Flexibility and the European Court of Justice.

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Part 1: Introduction

The purpose of this chapter is to discuss the ways in which the Amsterdam Treaty changes on "flexibility" (enhanced or closer co-operation) will affect the role of the European Court of Justice. It is about the functioning of the Court as an institution in the new institutional architecture of the differentiated Union. The objective is to offer an insight into the potential impact of the co-operation provisions on the approach of the Court, and to explore how the operation of flexibility may in practice affect the Court's role and function. The argument focuses on some aspects of the restructured judicial architecture that result from the Treaty changes as they relate to flexibility. In addition, the discussion makes tentative suggestions as to how the flexibility provisions may be affected by the Court's perspective.

Concern about the role of the Court inevitably leads to questions about the role of law in a differentiated or multi-speed European Union. This concern manifested itself loudly at the time of the Maastricht Treaty, especially in the context of the Social Policy Agreement and the UK "opt-out", a primitive form of closer co-operation that emerged as result of IGC negotiation stalemate. The impact of this opt-out on the nature of EC law was a primary concern of legal writers after the Treaty.[1] Much of the writing at the time was dedicated to understanding how the uniformity of EC law was affected by the Maastricht Treaty having created a level of EC law that would not apply to all of the Member States. However, as many of the chapters in this collection demonstrate, the idea that all EC legislation applied equally to all Member States was not new even at the time of the TEU.[2] Similar concerns arise in relation to the EMU opt-outs. Nonetheless, there is a significant difference between the kind of unequally applied law referred to in these chapters and the social policy development under the TEU. The development of European Union social policy is seen by many to be at the heart of European integration, in terms of commitment to Treaty objectives and a more general reflection of Member State attitudes to a vision of a "social Europe". Politically, this form of flexibility was far more significant than, for example, disequilibrium in the application of EC law in various extra-European

[1] See, e.g., J. Shaw, "Twin-Track Social Europe – the Inside Track" in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London: Wiley Chancery, 1994) and C.-D. Ehlermann, "Increased Differentiation or Stronger Uniformity" in J.A. Winter *et al.*, (eds.) *Reforming the Treaty on European Union, the Legal Debate* (The Hague: Kluwer, 1996). On another system of opt-outs under the Maastricht arrangements for EMU see generally P. Beaumont and N. Walker (eds.), *Legal Framework of the Single European Currency* (Oxford: Hart, 1999).

[2] See Chs. 3 and 6 in this collection, and also H. Kortenberg, "Closer Cooperation in the Treaty of Amsterdam" (1998) 35 *CMLRev.* 833 and C.-D. Ehlermann, "Differentiation, Flexibility, Closer Co-operation: the New Provisions of the Amsterdam Treaty", (1998) 4 *ELJ* 246.

territories of the Member States. Another significant difference is that the role of the Court and, importantly, the status of the law in question, are clearly regulated or pre-established in the case of the forms of differentiated integration that occurred before Maastricht. Under the TEU, in contrast, the Member States were feeling in the dark towards some workable form of differentiation on social policy development, IGC compromise being prioritised over a coherent and recognisable judicial system for the EU. The provisions on flexibility that have been placed in the Treaties after Amsterdam are the product of considered reflection on some of the defects of the cruder system that emerged from the Maastricht IGC. In so far as the ECJ is concerned, its role has been taken into account in the closer co-operation framework and outlined in the Treaties. The identification of formal changes in the Court's institutional role, although the primary focus of this chapter, is not the main concern in coming to an understanding about how flexibility will be judicially affected. Of deeper significance is the question of how properly institutionalised flexibility will affect the "traditional" role of the ECJ as the constitutional court of a relatively uniform EU.

The ToA "has introduced what one may call a principle that derogates from the traditional canons of unity and uniformity of Community law".[3] A significant (though obvious) remark in this respect is that the introduction of flexibility into this Treaty does not mean that the Court's role has been made more flexible. In fact the opposite is true, and the various modalities of variable geometry and flexibility that have been introduced into the Treaties under the ToA have a globally constraining effect on the ECJ, arguably limiting its autonomy and placing limits on its jurisdiction. Increasing the potential for flexibility in the EU is the general aim of the ToA, but the closer co-operation and variable geometry provisions - as well as the various opt-ins and opt-outs, and how they impact on the ECJ - lead to complexity and confusion concerning its role.

In many ways the fact that such a discussion is far from being the sole or primary focus of a work dedicated to an analysis of flexibility is indicative of the location of the flexibility changes at another level of constitutional development of the EU. The impact of closer co-operation on the Court of Justice was not the primary concern of the Treaty negotiators at Amsterdam. Nor was the flexible future of the EU considered primarily as a legal issue. Understanding the full impact of flexibility can be aided through observing the changes to the Court's jurisdiction, but these changes are not central to the redefined institutional mosaic. In providing for future flexibility under the ToA, the role of the Court was not centre stage.

