

EUROPEAN COMMUNITY STUDIES ASSOCIATION 6th Biennial International Conference, Pittsburgh, June 1999.

**Title of paper:** "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?

**Author:** Stephen Weatherill, Jacques Delors Professor of European Community Law in the University of Oxford. Somerville College, Oxford, OX2 6HD, UK; stephen.weatherill@law.oxford.ac.uk.

**Panel: The Constitution of the European Union: From Uniformity to Flexibility.** *A version of this paper will be published in O'Keefe and Twomey, "Legal Issues of the Amsterdam Treaty", forthcoming.*

## INTRODUCTION

The provisions on "closer co-operation" introduced by the Treaty of Amsterdam are of major potential significance. They attempt to establish an EU framework within which new endeavours may be pursued by some, but not all, Member States of the Union. They are intimately connected with the quest to identify what is central to the Union's mission and accordingly deserving of protection from splinter groups.

The pursuit of "flexibility", as a general label capable of covering a multitude of arrangements<sup>1</sup>, was central to the debate that led to the Treaty of Amsterdam, although the word itself was ultimately abandoned as a term apt for the Treaty proper in part because of its drift towards imprecision through over-use. Nevertheless, notions of flexibility, now focused on the Treaty provisions on so-called closer co-operation, were viewed during the negotiations which travelled via the intergovernmental conference initiated in Turin in March 1996 to the Treaty agreed at Amsterdam in June 1997 and signed in October 1997<sup>2</sup> as an element in the re-shaping of the Union's structure in preparation for enlargement<sup>3</sup>. It was widely perceived that some progress had to be made towards liberating elements of decision-making from the impediments caused by an influx of economic laggards, joining a (less frequently remarked-upon) batch of current members displaying patchy enthusiasm for deeper integration, and that orthodox transitional periods, even built on top of the learning process initiated in the countries of Central and Eastern Europe on the collapse of the Soviet Empire, were insufficient to meet the scope of the challenge. The institutional aspects of that task were largely left unfulfilled at Amsterdam, as decisions on, for example, weighted voting in Council and reduction in the number of Commissioners were

---

<sup>1</sup> Stubb, "A Categorization of Differentiated Integration", 34 *JCMS* (1996), 283-295.

<sup>2</sup> See especially Edwards and Phillipart, "Flexibility and the Treaty of Amsterdam" CELS, Occasional Paper 3, (Cambridge, 1997) pp.6-12 and Annex I.

<sup>3</sup> It is put in this context by "Kortenbergh" (a pseudonym of a Community official), "Closer Cooperation in the Treaty of Amsterdam", 35 *CMLRev.* (1998), 833-854, at 835.

left for future resolution<sup>4</sup>. It is of profound interest to identify whether the success achieved in agreeing a text governing closer co-operation, signalling a type of differentiated integration, may truly be judged a valuable contribution to the process of laying foundations for the management of a Union boasting a membership of 20 or more States. Of still broader constitutional import, the new arrangements demand assessment from the perspective of their blatant assault on at least one cherished though perhaps exaggerated orthodoxy of EC law, its uniformity of application.

### ***THE LIMITS AND POSSIBILITIES OF CLOSER CO-OPERATION***

Closer co-operation is available under both the first pillar, the EC, and the third pillar, formerly Article K TEU dealing with Justice and Home Affairs, but, post-Amsterdam, converted into Title VI TEU, Provisions on Police and Judicial Co-operation in Criminal Matters. Although the issue was extensively debated in the negotiating phase, there is no parallel in the agreed text of the second pillar, dealing with common foreign and security policy, though the possibility of “constructive abstention” in the new Article 23(1) TEU, whereby an abstaining State may not be obliged to apply a decision while accepting that it binds the Union, may lead to functionally comparable results<sup>5</sup>. Under both first and third pillars, the pursuit of closer co-operation is subject to compliance with a “master provision” found in Articles 43 and 44 [ex K.15 and K.16] TEU. Article 43 provides

1. Member States which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and the Treaty establishing the European Community provided that the cooperation:
  - (a) is aimed at furthering the objectives<sup>4</sup> of the Union and at protecting and serving its interests;
  - (b) respects the principles of the said Treaties and the single institutional framework of the Union;
  - (c) is only used as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
  - (d) concerns at least a majority of Member States;
  - (e) does not affect the acquis communautaire and the measures adopted under the other provisions of the said Treaties;
  - (f) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
  - (g) is open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework;
  - (h) complies with the specific additional criteria laid down in Article 11 of

---

<sup>4</sup> Protocol on the Institutions with the Prospect of the Enlargement of the European Union, attached to the Amsterdam Treaty. See Blumann, “Aspects institutionnels”, 33 *RTDE* (1997), 721-749.

<sup>5</sup> Peers, “Common Foreign and Security Policy 1997”, 17 *YEL* (1997), 539-583 at 552-555; Kortenbergh *supra* n.3 at 853; Ehlermann, “Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty”, 4 *ELJ* (1998), 246-270 at 264-66.

the Treaty establishing the European Community and Article 40 of this Treaty, depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.

2. Member States shall apply, as far as they are concerned, the acts and decisions adopted for the implementation of the cooperation in which they participate. Member States not participating in such cooperation shall not impede the implementation thereof by the participating Member States.

According to Article 44 TEU, the relevant institutional provisions of the TEU and of the EC Treaty apply for the purposes of the adoption of the acts and decisions necessary for the implementation of this form of cooperation, subject to the modification that all members of the Council participate in the deliberations but that only those representing the willing closer co-operators take part in the adoption of decisions. The arithmetic of qualified majority is adjusted accordingly.

These provisions represent a first gateway. Further pre-conditions that must be satisfied before closer co-operation may proceed under the first (EC) pillar are contained in Article 11 [ex 5a] EC. In relation to “third pillar” closer co-operation in the area of Police & Judicial Co-operation in Criminal Matters, relevant criteria are found in Article 40 [ex K.12] TEU.

Article 11 EC provides

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles 43 and 44 of the Treaty on European Union, to make use of the institutions, procedures and mechanisms laid down by this Treaty, provided that the cooperation proposed:
  - (a) does not concern areas which fall within the exclusive competence of the Community;
  - (b) does not affect Community policies, actions or programmes;
  - (c) does not concern the citizenship of the Union or discriminate between nationals of Member States;
  - (d) remains within the limits of the powers conferred upon the Community by this Treaty; and
  - (e) does not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter.

