostility to flexibility, see J Shaw, 'Relating Constitutionalism and Flexibility in the European Union', in de Burca and Scott (eds), *Constitutional Change in the EU, From Uniformity to Flexibility* (Hart, 2000).

⁴⁰ A Sepos, in 'Differentiated integration in the EU: The Position of Small Member States', EUI Working Paper RSCAS No 2005/17, correctly notes that from a liberal intergovernmental perspective, which is a special version of the international law narrative, differentiation is easy to explain by Member States' craving for power and the consequent enhancement of their positions.

⁴¹ Ibid.

⁴² For a more in-depth discussion of classical constitutionalism in the EU and the evolution of EU constitutionalisms in general, see M Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 (1) German Law Journal.

guishable from constitutional federal states,⁴³ is pursuant to the classical constitutional vision defined by an imperative of an ever closer union between the peoples of Europe, which means that it should proceed in just one way.⁴⁴ As a result, harmonisation, if not unification, should be its main paradigm. All differences and diversity existing in integration are accordingly, more or less, perceived as obstacles, first to free trade, but ultimately to integration as such.⁴⁵ Incrementally, but steadily, they should give way to a supreme Community law requiring uncompromised uniformity in its application across all Member States.

Introducing more flexibility in integration or even allowing its constituent entities to integrate at different speeds in different fields of integration would openly defy the very purpose of the entire constitutional enterprise. This latter was launched precisely with the opposite objective: namely to further integration not to loosen it.⁴⁶ On the basis of statist constitutional federal experiences, to which classical EU constitutionalism is most indebted and where it in fact originates from,⁴⁷ it has been presumed that as a constitution confers unity and order in a statist environment, the same virtuous effects should come about in the supranational environment as well. Consequently, for many years the process of European integration has been conducted in a spirit of furthering unity and uniformity, and constitutionalism has been selected as the most appropriate tool for this. Integration has fallen prey to the so-called unity dogma with a natural tendency and strong presumption towards uniformity.⁴⁸ This explains why flexibility has only figured on the margins and why realistically speaking no organised form of differentiated integration could come into being. Even in those few instances where its use was at least ostensibly seriously contemplated, it was portrayed either as a last resort measure⁴⁹ or was seized upon as a means of exerting pressure in negotiations against more reluctant Member States under the threat of

⁴³ JHH Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg' in Nicolaidis (ed), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001) 56.

⁴⁴ Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CMLRev. 67.

⁴⁵ Avbelj (n 42).

⁴⁶ MP Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union', in Weiler and Eisingruber (eds), 'Altneuland: The EU Constitution in a Contextual Perspective' Jean Monnet Working Paper 5/04 <<http://www.jeanmonnetprogram.org/papers/04/040501-18.html>> accessed 13 August 2007 6.

⁴⁷ M Avbelj, 'Pitfalls of (Comparative) Constitutional Law for European Integration' Eric Stein Working Paper 1/2008 <http://www.csesp.cz/en/working_papers.php>.

⁴⁸ CD Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the concept of "two speeds"' (1984) 82 Mich L Rev 1274, 1288.

⁴⁹ In fact, the relevant Treaty provisions stipulate it as such.

exclusion or second-class membership. It has been very rarely, though over time more so, seen as an opportunity for European integration.⁵⁰

The Europe of Today: Post-enlargement and the Lustration of Constitutionalism

With an insight into the historical development and also causes and internal dynamics of flexible integration, we are now well equipped to address the central question of this paper. What should be made of flexible integration in the EU of today? Is all that has been said above still fully valid for European integration as it presently stands? This would mean that flexibility, especially that of the third-order kind, remains largely a non-issue. On the other hand, have there been changes which merit the re-opening of the flexibility debate and contemplating its practical potential anew?

As is well known, European integration in the last five years has witnessed two major political events which have had a fundamental impact on its overall political, economic and legal nature. The first was its enlargement from 15 to 27 Member States. The second, which followed the first, and which is certainly not unrelated to it, is the rise and fall of documentary constitutionalism. This has resulted in a strong blow to the dominant constitutional perspective of integration, which has literally been forced to the very brink of lustration.