The chapter attempts to expose the issues arising from the fundamental changes in the role of the Court brought about by the Amsterdam Treaty. Article 220 (ex Article 164) EC is now far from adequate as a basic indication of the court's jurisdiction. The expansion and diversification of the Court's role across the Treaties was a process that began under the TEU. The Social Policy Agreement and the primitive flexibility which that

[3] G. Gaja, “How Flexible is Flexibility under the Amsterdam Treaty?” (1998) *CMLRev.* 855.

entailed specifically affected the scope of the Court of Justice to review the effect of SPA-derived law on the non-participating UK. Secondly, the establishment of the pillars and the creation of the potential for EU law, closely bordering EC law but not subject to the power of the Court, led to ambiguity surrounding the Court's role and to a specific limitation of the Court's role in this respect (as detailed under the then Article L TEU). The Amsterdam Treaty has rendered the situation much more complex, but subject to less ambivalence, in that the Court's jurisdiction is now more precisely delineated and defined. The question is, do these fundamental changes represent "[u]ne regression de contrôle juridictionnel",[4] or can these crucial alterations to the judicial branch be seen as a positive development?

The chapter is structured in the following way: part 2 deals with ways in which the Treaty of Amsterdam changes impact generally on the ECJ but focuses specifically on the way in which a differentiated judicial role results from these changes. Part 3 looks at the enhanced co-operation provisions and the role of the Court within the new framework for managing differentiation in the Union. Part 4, finally, analyses these changes in terms of the likely impact on the approach and function of the ECJ, making a series of observations and indicating potential areas of particular interest as to the possible future position of the Court under the closer co-operation regime.

Part 2: The Court in a Differentiated Legal Order

Before the changes introduced by the Amsterdam Treaty, Article L (now Article 46) TEU outlined the framework for judicial input into EU law and policy-making. The amended Article L, now Article 46, TEU is the starting point for the observation of the Court's role in the post-ToA EU in general, but also for the specification of its power over closer co-operation provisions. The boundaries of the Court's functions are more blurred after the Amsterdam amendments and the system of jurisdiction much more complex. The new position of the limits of ECJ jurisdiction after Amsterdam resembles a very patchy structure,[5] in which the amended Article 46 TEU offers the first indication of the scope of the Court's powers. There are several ways in which the general jurisdiction of the Court of Justice has been altered or affected by the terms of the Amsterdam Treaty.[6] These are: the conditional extension of the Court's jurisdiction to rule on matters

[4] H. Labayle, "Le Traité d'Amsterdam. Un espace de liberté, de securité et de justice" (1997) 33 *RTDE* 851 at 862.
[5] R. Dehousse, "European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?" (1998) 35 *CMLRev.* 595 at 596.
[6] Art. 46 TEU (ex Art. L TEU) defines the new limits of the Court's jurisdiction. The Court's powers are stated to apply only to the EC Treaty (and ECSC and Euratom Treaties), the provisions of Title VI TEU (but subject to the conditions laid out thereunder in Art. 35 TEU), the provisions of Title VII TEU, under the conditions provided for by Art. 11 EC and Art. 40 TEU and, finally, Art. 6 TEU. See A. Albors-Llorens, "Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam" (1998) 35 *CMLRev.* 1273 for comprehensive treatment of the Court's general position after Amsterdam.

covered by the (restructured) Third Pillar,[7] on matters of fundamental human rights,[8] jurisdiction over the flexibility framework (Title VII TEU) as well as limited jurisdiction over the new Title on visas, immigration and asylum under the EC (Title IV EC) and over the related Protocols.[9] Furthermore, the Court's jurisdiction can also alter and expand in a differentiated manner outside the context of Treaty amendments, through instruments such as Conventions between Member States, for example the Brussels Convention or the Europol Convention.[10]

The alterations to the Court's role reflect the widespread concerns expressed after the Maastricht Treaty about the limited function of the Court in the adjudication of measures arising then under the Third Pillar and also the shallowness and hypocrisy of the relatively meaningless declaratory character of the non-justiciable fundamental human rights clause.[11] Comments at the time were rooted in concern about the development of EU policy and legislation without the effective judicial supervision of the ECJ. In respect of these changes therefore, the Amsterdam negotiations can be said to have taken account of the defects concerning the role of the Court. There is in the new Treaty system, in other words, a commitment to have the Court involved as an institutional actor in the new policy developments of the EU and to have some text-based representation of the ECJ role in the fundamental rights sphere.

The Maastricht Treaty had heralded a new era for the Court of Justice, in terms of its jurisdiction being excluded from significant areas of EU activity. To an extent, the Amsterdam Treaty has remedied this by a combination of "communitarisation" (bringing some Third Pillar areas within the remit of the EC pillar) and also the extension of the Court's jurisdiction under other changes made by the ToA. Amsterdam developments in respect of the Court of Justice in general represent a significant revision of the role of and respect for law in the newly-structured European Union. The Maastricht negotiators chose to expand the Community and establish the Union without the involvement of the judicial branch and were castigated for this, and this situation has been at least addressed if not fully resolved under Amsterdam.