Article 40 TEU is located in the re-named post-Amsterdam third pillar entitled “Provisions on Police and Judicial Co-operation in Criminal Matters”. This has surrendered some of its material scope to the EC while injecting some “third pillar” method into the relevant Title of the EC pillar while, in turn, itself being endowed with aspects of communautaire method which surpass the Maastricht settlement. Article 40 provides

1. Member States which intend to establish closer cooperation between themselves may be authorised, subject to Articles 43 and 44, to make use of the institutions, procedures and mechanisms laid down by the Treaties provided that the cooperation proposed:
  - (a) respects the powers of the European Community, and the objectives laid down by this Title;

- (b) has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice.

It is not within the scope of this paper to examine at length the procedures invented to manage entry to and conduct of areas subjected to closer co-operation by some but not all Member States. It is, however, of at least symbolic importance in understanding the sensitivity of this species of flexibility that the authorisation procedure resuscitates a control mechanism akin to the Luxembourg Compromise. The matter is reconsidered below in tracking the grip on planned closer co-operation held by non-participants.

### *AN ASSESSMENT LOADED WITH AMBIGUITY*

The appeal of this procedure lies in the promise of managed and non-exclusionary deepening of collaborative endeavour by most, but not all, member states. Variation occurs sector-by-sector, diminishing the risk of a generally applicable deep rift between hard core States and an outer rim. This promises a more functionally sophisticated distribution of involvement than would prevail in a model based on all-or-nothing participation in the core, which is the simple model of a “two-speed Europe” of groundbreakers and marginalised part-timers. It offers the prospect of less friction and division between the “ins” and the “outs”, because it is perfectly possible that different combinations of States will be in or out, depending on the subject matter in issue. And the groupings are not static, so the list of “outs” may diminish over time, although there is no assumption that all Member States will ultimately sign up for newly engineered closer co-operation. Admittedly, a price is paid for this deeper general engagement in co-operative ventures. An inevitable intransparency will flow from the kaleidoscope of sector-specific coalitions, the shape of which may in any event alter as new adherents choose to join particular clusters. This directs the debate towards the realms of multi-dimensional sources of authority in the Union, a plurality of legal orders which transcends the orthodox theoretical focus on States acting either individually or aggregated as a single Community/ Union of 15<sup>6</sup>. At a still more general level, the development of such novel methods of law-making in the Union confounds any attempt rigidly to compartmentalise Union law into an EC and a non-EC EU species<sup>7</sup>. This in turn points towards an increasingly complex multi-tiered system of law and policymaking under the umbrella of the European Union. Dynamic though these trends doubtless are, their shape is not easy to comprehend.

More specifically, the Amsterdam arrangements offer a more flexible, adaptable and planned dynamic than can be seen in, for example, the Social Policy arrangements struck at Maastricht, and killed off at Amsterdam<sup>8</sup>, which were overtly designed to solve a sector-

---

<sup>6</sup> See especially Walker, “Sovereignty and Differentiated Integration in the European Union”, 4 *ELJ* (1998), 355-388. See also, in advance of the invention of closer co-operation but usefully read in its light, MacCormick, “Beyond the Sovereign State”, 56 *MLR* (1993), 1-18.

<sup>7</sup> De Witte, “The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?”, Ch.3, pp.51-68 in Heukels, Blokker and Brus (eds), *The European Union after Amsterdam* (Kluwer Law International, 1998).

<sup>8</sup> Art. 2(58) Treaty of Amsterdam.

specific political disagreement and which were underpinned by no clear rationale other than surrender to British intransigence. The murky pre-Amsterdam Schengen pattern, legally ambiguous in its extra-EU netherworld, disturbingly intransparent and (relatively) under-supervised<sup>9</sup>, fares even worse when compared with the (relatively) clear shape for closer co-operation plotted at Amsterdam. "Flexibility", covering a multitude of devices, has a longer history in EC law than is commonly supposed<sup>10</sup>, but here now is a Treaty-based, constitutional formula which appears to offer a more-or-less concrete basis for adjudication of the acceptability of particular species of co-operation in replacement for breezier, abstract theorizing on the general credo of flexibility. This offers a tantalising reassurance to the EU constitutionalist that flexibility is capable of absorption into orthodoxy.

Moreover, the opportunity for advance (through some means) other than at the pace of the slowest members of the convoy seems especially vital in the light of the next load to be placed on the European Union system, enlargement to the East. In this sense, the provisions on closer co-operation could be regarded as part of the resolution of the debate about whether the widening of the Union will foreclose its deepening. Opportunities for closer co-operation among some but not all member states allow deepening to accompany widening, albeit at the (perhaps inevitable) price of abandoning the uniformity of application of the law.

That is the positive summary of closer co-operation as an instrument of flexibility crafted by the Treaty of Amsterdam. There is also a negative, or at least a cautious, side. It is envisaged that rules adopted within the EC system, using EC procedures and EC legal instruments, will bind some but not all Member States. It is clearly envisaged in Article 43(1)(g) that the closer co-operation "does not affect the competences, rights, obligations and interests of those Member States which do not participate therein" which presumably can only be taken to mean that what constitutes a form of binding Community law for some Member States is not of such a character for other States, the non-participants. This does not seem to be forbidden discrimination under the new provisions, as long as within each State treatment is equal according to nationality. There is no question of all States pursuing the same end, albeit at different speeds, on the model of transitional periods. Whole chunks of joint endeavour may become the preserve of a particular group only. How savage the assault on cherished principles of EC law launched by the provisions on closer co-operation should be reckoned and whether the advantages for freeing up sector-specific advance outweigh the costs of concession to uniformity may depend on the observer's perception of the necessary scope of

---

<sup>9</sup> See e.g. Curtin and Meijers, "The principle of open government in Schengen and the European Union: Democratic retrogression?", 32 *CMLRev* (1995), 391-442.

<sup>10</sup> Usher, "Variable Geometry or Concentric Circles: Patterns for the European Union", 46 *ICLQ* (1997), 243-273. Also Edwards and Philippart *supra* n.2; Ehlermann, *supra* n.5; Walker *supra* n.6; Stubb *supra* n.1. For an early exploration, see Ehlermann, "How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds", 82 *Michigan Law Rev* (1984), 1274-1293.