If our analysis of the flexibility process conducted above is correct, the changes in European integration just described affect two of its four defining elements. The first cuts through the triggers of flexibility and concerns more concretely the heterogeneity between the constituent entities of integration. Heterogeneity has been increased by every single enlargement. This is a rule that has so far known no exception, and the latest big bang enlargement offers us no reason to conclude the opposite. On the contrary, it is *this* enlargement, more than any other, that must be recognised as the biggest and simultaneously most diversity-augmenting in the entire history of the EU. Its vastness is not so much due to quantity, even though the number of Member States has almost doubled, as to quality. European integration with enlargement to the East definitely tore down the Iron Curtain and by doing so integrated the-post communist states which historically, provided there is such a thing, had belonged to a common European cultural space but had been subsequently excluded from it for half a century.

This has inevitably had a strong effect on them and made them objectively different from Western European countries, to use still a very

⁵⁰ For a more optimistic view, see Tuytschaever (n 4).

much vital cold-war terminological cliché. There are differences which can be measured in economic terms such as the Eastern block being much poorer and less economically developed, while there are others which cannot because they pertain to the systemic characteristics of the society as a whole. These latter differences, though much less visible and harder to identify, are equally, if not even more, important. They concern the quality of democracy, the presence or absence of legal and political culture and ultimately boil down to the most elementary, but in practice the most resilient and enduring, differences in the people's mentality.

To cut a long story short, European integration before and after 2004 is simply not the same thing. It is now truly pervaded by far-reaching social, economic, legal, political, cultural, linguistic, religious and other forms of diversity. This new unprecedented scope of diversity must inevitably be expressed in the daily legal and political life of integration, given that law and politics depend on the social substratum that they regulate and from which they grow. If in the widest social sense European integration has undergone a transformation from the relatively socially homogeneous six original Member States to an objectively socially heterogeneous 27 Member States, then the EU can no longer plausibly follow the same linear path of integration which knows only one direction and ultimately operates on the basis of the principle that, one way or another, one size must fit all. In short, the EU reality, post big-bang enlargement, certainly speaks in favour of a more flexible type of integration.

Interestingly, we come to the same conclusion when examining the EU's recent constitutional travail. It had seemed that with Maastricht's creation of the pillar structure, which was believed to have blown integration into bits and pieces,⁵¹ the classical constitutional vision and its unity dogma had suffered a decisive, if not definite, defeat. Instead, we have witnessed its full revival. In accordance with the desires of EU constitutionalists expressed way back in the early 1990s, the EU after the Treaty of Nice embarked upon fully-fledged documentary constitutionalisation. The classical constitutional vision appeared to be re-vindicated and once and for all written down in the genetic code of European integration. However, for many unexpectedly, for others not so, the result was rather the opposite. The CT was rejected by two founding Member States in popular referenda, ie by the people who should have embraced it with open hands as it was tailored just for them. In the sobering constitutional limbo that followed, new solutions were desperately sought and after a two-year period of intense reflection (the Germans put it best when they called it, and with good reason, a *Denkpause*) a new Reform Treaty, later baptised as the Treaty of Lisbon, was agreed upon.

⁵¹ Curtin (n 44) 46.

However, this represented a literal *salto mortale*.⁵² In a manner close to the lustration of EU constitutionalism, European stakeholders uprooted everything from the text of the Constitutional Treaty, which they had only a short while before so vigorously defended, that might in any way be reminiscent of the C-word, going even so far as deleting the provisions on the EU's values and symbols.⁵³ Hence, it took only a couple of years for the EU constitutional narrative to travel from the long aspired European constitutional skies to the deepest abyss of the EU's constitutional self-denial. Undoubtedly, this journey has seriously discredited the constitutional basis of the unity dogma and the pertaining faith in the indispensability of a linear development towards an ever closer Union. Now that this has been done, the biggest hurdle standing in the way of more flexible integration might have been removed or is at least in the process of being removed.

Pros and Cons of Flexible Integration

With the demise of the stifling unity dogma underlying the classical constitutional vision of integration, and with a concurrent, unprecedented increase in heterogeneity, the present state of European integration, in theory at least, provides fertile soil for a potential new launch of the flexibility process in the form of the differentiated integration which interests us here. The time therefore seems to be ripe, but is it in fact opportune or even necessary to introduce the strongest version of flexibility in integration? What are the possible advantages, but also disadvantages that third-order flexibility could have for European integration as a whole?