The Court's jurisdiction prior to the ToA changes was essentially confined to the EC Treaties and the final provisions of the TEU. Thus, the position prior to Amsterdam was at least not overly complex. It suggested that there were very clear boundaries to the Court's jurisdiction, namely that there should be no Court "interference" in the Second and Third Pillar matters, and the Court could rule only on the EC Treaties and the final provisions of the TEU. This reflected the distrust of the Court's interpretative powers, which some

[7] Art. 35 (ex Art. K.7) TEU.
[8] Art. 6(2) (ex Art. F) TEU.
[9] Protocol on the position of the UK and Ireland, Protocol on the position of Denmark and Protocol integrating the Schengen Acquis into the framework of the EU.
[10] See further P. Beaumont, "European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters" (1998) 48 *ICLQ* 223.
[11] See, generally, D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London: Wiley Chancery, 1994).

Member States would have had in respect of issues of national security or immigration policy. However, even though the Court had been effectively excluded from ruling upon Third Pillar matters, this had not prevented it taking the opportunity to consider its jurisdictional borders. Both the ECJ and the Court of First Instance have confirmed their willingness to declare that their jurisdiction extends to Third Pillar-related issues, despite the absence of specific jurisdiction in this regard.[12] These cases are suggestive of the Court's willingness to interpret its jurisdictional scope beyond the confines of Article 46 TEU. It will be interesting to observe to what extent the ECJ position may change in this respect post-Amsterdam, with the Article 46 amendments now providing the possibility of judicial input into the Pillars, albeit in a limited manner.

The main provisions of the new jurisdiction can be summarised as follows. First, Article 46 TEU is amended to extent the Court's jurisdiction to Third Pillar (Title VI TEU) matters (police and judicial co-operation in criminal matters), according to the provisions set out in Article 35 (ex Article K.7) TEU. Here, a special kind of Third Pillar-specific form of jurisdiction has been designed for the Court, namely a restricted form of preliminary rulings, direct action and actions against Member States.[13] Member States are required to make a declaration accepting the jurisdiction of the ECJ in this regard. This is an instance of discretion-based jurisdiction, exposing some Member State citizens to the possibility that their state will not opt for jurisdiction and leading to a lack of uniformity in interpretation here, with nationals of different Member States enjoying different levels of protection. Despite the strict rules surrounding jurisdiction in this regard, it is a major development that the Court is to have a say in Third Pillar matters, remedying a situation much decried after Maastricht from a civil liberties perspective. The EU Member States had manipulated for themselves an extra-parliamentary zone of activity, where important decisions on all the matters within the then remit of the Third Pillar would escape judicial supervision, both at national and supranational level. This situation is now remedied by both communitarisation and this new possibility of limited jurisdiction over the Third Pillar. However, it is significant in this regard that Article 35 TEU expressly denies direct effect to the measures emanating from the Third Pillar.

The communitarisation of immigration, visa and asylum matters has given the Court of Justice extended jurisdiction over an area of EU activity previously falling under the Third Pillar and declared to be outside the scope of the Court's jurisdiction.[14] But the role of the Court under Title IV EC is not the same is it is under the EC Pillar in general. There is a limited preliminary reference procedure (just as there is also a limited, but different, preliminary reference system under Title VI TEU), and measures relating to the maintenance of

[12] See Cases C-170/96 *Commission v. Council* [1998] ECR I-2763, T-174/95, *Svenska Journalistfurbundet v. Council,* [1998] ECR II-2289, T14/98, *Hautala v. Council*, 19 July 1999.
[13] Albors-Llorens, n.6 *supra*, at 1278 ff., and M. de Boer, "Justice and Home Affairs in the Treaty on European Union: More Complexity Despite Communautaraization" (1997) 4 *MJECL* 310 and N. Walker, "Justice and Home Affairs" (1998) 47 *ICLQ* 236.
[14] For a lengthy discussion of the new Title IV EC, see K. Hailbronner, "European Immigration and Asylum Law under the Amsterdam Treaty" (1998) 35 *CMLRev.* 1047 and den Boer, n.13 *supra*.

law and order and internal security are stated to be outside the scope of the Court's powers (Article 68(2)). There is, also, a special advisory procedure under the new Title, which will allow Member States to seek a ruling of interpretation from the Court, without it becoming a subject of legal proceedings (Article 68(3)). Strictly speaking, these revisions of the Court's jurisdiction are not related to closer co-operation, *per se*. However, these specific changes introduced under Title IV EC and Title VI TEU contribute significantly to the overall picture of a differentiated judicial space in the European Union. The limitations on the role of the Court under Title IV EC can be criticised in that the opportunity has been missed to create a common judicial area under this Title, the "justice" in the name not being reflected in the provisions themselves.[15]