“uniformity” in EC law<sup>11</sup>. It should not be neglected that the system’s geographical and functional expansion in recent years has generated tensions that have been partially resolved by recourse to methods inimical to uniformity as normally conceived<sup>12</sup>. In that light, the novelty of the Amsterdam provisions should not be exaggerated, especially when the groundbreaking Maastricht examples of social policy and economic and monetary union are recalled (though recognition of repetition of sorts is not necessarily a basis for approval). It is also significant that the inapplicability of provisions as EC law in some Member States also characterises the complex arrangements for developing an area of freedom, security and justice within which the free movement of persons may be assured, now found in Title IV of the EC Treaty but modified by associated Protocols to the Amsterdam Treaty. This provides for sector-specific flexibility which caters for hesitations about eliminating barriers to personal mobility felt by the UK and Ireland, on the one hand, and Denmark, on the other, where, illuminatingly, each State had rather different anxieties and impulses<sup>13</sup>. However, at least it can be conceded that the construction of a closer co-operation framework within which as yet unseen forms of fragmented activity involving unspecified participants may be developed within the Union demands careful appraisal lest it tip the system lurching towards irremediable fracture. It is, for sure, a quite different challenge from that of transitional periods. It even transcends opt-outs where the scope of rights and obligations are defined in primary Community law, such as the Protocol-plus-Agreement in the case of Maastricht social policy in which, in any event, the identity of the unwilling State was already fixed.

### *IMAGINING ARENAS OF CLOSER CO-OPERATION*

It is difficult to envisage that the criteria for closer co-operation will be met with any degree of frequency, especially within the first (EC) pillar. The first striking aspect to the criteria written into the Treaty is their negative flavour. They stipulate a great many things that cannot be done through engagement with the new provisions on closer co-operation. This is doubtless indicative of nervousness that the legal order may be tipped towards indecipherable fragmentation. “Flexibility” in the application of EU law may be motivated by many

---

<sup>11</sup> E.g. Constantinesco writes that Article 11 EC “marque donc l’entree, dans le droit originaire, de ce bouleversement de certains de ses principes fondamentaux les mieux etablis” (“Les clauses de cooperation renforcee”, 33 *RTDE* (1997), 751-767, 754); for Ehlermann *supra* n.5 at 257 the price paid is not “too high”. Lawyers certainly differ in their evaluation of the adaptability of the systems; political science may add further nuance. Cf the famous critique of the Maastricht Treaty by Curtin, “The Constitutional Structure of the Union: a Europe of Bits and Pieces”, 30 *CMLRev.* (1993), 17-69.

<sup>12</sup> See *supra* n.10; also Weatherill, *Law and Integration in the European Union* (OUP, 1995), Ch.5; and on perceived trends towards “disintegration”, see Shaw, “European legal studies in crisis? Towards a new dynamic”, 16 *OxJLS* (1996), 231-253.

<sup>13</sup> In general on the new provisions, see Weatherill and Beaumont, *EU Law*, 3rd ed. (Penguin Books, 1999), 647-663. Specifically on the background to the Protocols, see Kortenberg *supra* n.3 at 836-843.

concerns, including political disagreement with the majority's preferred path<sup>14</sup>, objectively grounded economic variation<sup>15</sup>, basic facts of physical geography<sup>16</sup> and even naked demands for uniquely favourable treatment<sup>17</sup>, and it seems that the Amsterdam provisions on closer co-operation are designed to impose severe restraints on all forms, irrespective of motivation or pattern. To pick at the bones of the provisions, there is a rather odd mix of statements of the blindingly constitutionally obvious, such as the direction that closer co-operation in the EC pillar shall "not concern areas which fall within the exclusive competence of the Community", and those which impose rather opaque but apparently very high hurdles. It is not permitted that closer co-operation shall "affect" Community policies, actions or programmes (Article 11(1)(b) EC); but what really does not so affect such a weighty bundle, which may even be taken to contain not only formally binding but also soft law? Nor may closer co-operation affect the competences, rights, obligations and interests of those Member States which do not participate therein (Article 43 TEU). But the evolved patterns of mutual interdependence among the Member States make it implausible that closer co-operation between some will not "affect" the others to some extent. The provisions appear to be based on assumptions of a static relationship between policy sectors, which is entirely at odds with the historically documented development of a Community which has enjoyed a steady expansion in the impact of its regulatory activity.<sup>18</sup> This scepticism about the opportunities for carving out areas of closer co-operation unmarked by spillover into other areas finds topical echoes in the Commission's questionable assumption that the process of EU enlargement can be pursued by emphasising as a first priority embrace of some (internal market dominated) areas of the *acquis* in preference to areas of common regulation which can be left over for subsequent absorption<sup>19</sup>; and, wider still, the role of regulatory standards and their intimate relationship to trade integration is of direct relevance to the evolving patterns of international economic law.

---

<sup>14</sup> E.g., at Maastricht, the UK's approach to social policy and that of the UK and Denmark to EMU, third stage.

<sup>15</sup> E.g. the EMU convergence criteria.

<sup>16</sup> E.g. the UK's stance on border controls, although of course the claim to "real" physical frontiers tells by no means the full story not least because the UK is not an island. See also Art. 299(2) [ex 227(2)] EC.

<sup>17</sup> E.g. the Protocol on the Acquisition of Property in Denmark ("Second Homes"), attached to the Maastricht Treaty.

<sup>18</sup> For the classic exposition see Weiler, "The Transformation of Europe", 100 *Yale LJ* (1991), 2403-2483. See also Weatherill, "On the depth and breadth of European integration", 17 *OxJLS* (1997), 537-55, for criticism of a previous version of "flexibility", based around a hard core, proposed in Dewatripont et al (eds), *Flexible Integration - Towards a More Effective and Democratic Europe* (Centre for Economic Policy Research, 1995). In a sense, the Amsterdam provisions adhere to the basic shape of the Dewatripont model, but the "hard core" is nothing less than the entirety of the *acquis communautaire*.

<sup>19</sup> Agenda 2000, "For a stronger and wider Union", Supplement 5/97 - Bull. EU, esp. p.52.