Of the arguments in favour of differentiated integration, the objective existence of a growing diversity between constituent entities should be mentioned first. Differentiated integration as a diversity-managing mechanism takes full account of this diversity, both its positive and negative sides. It also tries to find solutions which would preserve it as far as possible, while making sure it does not transform itself into a stumbling block for integration. In this way, an open decision for differentiated integration is much preferable to those strategies, typical of the classical constitutional vision, which tend to disregard diversity either by downplaying its true extent or by simply railroading it through uniform EU-wide solutions.

First of all, by recognising diversity, differentiated integration can give greater legitimacy to the entire process of integration. In so doing, as one commentator has noted, it could also increase the democratic

⁵² Avbelj (n 42).

⁵³ While paradoxically adding in the same voice that they will nevertheless continue to fly around Europe.

potential of European integration by showing respect for national democratic majorities without allowing this majority, as a European minority, to block the realisation of European majority preferences.⁵⁴ At the same time, such a model of integration could be much more efficient. At present a *de facto* consensual system has entangled integration in the so-called politics of incrementalism.⁵⁵ This is characterised by the practice of postponing the most sensitive and burning issues of integration hoping that in the future new energy and motives will be found to tackle what cannot be achieved at present. While this patient, progressive, consensual synchronised integration certainly has its advantages, after all it made integration possible in the first place and brought it to this, especially in comparative terms, enviable stage, it also has strong downsides. Consensus, even if only *de facto*, is a mode of decision-making which favours the *status quo* at the expense of change and progress. Due to its all-or-nothing effect (either all agree or there is no decision), it enables every single participant to block the game for whatsoever marginal reason. As a result, the EU has ended up with a stagnant legal, political and economic agenda. A brief look at its development over the last two decades almost shockingly reveals that EU political debate has had a cyclical character⁵⁶ with a clear lack of significant progress. For instance, in economic terms, the flagship of EU integration, ie the common market, has still not been achieved. All attempts to provide the EU with new impetus through successive intergovernmental conferences have resulted only in wrestling with the decades-old leftovers of the past.⁵⁷

The EU has thus been paying a huge and increasing price in terms of efficiency, but there are also other injurious side effects. One of these concerns transparency. Even those who are very much in favour of the present model of integration are ready to concede that it has led to an opaque system which is barely legible.⁵⁸ A second, and perhaps even more important effect concerns the issue of the overall stability of integration. When differences between Member States are so big that no solution which would satisfy everyone can be found, insistence on a particular solution might lead some Members to have recourse to formal mechanisms

⁵⁴ Thym (n 38) 1735.

⁵⁵ See more in M Avbelj, 'European Constitution-Building Through a Basic Law and Differentiation' in Neuwahl and Haack (eds), *Unresolved Issues of the Constitution for Europe* (Les Editions Themis, 2007).

⁵⁶ W Wallace and H Wallace, 'Flying together in a larger and more diverse European Union' Working document of the Scientific Council for Government Policy (The Hague 1995) 23.

⁵⁷ W Weidenfeld and J Janning, 'Strategy Paper for the International Bertelsmann Forum' in *The New Europe & Strategies for Differentiated Integration* (Bertelsmann Foundation Publishers, Gütersloh 1997).

⁵⁸ R Dehousse, 'The Unmaking of the Constitution: Lessons from the European Referenda' (2006) 13 *Constellations* 152-164.

outside the Treaty framework⁵⁹ or even to informal, more or less, secret dealings behind the scenes.⁶⁰ This could lead to the erosion of the EU's activities and its incremental disintegration from the outside,⁶¹ simultaneously having detrimental effects on its democratic pedigree. Conducting differentiated integration in an organised, transparent way within a Treaty framework subject to judicial and parliamentary supervision following rules which have been laid down in advance and agreed upon by all appears much more credible and appealing.⁶² Moreover, in this way differentiated integration could be used, in the opinion of many, as a vehicle of change guaranteeing the evolutionary dynamics that European integration is in desperate need of.⁶³

However, although arguments in favour of differentiated integration are not lacking, there are also a number of counterarguments. These can be divided into two groups. The first is concerned with the negative normative implications that differentiated integration could have for European integration. In particular, its coherence could be at stake. The argument goes that even now the relationship between the EU and national legal orders is not fully settled, and creating a third or further level as a result of differentiated integration would only make coherence a more remote ideal. The present solidifying, hard-won supranational structure would come under the additional strain of fragmentation, which could make it less and less intelligible and thus barely comprehensible to its subjects. This lack of transparency would necessarily detrimentally affect the already frail legitimacy of integration.⁶⁴ What is worse, differentiated integration would mean a terrible blow to the bonds of solidarity and political community in whose absence the existence of European integration would be hard to imagine.⁶⁵

The second group of arguments against differentiated integration emphasises its inoperative practical side. This is not necessarily related to the first group, as while many would oppose differentiated integration

⁵⁹ The Prüm convention is the most recent example.