The pattern of conditional extension to jurisdiction evidenced above is repeated in respect of the integration of the Schengen Agreement into the EC Treaty system. There are limitations on the Court's jurisdiction in respect of this particular form of agreed enhanced co-operation, relating to the areas of the Schengen Agreement, which are now consigned to Title IV EC.[16] According to Article 2(3) of the Schengen Protocol, the ECJ shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. This reflects the position also expressed in Article 68(2), concerning the jurisdiction over Title VI EC matters in general – but it is wider, in that Article 68(2) refers just to preliminary rulings and not to Article 230 jurisdiction. In essence, these various new formulations of preliminary reference (in Title IV EC, Title VI TEU and the Schengen Protocol) limit the scope in which national courts have to participate or to use this procedure, restricting the power to courts of last resort only. Under the Third Pillar regime there are two stages restricting the possibility of a preliminary reference action occurring in this area: the Member States have explicitly to accept the Court's competence in this regard and they may further specify which courts in their legal systems are allowed to use the new procedure.[17] Furthermore, the ECJ is confined in respect of the acts over which it may have preliminary jurisdiction under this procedure, and these do not encompass the provisions of Title VI itself. To sum up, in any case arising in a national court that has a migration or immigration dimension, the scope for use of Article 234 will never be very clear and will lead to confusion in national courts, and of course may not even be available in some national courts. This "proliferation of new solutions"[18] will be rendered even more complex in the future by the fact that under Article 67 EC, once the transitional period is over, new provisions relating to the powers of the ECJ may be adopted by the Council. The general trend relating to the new, differentiated preliminary reference system has been to restrict both the courts that may avail of the Article 234 procedure and also the scope of the ECJ itself in this regard. But complexity and restraint at what price? If reduced workload is the goal, is

[15] J. Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 *ELRev.* 321 at 323.
[16] E. Wagner, "The Integration of Schengen into the Framework of the European Union", 2 1998 *LIEI* 1 at 24.
[17] Art. 35 TEU.
[18] Wagner, n.16 *supra*, at 3.

it justifiable to have such a pragmatic perspective towards EC law? The ECJ itself has recently highlighted the problems relating to preliminary references under the current system.[19] The delays in the system and effects on the rights of individuals are underlined. Yet, the Court itself supports the restriction of preliminary rulings in specialised areas to specific national courts.[20]

Nonetheless, the crucial risk of divergent interpretations of Community acts in the area of migration is a serious consideration. The new terms on variegated forms of preliminary ruling that will prevail under Title IV EC and Title VI TEU will result in significant differences in both the use of this procedure throughout the EU and in respect of the uniform application of EU law. Under Title IV EC, the Member States may choose to submit themselves to the Court's preliminary ruling jurisdiction. Under the Third Pillar, States may also so choose[21] and, furthermore, select which courts will be able to avail of the preliminary reference possibility. These two jurisdictional scenarios will result in considerable divergence of EC/EU law pertaining to the areas concerned. In some Member States (those that do not opt for jurisdiction), none of the courts may be permitted to resort to Article 234 (ex Article 177) in respect of, say, an asylum matter, whereas in others the full scope of EC law and the ECJ will be available in all courts. Furthermore, the position of the courts in the non-participating states in respect of the use of a relevant ECJ interpretation or declaration of validity is uncertain and will at any rate result in potentially uneven application of EC and EU law throughout the EU. This level of differentiation poses serious issues in terms of citizens and their effective participation in the EU legal order, given, especially, that immigration and asylum matters inherently concern individuals' free movement and residence rights. In addition, the coherence and relative comprehensibility of the law pertaining to the EC/EU migration regime is fundamentally affected by the differentiated applications of Article 234 envisaged under the new rules for the Court in the reformatted immigration and asylum system after Amsterdam.

The opt-in possibilities for Member States in relation to the new forms of preliminary reference will result in an application of variable geometry in this regard, with unequal use of the procedure in the EU. The principal and primary aim of the Article 234 procedure is uniformity of interpretation. These new procedures pose a serious threat in this regard. There is a paradox here, as the teleological essence of the procedure is destroyed by the new regimes. Will national courts without the power to refer still be able to use ECJ interpretations or, more importantly, invalidity declarations? There has been erosion of uniformity or attachment to uniformity in this regard in favour of a more pragmatic perspective.

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[19] *The Future of the Judicial System of the European Union: Proposals and Reflections* (Luxembourg: ECJ Publications, 1999).
[20] *Ibid*., 23.
[21] "On the occasion of the signing of the [ToA] only six Member States declared to accept preliminary rulings by the Court [under Title VI TEU]", Austria, Belgium, Germany, Greece, Luxembourg and the Netherlands. J. Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 *ELRev.* 320 at 331.