Other threshold criteria loom equally forbiddingly. What does not constitute a discrimination or a restriction of trade between Member States and - in particular - what does not “distort the conditions of competition between the [Member States]”, which is not permitted according to Article 11(1)(e) EC? The reference to distortion recalls the power found in Article 96 [ex 101] EC to legislate in the face of differences between national provisions that are “distorting the conditions of competition in the common market”, but, more pertinent still, it is not difficult to discover harmonisation measures adopted under Articles 94 and 95 [ex 100 and 100a] EC which are motivated by the declared concern that distortive consequences flow from diversity between national laws. Article 94 is explicitly focused on the approximation of national provisions that “directly affect the establishment or functioning of the common market”; Article 95 targets measures that “have as their object the establishment and functioning of the internal market”. But the terminology of distortion of competition caused by disparity between national laws underpins individual measures. For example, “differences in the conditions of competition which directly affect the operation of the common market are caused by disparities between national rules on quality of water for human consumption”, according to the Preamble to Directive 80/778<sup>20</sup> which proceeds to rely on (what were, pre-Amsterdam) Articles 100 and 235 as the basis for Community intervention in the field. Directive 80/779 declares that “unequal conditions of competition” flow from discrepancies between national laws governing air quality limits for sulphur dioxide<sup>21</sup>, and relies on Articles 100 and 235 in establishing Community legislative standards. Further examples of the association between the language of distortion of competition and disparity between national laws may be tracked in Directive 87/102 on consumer credit<sup>22</sup> and Directive 90/314 on package travel<sup>23</sup>. Legislative practice reflecting the functional breadth of the harmonisation programme far exceeds this pocket of illustrations<sup>24</sup>, and it is more than a mere historical curiosity. The special status of the Directives made under the Agreement annexed to the Maastricht Protocol on Social Policy was obliterated by the use of Article 100, now 94, EC as a convenient device to amend them in order to extend their impact to the United Kingdom after the change of government in the United Kingdom in May 1997 removed the basic political objections to such measures. The Directives adopted to bring the UK on board the (small<sup>25</sup>) raft of measures adopted under the Maastricht arrangements for enhanced social policy making assert in their Preamble that the UK’s exclusion directly

---

<sup>20</sup> O.J. 1980, L229/11.

<sup>21</sup> O.J. 1980, L229/30.

<sup>22</sup> O.J. 1987, L42/48, made under Art.100.

<sup>23</sup> O.J. 1990, L158/59, made under Art.100a.

<sup>24</sup> On other Directives in the consumer field adopted under (what were) Arts.100/100a see, Weatherill, *EC Consumer Law and Policy* (Longman, 1997); in the environmental sphere see Scott, *EC Environmental Law* (Longman, 1998). And see Weatherill and Beaumont *supra* n.13, Ch.28.

<sup>25</sup> McGlynn, “An Exercise in Futility: The Practical Effects of the Social Policy Opt-Out”, 49 *NILQ* (1998), 60-73.



affects the functioning of the market and that accordingly Article 100 may be relied on as the basis for a measure extending the relevant obligations to the United Kingdom. For example, Directive 94/45 on European Works Councils<sup>26</sup> was extended to include the UK by Directive 97/74<sup>27</sup>, based on Article 100, which states that “the fact that Directive 94/45 is not applicable in the United Kingdom directly affects the functioning of the internal market”<sup>28</sup>.

So, one may ask, what does not distort conditions of competition? If these examples are taken at face value and transplanted to the provisions on closer co-operation, then the exclusion of a minority of Member States from at least some forms of co-operation pursued by the majority may be assumed to distort conditions of competition between the Member States, which debars pursuit of such co-operation in conformity with Article 11 EC. Admittedly, there is some risk here of contextual error. Much of this history is conditioned by unanimous voting which is the rule in Council for measures based on Article 100 (and, in fact, the normal practice under Article 100a despite the availability of recourse to qualified majority) which robs the constitutional principle of attributed competences of much of its practical vitality. The excuses made in camouflaging political desire to make things happen at Community level with the constitutionally capacious cloak of harmonisation under Articles 100/100a relate in part to the inadequacies of the Treaty in providing a basis for action in the fields of environmental policy, consumer protection and social policy. These are all areas which have been renovated at times of periodic Treaty revision, but pending such elaboration harmonisation has frequently provided a politically safe harbour for legislative ambition at EC level. A unanimous Council was typically prepared to pay mere lip-service to the constraints built into the Treaty<sup>29</sup>. Such a political context will not necessarily today condition the interpretation of Article 11(a)(1)(e) EC. This background dictates that analogies between stated rationales for harmonisation and the criteria laid down in the new Article 11 may mislead, but embedded deep within legal reasoning is the manipulation of context, and historical representations of the breadth of the notion of distortion of competition may come to be relied on to provide constitutional ammunition for opponents of a particular form of proposed closer co-operation.

This leaves elusive the question of what actually can be done in the name of closer co-

---

<sup>26</sup> O.J. 1994, L254/64.

<sup>27</sup> O.J. 1998, L10/22.

<sup>28</sup> See also Directive 97/80 on the burden of proof in sex discrimination cases OJ 1998 L14/6, extended to the UK by Directive 98/52 O.J. 1998, L205/66; Directive 97/81 on the framework agreement on part-time work O.J. 1998, L14/9, extended to the UK by Directive 98/23 O.J. 1998, L131/10; Directive 96/34 on the framework agreement reached by the social partners on parental leave O.J. 1996, L145/4, extended to the UK by Directive 97/75 O.J. 1998, L10/24.

<sup>29</sup> Since Article 95 (ex 100a) requires only a qualified majority vote in Council, politically defeated States have begun to explore the possibility of legal challenge to the majority’s claim to EC competence under that provision; see, e.g., Germany’s challenge in Case C-376/98 (pending) to the validity of Directive 98/43 on advertising and sponsorship of tobacco products, O.J. 1998, L213/9.

operation, notwithstanding the heavy negative emphasis embedded within the criteria. There is no explicit suggestion in the Treaty. Langrish has proposed as projects capable of complying with the conditions “further integration in areas such as culture, education or public health so long as any benefits or schemes established were open to all Union citizens.”<sup>30</sup> It is probably correct that co-operation in such areas would be sufficiently remote from the central concern to insulate trade patterns from disturbance by closer co-operation among some but not all Member States to escape condemnation as an interruption to Community policies, actions or programmes, which must not be “affected”, according to Article 5a (ex 11) or as constituting “a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter”, as forbidden by the same provision. Moreover, the relative paucity of secondary legislation in these fields, within the harmonisation programme especially, seems to optimize the chances for smoothing the path to permissible closer co-operation. However, the type of projects that might be foreseen as candidates would be necessarily limited in their scope. There is more relevant EC legal material in these fields than may initially be supposed and this may hem in opportunities for closer co-operation. Closer co-operation in culture, for example, would have to avoid trespassing on the *acquis* as it affects intellectual property rights, which would rule out potentially appealing methods for inducing cultural growth such as an offer of relatively more generous copyright protection. Other plans relating to, for example, restrictions on movement of art treasures would be forced to tread a wary line around the demands of the law of product and service market integration under Articles 28 and 49 EC. Even if space for such closer co-operation in culture, education or public health could be imagined, the necessary element of general access to the benefits created for the enjoyment of all Union citizens, which is recognised by Langrish and which secures compliance with Article 11(1)(c)’s<sup>31</sup> insistence on absence of discrimination, diminishes the attraction of such arrangements. It is a charter for free-riders.