⁶⁰ Shaw (n 39); *EUobserver* (n 34).

⁶¹ J Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy' (1998) 4 *European Law Journal* 63-86.

⁶² F Tuytschaever, 'EMU and the Catch-22 of EU Constitution-making' in de Burca and Scott (eds), *Constitutional Change in the EU, From Uniformity to Flexibility* (Hart, 2000).

⁶³ *Ibid* 195.

⁶⁴ 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 O'Keefe and Twomey (eds), *Legal Issues of the Amsterdam Treaty*, (Hart Publishing, Oxford 1999) 37.

⁶⁵ J.H.H. Weiler, 'Amsterdam, Amsterdam, Editorial', (1997) 3 *European Law Journal*, 309-312; R Harmsen, 'A European Union of Variable Geometry: Problems and Perspectives' (1994) 45 [109] *N Ir Legal Q* 129-130.

on normative grounds and simultaneously aver its practical impossibility, others would find it agreeable and perhaps even necessary but would be dissuaded from it due to an apparent lack of attainable workable means for its practical implementation. Indeed, the question whether differentiated integration can ever be put into practice is a decisive one and should interest us. No matter what arguments can be produced for or against differentiated integration, and even if the former are more numerous and stronger than the latter, as we believe to be the case, the entire intellectual endeavour is ultimately in vain if we cannot come up with evidence showing its viability in practice.

So far this has not been the case. Despite numerous attempts, we have still not been offered a reliable institutional solution. Hard intellectual work has been invested in looking for the means of striking the right balance between flexibility and coherence to avoid the extremes of fragmentation or uniformity.⁶⁶ There has been a constant search for a core that should remain intact, a periphery that could vary, and an appropriate line dividing the two. The suggested criteria for division vary and have ranged from the core being formed either by Member States and policy sectors, or by the substantive commitments, principles and value-foundations of integration.⁶⁷ None of these have proved to be satisfactory for everyone. In addition, concrete institutional solutions, such as the system of institutional representation, systemic relationships between constituent entities, the role of the courts and the distribution of financial benefits and burdens within a multi-dimensional European integration have been hard to conceive of.⁶⁸

Objective Prospects for Differentiated Integration

But what has been the reason for this? At the beginning, all the blame was put on the dominant classical constitutional vision. However, while this has been watered down, the practical inoperativeness of differentiated integration has remained. This indicates that there must be another, deeper reason for it. In fact, there are two. The first has to do with the context in which the need for differentiated integration arises. It is a situation of a long-lasting stand-off where differences between Member States reach a level where it becomes increasingly obvious that no uniform solution meeting the needs of all Members can be found. Each proposal for differentiated integration is thus usually preceded by a con-

⁶⁶ For a compilation of different approaches see De Burca and Scott (eds), *Constitutional Change in the EU, From Uniformity to Flexibility* (Hart, 2000).

⁶⁷ For a summary of all types of differentiation see Tuytschaever (n 4) and Stubb (n 5).

⁶⁸ See, for example, Beaumont, Lyons and Walker (eds), *Convergence and Divergence in European Public Law* (Hart, 2002).

siderable disagreement between Member States. However, at the same time any practically viable proposal for differentiated integration also requires that these very same disagreeing Member States find substantial agreement on the facets of differentiation. In other words, *differentiated integration is necessary* when the differences are so great that no reasonable agreement can be found for all to continue following the same rules at the same pace, *but is only possible* when these deeply disagreeing Member States can agree on how to disagree.

The crux of the issue is thus whether Member States that cannot agree on co-operation in a particular field can agree to disagree (and how much) in that field while remaining part of the same overall structure. This is not an easy task, especially when disagreement is not so much due to certain objective reservations on the side of Member States, but stems from their subjective, usually strategic, economic or geo-political reckoning aimed at maximising their national interests. In such circumstances of strategic interest and power-play, it is hard to expect the Member States involved to be ready to take a risk and trade the *status quo* for a more uncertain differentiated regime, in which it is by no means clear for whose strategic benefit it would actually work, as it has not been tried out.