Therefore, as can be seen, rather than neglect the role of the ECJ at Amsterdam, the ToA negotiators paid careful and precise attention to the exact position of the ECJ in respect of all the developments under this Treaty. One might suggest even too careful attention, seeming to ascribe a belt and braces approach to the Court, not allowing it to escape from the confines of these tight descriptions of jurisdiction deriving from Article 46 TEU. This approach is flawed in designing a web of jurisdiction that is difficult to grasp, but also and more fundamentally because the Court itself will not readily see its interpretative functions so easily controlled and limited. At one level, though, this political attempt to box in the Court is an interesting development. Although the Court's jurisdiction has been expanded beyond the limits set by the Maastricht Treaty, on one view this is a very guarded and protected expansion, one which allows limited scope for the Court to develop an expansive interpretation of the provisions. On another view, providing an extensive range of textual references for the Court's jurisdiction gives that institution a more constitutionally valid basis for its functioning, no longer being vulnerable to criticism for radical and wild forays of interpretation.

Part 3: The Closer Co-operation Framework and the Court

The new closer co-operation regime introduced under the Amsterdam Treaty preserves the dynamism but not the sense of collective enterprise in European integration, in providing for some of the Member States to develop an area of policy for and within the EU without the collaboration of all other Member States. Integration progresses but is territorially confined. As many of the chapters in this collection discuss, this approach towards the future of the EU is not new, but it has received a more legally-grounded dimension under the ToA, being now constitutionally embedded in the Treaties. There are two levels of pronouncements on flexibility in the ToA: the general provisions (Title VII TEU, i.e. Articles 43-45 TEU) and the specific provisions, Article 11 EC and Article 40 TEU, the latter providing for the operation of flexibility within the First and Third Pillars respectively.[22]

Kortenberg usefully categorises the various levels of closer co-operation provided by the Amsterdam Treaty.[23] These are: closer co-operation *predetermined* by the ToA itself (such as the integration of the Schengen Agreement and the various arrangements under Title IV EC), *undetermined* closer co-operation which will be governed by general enabling clauses and specific conditions laid out in both the First and Third Pillars, and, finally, co-operation on a *case-by-case basis*, as in the Second Pillar.[24] (This last level is less

[22] For an account of the background to the introduction of flexibility at Amsterdam, see J. Shaw, "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy" (1998) 4 *ELJ* 63-86.
[23] H. Kortenberg, "Closer Cooperation in the Treaty of Amsterdam" (1998) 35 *CMLRev.* 833. See also G. Edwards and E. Philipart, *Flexibility and the Treaty of Amsterdam: Europe's new Byzantium*, CELS Occasional Paper, 1997, No. 3, who also uses this type of categorisation and N. Walker, "Sovereignty and Differentiated Integration in the European Union" (1998) 4 *ELJ* 355.
[24] *Ibid.*, at 835.

significant from the Court's perspective.) In other words, past, present and future closer co-operation were all catered for at Amsterdam.

The route to appreciating where and how exactly the Court may intervene in matters concerning flexibility begins with Article 46 TEU, which refers to Court jurisdiction under Title VII TEU (Articles 43-45, the general enhanced co-operation clauses), but under the conditions laid out in the specific applications of that Title in both the EC Treaty and the TEU. These Articles (Article 11 EC and Article 40 TEU) are the two gateways to flexibility in the First and Third Pillars,[25] and Title VII TEU the "mother clause" or general enabling provision. There are differences between the two "gateway" provisions: the list of conditions is no longer in Article 11; Article 40 does not provide that closer co-operation should not concern citizenship;[26] and the procedures applicable in the two situations of flexibility are also different. Under Article 11 EC, the Commission plays a central role in the process and the Council is the sole decisive actor under Article 40 and the resulting instruments are also different. As Shaw points out, closer co-operation itself is never defined in any of these provisions.[27]

Both the enabling provisions and the specific applications of flexibility are well documented and have attracted important commentary.[28] Obtaining, however, a clear perspective on the precise role of the Court in this system is not immediately obvious from the face of the provisions. The starting point, again, is Article 46(c) TEU, which provides that the Court shall have jurisdiction over "the provisions of Title VII [TEU], under the conditions provided for by Article 11 of the [EC] Treaty and Article 40 [TEU]". Looking first, therefore, at the "mother" clause in Title VII TEU, this provides both a positive and negative list of general conditions for the application of closer co-operation, all of which are, according to Article 46, subject to the interpretative jurisdiction of the Court. There is no actual mention of the role of the Court in the wording in Title VII. As for the specific rules governing future flexibility, Article 11 EC lays out a list of negative conditions for closer co-operation under the First Pillar and specifies procedures and institutional roles. Once again, there is no specific mention of the Court under this provision, though there is indirect indication under Article 11(4).[29] Finally, Article 40 TEU, which will govern closer co-operation under the Third Pillar, does mention specifically the position of the Court. Article 40(4) states that "the provisions of the [EC] Treaty concerning the powers of the Court of Justice … and the exercise of those powers shall apply to [closer co-operation under Article 40]". Overall, this constitutes a byzantine and complex web of provisions, which do not clarify or precisely