In fact, in accordance with the general impression that these provisions are not easily complied with, it is a demanding task to imagine patterns that would fit the criteria (and be worthwhile for the participants)<sup>31</sup>. For example, what about stricter environmental standards devised by some but not all Member States and expressed in a Community legislative act made in accordance with Article 175 [ex 130s] and adopted with the authorization of the duly triggered provisions on closer co-operation? These would be robbed of much of their point if they could not be applied to goods or services directed at the territory of the participating States from the territory of non-participant EU members. Costs would be born locally alone, yet benefits undermined. But is it permissible for the closer co-operators to maintain trade barriers in order to achieve their anti-pollution ends? Plainly not, if the criteria are taken at

---

<sup>30</sup> Langrish, “The Treaty of Amsterdam: Selected Highlights”, 23 *ELRev.* (1998), 3-19.

<sup>31</sup> Most commentators take the trouble to emphasise the narrow scope of permissible closer co-operation. See, e.g., Constantinesco *supra* n.11; Shaw, “The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy”, 4 *ELJ* (1998), 63-86; Gaja, “How flexible is flexibility under the Amsterdam Treaty?”, 35 *CMLRev.* (1998), 855-870; Favret, “Le Traite d’Amsterdam: une revision a minima de la Charte constitutionnelle de l’Union europeenne”, 33 *CDE* (1997), 555-605, at 595-600; Ehlermann, “Engere Zusammenarbeit nach dem Amsterdamer Vertrag: Ein neues Verfassungsprinzip?”, 32 *EuR* (1997), 362-397; Edwards and Philippart *supra* n.2.

face value, for such interventions would naturally affect Community policies (on the internal market) and would restrict trade between Member States (that indeed would be the avowed purpose); moreover, they would seem to “affect the competences, rights, obligations and interests of those Member States which do not participate” in the co-operation which is forbidden by the master provision in the TEU, Article 43(1)(f). The question then arises whether there should be read into the criteria a possibility of justification - a “rule of reason” which serves as a general principle of interpretation that softens the impact of Community rules across the whole sweep of Community activity, most prominently Articles 28, 49 and 81, weakening the plain words of a prohibition<sup>32</sup>. That is, if one State would be permitted to impede trade in pursuit of the superior (*in casu*) interest in environmental protection, as the Court has admitted is possible in the post-Cassis de Dijon case law dealing with trade barriers emerging as a result of environmentalism<sup>33</sup>, should such permission also be extended to a group of States acting under the provisions on closer co-operation? It might seem counter-intuitive to deny to a group of States regulatory opportunities available to a single State, unless the response is that market-fragmentation perpetrated by a single State is less hurtful to integration. But that would be an unduly trade-focused perspective which would neglect the EC’s steady accumulation of involvement in regulatory activities (its own and those of the Member States) including those pertaining to the environment; and which, moreover, would contradict the potency of the Querschnittsklausel on environmental protection introduced into the Treaty at Amsterdam by Article 6 [ex 3c] EC. What is more, even Community legislation “proper” governing environmental protection may impose prohibitions on the use or marketing of goods, and the Court has upheld the validity of such nuanced measures<sup>34</sup>. It is submitted that the Treaty provisions on closer co-operation could and should be interpreted in a parallel manner, in a way which reflects the modern multi-functional Community in which adjustments in competence allocation between the Community and its Member States seem increasingly to provide the key to reconciliation of competing interests of market integration and market regulation. The rigidity of the text may reflect an understandable fear of fragmentation loosened by a proliferation of closer co-operation, but read in a literal fashion, the provisions impose restrictions that are so tight as to choke off most, if not all, avenues of closer co-operation. In order to make the provisions operational, it is necessary to soften the criteria, for example by reading the prohibitions against affecting the acquis, the interests of non-participants and Community policies as prohibitions against any adverse effect. This would open up possibilities for evaluating the benefits of closer co-operation even in fields apparently hemmed in by threads of Community activity.

### *CONSERVING CONSTITUTIONALISM*

The reasons for the negative controls over the permissible deployment of the innovative provisions governing closer co-operation can be appreciated by separating the elements which must be satisfied before the provisions on closer co-operation may permissibly be invoked

---

<sup>32</sup> Cf AG van Themaat's Opinion in Case 286/81, Oosthoek, [1982] ECR 4575.

<sup>33</sup> E.g. Case 302/86, Commission v Denmark, [1988] ECR 4607; see Weatherill and Beaumont *supra* n.13, pp.588-594.

<sup>34</sup> Case C-284/95 Safety Hi-Tech Srl v S. And T. Srl [1998] ECR I-4301.

into three distinct types (although there is some overlap). There are those that protect the interests of the Community or Union; there are those that protect the substantive interests of non-participants; and there are those that protect the procedural and/or potential participatory interests of the non-participants. In this sense, the Treaty provisions nod respect to both “constitutionalising” and “conservatory” aspects of the Community or Union system<sup>35</sup>.