However, there is an additional dimension to what has just been said. For Member States to be able to make what sometimes seems an almost quantum leap from uniformity marked by disagreement to agreement on differentiation, they would need to possess appropriate guidance. They would require a roadmap allowing them to understand how to conduct their practices to implement differentiated integration to everyone's satisfaction. The task of providing one rests on the shoulders of the legal theory of European integration. However, this latter has so far failed to carry out its duty. It is a fact that differentiated integration has been significantly under-theorised.⁶⁹ A theory which would imbue the process as a whole with a sense of coherence has simply been missing. But in the absence of the theoretical imagination of the means for coping with differentiated integration, it is impossible to expect the latter to function in practice.

There is something in differentiated integration that has so far made it too hard a nut to be cracked by theory and even more by practice. This has to do, as Walker first noted,⁷⁰ with the kind of Europe that would emerge if differentiated integration were to be put in place. It would transform the existing bi-dimensional internal structure of integration, whereby one dimension is statist and the other supranational, into a

⁶⁹ Walker (n 13).

⁷⁰ Ibid 356.

multi-dimensional one. European integration would exist as a common whole composed of the Member States, a supranational level constituted by all the Member States, and then various other dimensions (levels) in which different Member States would participate in a different fashion to a different extent. To put this kind of monster into practice, it would require an institutional solution that achieved three things at the same time: enabling those Member States which would like to integrate further to do so, but without using their opportunity to the disadvantage of those which do not want to or cannot join them, while making sure that integration is preserved as a common whole. With all due fairness, none of the theories of European integration, especially not the dominant ones, are capable of offering a solution. All of them operate with a monistic mindset, which means that they see the world in binary terms and postulate order as their highest normative ideal. This is in stark contrast with the multi-dimensional thinking necessitated by differentiated integration, which requires transcending exclusive (as well as exclusionary) binary logic and accepting complexity, flexibility, and a more disordered type of order as a normal part of daily affairs and not as pathological occurrences.

Conclusion

In this light, it seems that objective prospects for re-launching the flexibility process, especially the third-order type of flexibility, remain rather gloomy. The main and decisive reason for this lies in our intellectual foundations. As heirs of the monistic mindset we lack the capacity to mastermind even viable theoretical models for multi-dimensional European integration, which makes the latter's practical realisation hardly possible. This means that in the light of the practical unavailability of differentiated integration, heterogeneity in European integration will have to be dealt with in other ways. First and second-order flexibility are at hand and have so far proven to be able to accommodate some diversity and eschew the majority of stalemates. The other option is to continue with the present politics of incrementalism and its ensuing package deals between Member States on the basis of *quid pro quo* incompletely theorised agreements.⁷¹

⁷¹ Avbelj (n 42). The expression "incompletely theorized agreement" was coined by CR Sunstein, 'Constitutional Agreements without Constitutional Theories' (2000) 13 *Ratio Iuris* 117-130. For the application of this approach within EU law see MP Maduro, 'Contractual Law: Europe's Constitutional Pluralism in Action' in Walker (ed), *Sovereignty in Transition* (Hart, 2003) 502. This means that the actors manage to strike an agreement on a particular outcome without agreeing about the theories and reasons underlying this outcome, since the latter is (usually) only possible after a short-term trade-off for some benefits in another domain of EU activities.

However, we believe that sooner or later these techniques will prove inadequate for European integration and a real move towards differentiated integration will be necessary. A clear need for this is emerging already now in the Europe of 27,⁷² but the need will become all the more pressing and a solution perhaps even indispensable ten years from now when all the countries of the Western Balkans could join, not to mention the rising Turkish star on the Eastern horizon. If we do not take any theoretical step forward soon, we will, much more so than today, be faced with a very annoying, if not disturbing, situation with potentially destabilising and unsettling effects for European integration whereby this latter will be in genuine need of flexible solutions, even those of a third order. However, we will be theoretically, and therefore *a fortiori* in practice, unable to come up with any workable and hence feasible models.

⁷² The French proposal for a Mediterranean Union, Polish pressure to find a privileged solution for Ukraine, etc.