[25] Monar, n.15 *supra*, at 333.
[26] A surprising omission, see *ibid*.
[27] Shaw, n.22 *supra*, at 71.
[28] See Kortenberg and Ehlermann, n.2 *supra*, and N. Walker, "Sovereignty and Differentiated Integration in the European Union" (1998) 4 *ELJ* 355.
[29] "The acts and decisions necessary for the implementation of cooperation activities shall be subject to all the relevant provisions of this Treaty …"

illuminate the position of the Court. There is also widespread speculation that these provisions are too confining and complex to induce the Member States to make regular use of them.[30]

The Court's jurisdiction on enhanced co-operation is a power to review decisions to operate such co-operation, to determine their compliance with the general co-operation provisions in Title VII TEU. The power of the Court is itself then subject to the different conditions found in the specific co-operation clauses in the two Pillars concerned (i.e. Articles 11 EC and 40 TEU). This means that, for example, in the case of any enhanced co-operation under the First Pillar, the Court has, according to Article 11 EC, jurisdiction to review both the decision to operate enhanced co-operation and any implementing legislation resulting therefrom. In contrast, the Court's power in relation to Third Pillar enhanced co-operation is confined to the decision to establish that process in the first place; in other words, the general provisions of the EC Treaty concerning the Court will apply *only* to the initial decision to operate flexibility under the Third Pillar. Finally, as regards judicial supervision of the outcome of any such co-operation in Third Pillar policy areas, Article 35 TEU is the applicable provision. As discussed above, the Court's jurisdiction in respect of any such implementing legislation and the action of participating Member States will be limited in the way specified in that provision. That, therefore, is the general position of the Court within the closer co-operation regime.

Judicial control of the EC Treaty closer co-operation provisions[31] could encompass the ECJ being called upon to rule on, first, the conditions for authorisation set out in Article 11 EC itself. Secondly, it has been suggested that the Court may have a role in adjudicating a refusal by the Commission to submit a proposal to the Council concerning authorisation for closer co-operation.[32] In terms of the justiciability of such a refusal, it has been suggested that this is limited to the formal compliance by the Commission with the requirement to give reasons for the decision and not as regards the content of the refusal itself.[33] The Commission appears to have discretion under Article 11 to refuse to submit a proposal to the Council, but it is suggested here that there may be limits to these powers. The suggestion concerns the possible interpretation by the Commission of the meaning of exclusive competence. Moving on from Article 11 EC, Shaw also suggests that Article 43(2), a statement of loyalty, which being broadly modelled on Article 10 (ex Article 5) EC, is capable of extensive interpretation by the Court. Article 11 EC is characterised by Shaw as containing "a set of five supplementary commandments".[34] However, confusion is introduced here as some of them replicated Article 43, but some also add extra and more precise conditions for the application of enhanced co-operation under the EC Pillar. She suggests a reordering of the five conditions in order to highlight their relative importance. Article 46 TEU states that the powers of the ECJ shall apply to Article 43 under the conditions

[30] See further, Kortenberg, n.2 *supra*, and S. Weatherill, Ch. 11 in this collection.
[31] See F. Tuytschaever, *Differentiation in the European Union* (Oxford: Hart Publishing, 1999) at 61.
[32] *Ibid.*
[33] J. Shaw, "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy" (1998) 4 *ELJ* 63 at 75.
[34] *Ibid*., at 72.

laid out in Article 11 – a circuitous route to understanding the scope of the jurisdiction, but Article 11 does not put any conditions on the exercise of the ECJ power. Tuytschaever suggests that the ECJ powers do not extend to interpreting the Article 43 criteria for authorisation, or to decisions to establish closer co-operation and instead only to application to one of the specific fields of policy or implementation of that decision.[35] Was it the intention of the IGC to ensure that the full powers of the ECJ extend to all matters within the framework of co-operation under the EC Treat? If this is indeed the case, then being able to submit Article 43 to the Court's jurisdiction will mean that the notion of "*acquis Communautaire*" would, for the first time, be possibly subject to the Court's interpretation, with potentially interesting implications for example in the new accessions context.

The specific provisions in Article 11 EC contain a negative list of the fields in which co-operation will not be permitted.[36] There will be much room for interpretation here. A Member State may oppose the decision on closer co-operation to be taken by QMV in the Council for stated and important reasons of national policy. In this case, no vote will be taken so no legal act will result, and therefore no jurisdiction of the ECJ will result. But the Council then by QMV may ask the European Council to arbitrate. This, however, could arguably result in a legal act, an act of the council (rather than of the European Council, which of course is not subject to the jurisdiction of the Court), bringing it within the jurisdiction of the ECJ under Article 230 EC. The Court will generally review the conditions for resorting to closer co-operation under both Title VII TEU and Article 11 EC, and then review the product of that closer co-operation once authorised. It has been pointed out, however, that it would be difficult for the Court to be given the opportunity to review the existence of important reasons of national policy, as here also no act will exist to be subjected to the Court's review.[37]