The master provision, Article 43 TEU, limits closer co-operation to that which is aimed at furthering the objectives of the Union and at protecting and serving its interests; which respects the principles of the said Treaties and the single institutional framework of the Union; which does not affect the acquis communautaire and the measures adopted under the other provisions of the said Treaties. Within the EC pillar as such, Article 11 EC provides that co-operation shall not concern areas which fall within the exclusive competence of the Community; must not affect Community policies, actions or programmes; must not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter. These conditions might also be analysed as protective of non-participating Member States, in so far as they have an interest (shared by participants) in sustaining the integrity of the Community/ Union as whole. But there are also specific criteria which deal with States on the outside looking in. Article 43 TEU insists that closer co-operation must not “affect the competences, rights, obligations and interests of those Member States which do not participate therein”. Article 11 EC provides that closer-cooperation in the EC pillar must not “concern the citizenship of the Union or discriminate between nationals of Member States”. The procedures for approving use of the provisions governing closer co-operation also contain protection for the voluntarily excluded minority. Article 11(2) EC allows control over the authorisation of closer co-operation via the ability of a member of the Council to declare that, “for important and stated reasons of national policy”, it intends to oppose the granting of an authorisation by qualified majority. This may lead to a default setting of referral by qualified majority vote to the Council, meeting in the composition of the Heads of State or Government, for decision by unanimity. Article 40 TEU provides for a similar possibility, with the ultimate power to decide by unanimity resting in the hands of the European Council. To this extent, a doggedly opposed State holds a veto, although it is initially required to state reasons for its opposition. Jitters about the resurgence of this cousin of the Luxembourg “Accords”, albeit in formal legal rather than shadowy political form, are understandable and, more than most issues, the place of such a device as an established precedent serving as a model in future plans for Treaty revision will demand attention. Undoubtedly the employment of this device as a gateway is designed to protect the interests of non-participants and is emblematic of the caution associated with these new procedures. They are remote from orthodox “constitutionalised” norms within the EC system. It is furthermore specifically provided in Article 43 TEU, the master provision, that closer co-operation shall be “open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework”. Procedures are elaborated (in slightly different ways) in the relevant provisions in the first and third pillars. So the gates to closer co-operation are only opened provided no State is prepared to block use of the procedure; and the gates stay

---

<sup>35</sup> On this dichotomy, see Dashwood, “States in the European Union”, 23 *ELRev.* (1998), 201-216.

open indefinitely even for excluded States. To stand aloof from closer co-operation is not a terminal disease. This maximises connections between the acquis as normally understood, binding all 15 States, and the structures established to allow closer co-operation. It is probable that non-participants will pay close attention to patterns of closer co-operation as they evolve in order to grab the most opportune moment to join. Moreover, the availability of later accession may prove a useful inducement to States preferring not to participate initially not to block others from doing so. The adaptability of this system contrasts with the social policy arrangements fashioned at the eleventh hour in Maastricht in order to insulate the British from the greater ambitions in the field of the other Member States, which omitted any agreed method for hoisting the British back aboard and which therefore required elimination by a formal amendment to the Treaty. At the very least, the availability of the new avenues cut for closer co-operation alter the context of the political debate between the enthusiasts for new forms of integration and those displaying greater hesitancy by providing the former group with new bargaining chips.

### ***FLEXIBILITY WITHIN OR OUTWITH THE NEW ARRANGEMENTS***

Article 43 TEU, the master provision, underlines the exceptional nature of the provisions on closer co-operation, and the absence of any intention to allow them readily to usurp orthodox method. One can envisage that the new arrangements will not exhaust the interest of Member States in devising new patterns of flexible collaboration. The less that groups of States are able to do - or wish to do - under Treaty-based closer co-operation, the more they are likely to concoct yet further forms of flexibility. Even if criteria in Article 11 EC forbidding, for example, an effect on Community policies or a distortion of competition are themselves read flexibly, forms of co-operation will be excluded from elaboration under the structure of "closer co-operation". A simple example: closer co-operation must concern at least a majority of Member States, which is presumably designed to rule out unduly small splinters, where the advantages of niche co-operation would be regarded as too small to justify the disadvantages. But any arrangements that are initially capable of attracting no more than seven States will have to look outside the system invented at Amsterdam for their shape. It may emerge that the new provisions on closer co-operation are inapt to meet the aspirations of (some of) the Member States, with the result that à la carte co-operation occurs anyway, within the scope of Union competence but employing procedures other than those foreseen even by the renovated Treaty. The Amsterdam Treaty does not seem to exclude such novelties, for the wording of the provisions on closer co-operation are clearly no more than permissive<sup>36</sup>. The ability of would-be closer co-operators to find some way to achieve their aspirations, even if baulked in an attempt to formalise "Amsterdam closer co-operation", also conditions the practical value of the veto conferred on non-participants.

However, neglect of the new provisions would defeat (part of) the point of formalising the patterns of co-operation. Schengen provides a powerful illustration of the alarming features of intransparency and dearth of effective supervision which attach to systems which accept the need for transnational decision-making but which assume the viability of national-level

---

<sup>36</sup> Art.43(1) (ex K.15(1)). See Gaja *supra* n.31 at 869.

political and judicial scrutiny of those decisions<sup>37</sup>. Extra-Treaty arrangements operating as binding rules under public international law are required as a matter of EC law principle, specifically that located in Article 10 [ex 5], to comply with EC norms in so far as they touch fields within which the EC is competent<sup>38</sup>, but effective supervision is diminished once the EU arena is left behind. Minimising recourse to such murky, extra-EU models is a worthy ambition. Consequently, a further element in the argument in favour of a flexible reading of the criteria that must be complied with by closer co-operators is supplied by the desire to maximise the use made of the new and relatively clearly-shaped structures of closer co-operation under the EU's roof.

The assumption is woven through the fabric of this essay that the gateway to closer co-operation appears narrow, but that the criteria in the Treaty should be applied in a rather pliable manner in order to offer opportunities for life to be breathed into the new provisions. Naturally, the institutional context is relevant. An effect of establishing a control mechanism heavily dependent on consensus among the Member States is likely to be to forestall any direct challenge before the European Court to planned closer co-operation. The embrace of the new type of veto found in both first and third pillars is testimony to the anxiety of Member States to retain a direct control over the latent fragmentary trends embedded within the pattern of majority closer co-operation. But the future elaboration of a political reading of the nature of the criteria governing closer co-operation, though doubtless a highly significant product of dialogue between the Member States, cannot foreclose a more specifically legal involvement. The criteria are apt for judicial interpretation<sup>39</sup> and, although one would not anticipate the Court to adopt an intensive standard of review if asked to check the validity of arrangements for closer co-operation<sup>40</sup>, any such litigation will propel it, as so often, into a pivotal position in the adjudication of the scope and limitations of EU legal method.

### ***THE HESITANT NATURE OF CLOSER CO-OPERATION***

An unpredictable dynamic is at work. The EU's exposure to manifestations of flexibility such as those which characterised social policy from Maastricht to Amsterdam and those which attend the EMU project doubtless concentrated minds in the pre-Amsterdam IGC on the need for provisions on "closer co-operation". But disquiet about its possible directions generated rigid substantive conditions, combined with procedural brakes including a form of veto, with the result that the overall package displays fiercely protective instincts about the whole sweep

---

<sup>37</sup> E.g. Curtin and Meijers *supra* n.9.

<sup>38</sup> E.g. Case 44/84, *Hurd v Jones*, [1986] ECR 29.

<sup>39</sup> Art. 46 [ex L] TEU.

<sup>40</sup> Cf the cautious approach taken in Case C-84/94, *UK v Council* [1996] ECR I-5755, a case motivated by anxieties about the perceived over-extension of Treaty provisions demanding only a QMV in Council which are comparable to those mentioned *supra* n.29, albeit in relation to (what was then) Art.118a rather than Art.100a. See also De Burca, "The principle of subsidiarity and the Court of Justice as an Institutional Actor", 36 *JCMS* (1998) 217-236.

of the EU's politically and judicially generated achievement thus far and firmly rejects the extreme version of an la carte Europe associated during the 1990s with John Major. Yet application of these procedures according to their severe textual rigour will breed frustration and tend to drive co-operation outside the EU structure. This suggests that in individual cases they will not be applied rigidly - nor, in my submission, should they be (for reasons stated above). Put another way, the Amsterdam criteria betray a nervous concern to infuse the new provisions with the spirit of the EC's institutional, constitutional and substantive structure and, indeed, to anchor them into EC method, but to exercise a control based on denial that activity taken in their name shall affect the acquis. Inspection of this quest invites the response that it is fruitless - that the Member States are trying to have it both ways!

In this respect, "closer co-operation" fits within a broader post-Single European Act narrative. Expansion of the EC's competence coupled to the rise of qualified majority voting in Council has been accompanied by subtle exertion of control by the Member States over the way in which that competence is exercised, in particular its constitutional impact on residual national competence in the field. As Reich observed, "[T]he more competences the Community is acquiring, the less exclusive will be its jurisdiction" <sup>41</sup>. Generally, these trends may be grouped around the perception that Community intervention should no longer be taken to exclude a role for national action in that field even though such shared involvement may compromise uniformity across the EC's territory. Article 95(4)-(9) [ex 100a(4), but amplified by the Amsterdam Treaty] and the technique of minimum harmonisation represent examples of such adjustment in the arena of harmonisation; so too specific opt-outs and derogations in secondary legislation. Moreover, in some areas the scope of Community intervention is explicitly confined by the Treaty. In the field of culture, for example, harmonisation is placed off the EC's limits by Article 151 [ex 128] and, instead, the Community is invited to support and supplement its Member States. Yet more decisive breaks with expectations of uniformity are found in the opt-outs allowed to dissentients in the fields of social policy and monetary union at Maastricht. Trends towards the decline of exclusivity claimed through Community legislative action, and associated challenges to the notion of a uniformly applicable legal order, may be tracked throughout the Amsterdam Treaty, which is strongly spiced by features associated with "flexibility", for example those in Title IV of the EC Treaty governing the geographically fragmented area of freedom, security and justice, which may be traced back to absence of consensus about the scope of action to be taken in common <sup>42</sup>. Closer co-operation is emblematic of these trends; perhaps even a further step down this road. The widening of action in these circumstances will, for some (minority) member states, result in no surrender of competence at all, let alone merely the loss of a right to depress standards surrendered in a regime such as that envisaged by minimum harmonisation. Space for diversity is preserved.

---

<sup>41</sup> Reich, "Competition between Legal Orders: A New Paradigm of EC Law", 29 *CMLRev* (1992) 861-896, 895.

<sup>42</sup> See discussion by Usher, "Flexibility and Enhanced Cooperation", Ch.14, pp.253-271 in Heukels, Blokker and Brus *supra* n.7; Devuyt, "Treaty reform in the European Union: the Amsterdam process", 5 *JEPP* (1998), 615-631,

Nonetheless, it is one thing to accept that the days of common rules for a common market lie in the past, reflecting the relative simplicity of a smallish number of more-or-less economically homogenous countries pursuing an agenda of trade integration narrowly conceived; it is another thing to admit that these provisions are the correct method for responding to pressures for a more diversified Europe. True, the provisions on closer co-operation tend away from the model of concentric circles, in which a hard core is permanently privileged over the more peripheral participants, but the preferred pattern tends closer to chaotically-arranged circles strewn around the EU core, enclosing different sets of states dependent on the policy sector in question. Objection cannot sensibly be taken to the principle of constitutional re-distribution of power in a Union lately marked by increasing geographical and functional expansion, but peril lies in the possibility that practice may escape effective democratic control. The flexibility debate is therefore intimately associated with that surrounding legitimacy<sup>43</sup>. Anxiety about the destabilising impact of increasing intransparency and accelerating fragmentation under the appealing name of flexibility is real. Closer co-operation has some potential as a means of breaking the stale debate conducted in the name of subsidiarity about whether national- or Community-level action is apt for a particular sector, for, in so far as the rigorous criteria are satisfied, closer co-operation offers a mid-way solution. But where does the multiplicity of such layers of overlapping political authority leave the viability of notions of building beyond the national demos in order to invigorate fresh forms of European constitutionalism<sup>44</sup>? A proliferation of units of closer co-operation would do little for the intelligibility of the Union, and could ultimately jeopardise its stability.

“Closer co-operation” under the Amsterdam Treaty has much in common with subsidiarity under the Maastricht Treaty. The parallel use of the undefined notion of areas of exclusive Community competence, from which the application of both notions is excluded, provides a semantic hint of a broader phenomenon of delicate evasion of precision. The apparent lack of operational utility and the puzzlement felt by many lawyers should not deflect attention from the point that both closer co-operation and subsidiarity are expressions of political mood about directions taken and to be taken by the Union. But they are not easily - and perhaps not usefully - pinned down. Commissioner Oreja observed that “...[T]he more we define subsidiarity, and the more we define the limits between the EU and the Member States, the more we distance ourselves from the very idea of subsidiarity, which is based on the idea of constant evaluation of how a choice made at one level or another affects the common good. Laying down strict rules for subsidiarity would negate its very essence”<sup>45</sup>. This tension between dynamism and flexibility on the one hand and definitions and rigidity on the other also informs the debate about closer co-operation. Anchoring the pre-conditions for permissible closer co-operation into the Treaty is liable to defeat the need for a responsive system able to perform unforeseen tasks by crafting novel forms of co-operation. From this perspective, the Treaty provisions are best treated as a framework within which decisions are

---

<sup>43</sup> See especially Shaw *supra* n.31.