It is worth noting that concerns have been expressed about the justiciability of the closer co-operation provisions, with comparisons being made with subsidiarity under Maastricht.[38] It is true that interpreting co-operation clauses will necessitate the Court ruling on difficult questions, such as whether an area chosen for enhanced co-operation falls within the exclusive competence of the EC. But the complexity of these issues does not render them *per se* non-justiciable. Nor, it is submitted, would the fact that a decision to activate enhanced co-operation is a political decision, make the Court shy of proffering an interpretation in any given instance.[39] In particular, in so far as the EC Pillar is concerned, the ECJ will be required to determine whether a particular application of enhanced co-operation is or is not within an area of exclusive competence. In this way, such potential for adjudication will involve the Court in a similar exercise as that also envisaged under

[35] Tuytschaever, n.31 *supra*, at 63.
[36] See Kortenberg, n.2 *supra*, at p.848.
[37] Gaja, n.3 *supra*, at 865.
[38] See further Albors-Llorens, n.6 *supra*, at 1284.
[39] See further, G. Edwards and E. Phillipart, "Flexibility and the Treaty of Amsterdam: Europe's New Byzantium" (1997) CELS Occasional Paper, No. 3.

Article 5 (ex Article 3b) on subsidiarity, where the determination of exclusive and non-exclusive competence is also implied and no less complex.[40]

The judicial appreciation of co-operating measures will also involve review of the position of non-participating Member States and the impact of co-operation provisions on nationals of these states. This situation is similar to the post-TEU queries about the Social Policy Agreement. In particular, questions about the meaning of EU citizenship in a fragmented polity will necessarily be implicated in this context.[41] The ultimate output or product of closer co-operation will not affect non-participating states (Article 43(1)(f)). This results in a situation whereby that which is treated as Community law by some Member States is not equally regarded by others (i.e. the non-participating states). This is a serious and fundamental erosion of the uniform nature and tradition of EC law, bolstered by the Court raising issues similar to those raised in the debate about the social policy agreement law after TEU.[42]

There is a distinction between the provisions setting out the management of future flexibility as opposed to elements of flexibility which were in fact provided for at the time of the ToA. These occur under the new Title IV EC and in the related opt-outs of the UK, Ireland and Denmark, and also to the integration of the Schengen *acquis* into the framework of the European Union. It is also specifically provided that the closer co-operation under Title IV EC will not result in legal obligations for the non-participating states.[43] This is a specific application of flexibility, along the model adopted at the Maastricht Treat, but one which is more sophisticated and takes into account the criticisms of that kind of simplistic opting-out for which that Treaty provided. The Court of Justice has a different role in relation to Treaty-negotiated flexibility than it does in relation to the potential Article 43 type closer co-operation envisaged in the future. For a start, the former is much easier to organise, without formalised institutional input and without having to resort to the rigours of the flexibility clauses now in the Treaties. The Member States concerned not to participate in a new area of, or an extension of, EC competence negotiate at this time of the IGC, specifying precisely their position. Mention should, finally, be made of the Schengen protocol in this regard. It is the best example of the kind of closer co-operation *outside* the framework of the European Union,[44] in fact precisely the kind of closer co-operation that is envisaged now to be covered by the new flexibility provisions, thus allowing the EC institutions, and in particular the Court, an input into such initiatives. Steps were taken at Amsterdam to integrate this pre-existing form of flexibility, the Schengen *acquis* Protocol. These provisions are quite

[40] See generally, G. de Búrca, "Reappraising Subsidiarity's Significance after Amsterdam" (1999) Harvard Law School, Jean Monnet Working Papers, on http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/9990701.html and also G. de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 38 *JCMS* 217.

[41] On this subject and for a relevant analysis of Case 235/87, *Annunziata Matteucci v. Communauté française de Belgique et al.* [1988] ECR 5589, see also Bruno de Witte, Ch. 3, this collection.

[42] See further D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 *CMLRev.* 17.

[43] Protocol on the position of the UK and Ireland.

[44] See further B. de Witte, Ch. 3, this collection.

complex in themselves. For our purposes here in appreciating the full range of the Court's jurisdiction in relation to flexibility, it can be observed that under the Schengen protocol, the 13 signatory states are authorised to establish a form of closer co-operation among themselves within the scope of the Schengen Agreement, to be conducted within the institutional and legal framework of the EC.

It can be observed, therefore, that a very complex network of Treaty provisions governs the judicial appreciation of flexibility and its potential outcome. This appears to introduce a significant amount of confusion into the realm of ECJ jurisdiction. It also has important implications for citizenship understanding of the closer co-operation system. These concerns are now addressed in the next Part.