<sup>44</sup> Weiler, “The Reformation of European Constitutionalism, pp.9-40 in Kreuzer, Scheuing and Sieber (eds), *Die Europaisierung der mitgliedstaatlichen Rechtsordnungen in der Europaischen Union* (Nomos, 1997).

<sup>45</sup> Newsletter, 28 September 1998.



to be taken and which asserts a basis for protecting the strengths of the evolved system, but the need for awareness of changing needs must inform the operation of the system as it evolves. In fact, closer co-operation is properly seen as merely one feature of musing about flexibility. Mary Robinson, former President of Ireland, observed that "the chief advantage of [subsidiarity] seems to be its capacity to mean all things to all interested parties - simultaneously"<sup>46</sup>. One may readily substitute the word "flexibility" for "subsidiarity" in this quote and retain a perceptive insight into the rolling political process which has generated a vast debate about the nature and purpose of the Union and its legal order under the labels of first subsidiarity and now flexibility. But it would not be possible to replace subsidiarity with "closer co-operation" in Robinson's comment. The meaning of closer co-operation is tied to the relevant Treaty provisions and although it has been explained in this paper that there is room for debate about their meaning, the result is that the technical legal debate about closer co-operation has become only one aspect of a broader political debate about flexibility. So, for example, flexibility as a general notion, unlike subsidiarity and unlike Union citizenship, has not been offered to the Court as part of EU legal currency. In this sense, the provisions on closer co-operation are only part of the trends associated with flexibility and their technical legal meaning may turn out to be of transient interest only. The provisions on closer co-operation are merely the lawyer's tip of the iceberg of flexibility, laden with an anxiety that drift away from common rules towards differentiation may ultimately fatally undermine the core constitutional features of the system.

***"IF I'D WANTED YOU TO UNDERSTAND I WOULD HAVE EXPLAINED IT BETTER"***<sup>47</sup>.

The words of Johan Cruyff, one of the most famous of all Amsterdammers, were directed at baffled journalists searching for meaning in the great footballer's cryptic observations. But they have resonance for those inquiring into the intent of the Member States over the period in which the Amsterdam Treaty was pieced together. The provisions on closer co-operation typify the opaque nature of the process and the worrying dearth of "better" explanation.

The high hurdles that must be crossed before "Amsterdam closer co-operation" may proceed betray a profound anxiety that flexibility may subside into fragmentation. "Flexibility" - in the wide sense - is part of the fiendishly complicated process of addressing, circumventing and hiding from political obstacles to the expansion of the institutional, constitutional and substantive shape of the European Union's legal order. The new provisions are part of an attempt to develop the debate. One must expect close attention to be paid to the experiment of closer co-operation next time Treaty revision reaches the Union's agenda, for the provisions on closer co-operation sit at the eye of the constitutional storm over the extent to which a core mission can be sustained by uniformly applicable rules under the pressures of geographical and functional expansion in the Union. The Amsterdam provisions can be no more than a first

---

<sup>46</sup> "Constitutional Shifts in Europe and the United States: Learning from Each Other", 32 *Stanford Jnl Intl L* (1996) 1-12, 10.

<sup>47</sup> Johan Cruyff, quoted in Barend and Van Dorp (transl. Winner and Van Dam), *Ajax Barcelona Cruyff: The ABC of an Obstinate Maestro* (Bloomsbury Paperbacks, 1999), p.140.

tentative step in addressing the “deeper and/or wider” debate sharpened by enlargement. But in fact the Treaty provisions on closer co-operation capture the ambiguity of the result achieved at Amsterdam. Potentially novel patterns of co-operation are subjected to textual restrictions which insist on adherence to what has previously been done in the name of the EC and, later, the EU, and, moreover, a form of veto long thought dormant if not extinct in the system has been revived for the benefit of non-participants in proposed closer co-operation. In the meantime, high-profile projects such as Economic and Monetary Union and the area of freedom, security and justice within which the free movement of persons is to be ensured remain planned as enterprises which engage some but not all Member States, mocking the hesitancy of the system envisaged for closer co-operation.

The contours of the map of flexibility roll far beyond Amsterdam’s closer co-operation. Explaining the evolving patterns of the Union cannot easily be done “better”. Most of all, the system is not static and the absence of a fixed point which can be labelled as the target of the process of European integration disables transparent debate. It has been frequently remarked that while the Single European Act was driven by the horsepower of the “1992” project and the Maastricht Treaty by the crafting of EMU, the Amsterdam Treaty is deficient of any “big idea”, other than the rather shapeless concern to modify the Union’s institutional architecture in advance of enlargement, a goal which was in any event not realised at Amsterdam. The absence of a key motivating project may be embraced as indicative of the inadequacy of the mechanism of the intergovernmental conference in seeking to elevate the process of Treaty revision beyond intricate bargaining in the face of the huge difficulty in sustaining bold vision amid the inertia or, at best, compromise which is unavoidably connected with the unanimity rule. As the plans for enlargement proceed, it is a<sup>48</sup> disturbing thought that the Union’s expansion has already installed such inhibition on imaginative steps.

There is much in the detail of the Amsterdam Treaty which merits a modest welcome. The scope of application of the “co-decision” procedure is expanded, thereby advancing the role of the European Parliament, and eliminating many (though not all) of the institutional anomalies that hinged on choice between available Treaty bases for legislative action; the provisions concerning fundamental rights are elaborated; redundant provisions are repealed, others helpfully up-dated by amendment; social policy will be developed by and for all fifteen 15 Member States. But, in the Amsterdam Treaty, the devil is not in the detail. The intransparent package is incapable of capturing the popular imagination. It is the absence of any adequate counterweight to trends towards fragmentation and shady horse-trading that has led me elsewhere to argue in favour of the preparation of a “constitutional document” designed as a contribution to transparency and to the stabilization of the process of Treaty revision<sup>48</sup>. How much can be done at European level, how much should be done at European level, and how much in common?: flexibility, like subsidiarity, remains a catchphrase denoting problems, not solutions. But, by initiating a debate, such slogans may breed better explanations and ultimately better understanding. The EU needs to be demystified.

---

<sup>48</sup> Weatherill, “Safeguarding the *Acquis Communautaire*”, Ch.8, pp.153-178 in Heukels, Blokker and Brus *supra* n.7; Weatherill, “Flexibility or Fragmentation: Trends in European Integration”, in Usher (ed), *The State of the European Union: Structure, Enlargement and Economic Union* (Longman, forthcoming).