Part 4: The Future of the Restructured Judicial Architecture

Amsterdam has produced a complex network for flexibility and a new system is envisaged with a redefined and restricted role for the Court. What other general reflections and questions may be raised in attempting to analyse the implications of enhanced co-operation on the functioning and role of the ECJ in the differentiated polity which will result? A general preliminary remark is that the new co-operation regime has led to a situation in which the Court has seen both a significant restriction in its powers as a Court and also an expansion of its jurisdiction. Much criticism can be made of the complicated jurisdictional space that emerged from Amsterdam. Nonetheless, it has given cause for reflection on the role of the Court. This institution would have been far from being the prime consideration of those drafting new provisions for a flexible Union, but judicial issues were not ignored under this Treaty. There is a suggestion of a pattern emerging here perhaps, with the Court function becoming more tightly prescribed at IGC negotiations. This pattern, of increasing control over the Court resulting from the IGC process, may lead to an incremental change in the nature of the relationship between the Court and the Treaties it is charged with interpreting. One possible consequence is a restructured jurisdiction for the judicial branch as it becomes more controlled by the political branch. Is this a kind of revenge at last? Alternatively, it may promote a more mature and structured role for the Court leading to a new phase where it will not have the freedom of its glory days to interpret EC law into new dimensions, a phase in which the Court becomes a more constrained agent but under which it may be granted a different kind of freedom to act within clearer and more obvious confines, thus freeing it from charges of excessive abuse of its powers.

As Shaw says, the process of identifying and interpreting the key features of the EC/EU's constitutional core and the irreducible minimum of a single legal order is the primary task of the lawyer.[45] She also asserts that "[t]he future role of the Court of Justice and its likely approach to the new challenges remain moot points,

[45] Shaw, n.33 *supra*, at 70.

but are of considerable interest nonetheless".[46] Here I make a series of observations about that role of the Court, or attempt to expose some of the dilemmas of co-operation for the Court, from the perspective of understanding the constitutional core of the legal order.

The question of thow the Court will police the fragmentation of Community law arising from closer co-operation is fundamental. The handling of the review of the operation of enhanced co-operation will be an extremely delicate exercise at many levels. It will reveal the longstanding uncertainties embedded in the Treaty system, fundamental concepts of the EC/EU legal order the meaning of which is still uncertain, such as exclusive competence and *acquis Communautaire*. The new provisions, therefore, while far from complex, present the Court with a valuable opportunity and scope for expansive interpretation in the future. They also raise fundamental questions about the role of law in a differentiated polity. Furthermore, the complexity of the system post-Amsterdam is a threat to the coherence and understanding of EU law for citizens and national courts alike. The interaction of citizen and the EU judicial system is hindered by the new rules.

A second important issue concerns the extent to which the new architecture affects the internal coherence of EC law. If there was something special about the nature of EU law, residing in fundamental principles developed by the Court and its allegiance to uniformity, has this now been affected by embedding the judicial system in all of these complex rules and partitions of jurisdiction? EC law had a special mode of reasoning, relating to ALL Member States and national courts, and this is now affected by the changes in terms of the specific closer co-operation and the general system of flexibility. The function of EC law, uniform law, concerned connections between all Member States, and although this may at times have been narrowly located in the preservation of the common or single market,[47] it constituted the uniqueness of the supranational system which risks being eroded by ToA closer co-operation changes.

Flexibility is a political initiative and compromise, and it is difficult to see how something so instrumentally inspired translates into the judicial realm. We need to consider how the Court can work with and within this political compromise. There is a legal and political concept of the constitution of the EU, and closer co-operation lies at the heart of this tension, with the political pursuing flexibility as the optimum route for integration and the legal concept intimately allied to one of flexibility's conceptual opposites, uniformity.[48] The political constitution, as formed and reformed by the IGC process, produces a different outcome to that which the legal concept of constitution emerging from the Court's jurisprudence does, with the latter traditionally attached to uniformity. The Court is not merely an institution that might be at the service of closer co-operation as an aspect of European integration. It has always seen itself and acted as far more than

[46] *Ibid*., 80.
[47] E.g. Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at para. 14.
[48] See Shaw, Ch. 15, this collection.

that, as a constitutional court standing above the Treaty order. But its constitutionalist tendencies may have been usurped by the Amsterdam changes. The ECJ was responsible for shaping European identity to a large extent, and this may be fundamentally affected by the fragmentation of the legal order inherent in closer co-operation. The original goal was the common marked and related uniformity of the legal order. Closer co-operation (and the jurisdictional variable geometry produced by the ToA changes) is a challenge to the interpretative autonomy which the Court had fashioned for itself over the years. A related question is: has what might be termed "the autonomy of EU law" itself been affected by the flexibility initiatives?[49] This autonomy lies in the interpretation of the objectives in Articles 2 and 3 EC, and this is not affected by flexibility. In fact, the conditions laid out in Title VII TEU and in Article 11 EC and Article 40 TEU contribute to preserving the autonomy of EC law in this respect. Would the autonomy of the Court now be found in the interpretation of "ever closer Union" and, if so, what might be the relationship between that and closer co-operation since, on one reading, the latter is a direct contrast to closer Union?

The overall restructuring of the Court's jurisdiction might be justified if closer co-operation can be said to advance a political community for the EU or enhance citizenship of this community. However, as discussed above, both the complexity and lack of coherence in the flexibility provisions render citizen participation in the legal order more difficult. In particular, the specific manifestations of closer co-operation under the ToA in the sphere of immigration and asylum have the potential seriously to impede citizenship access to justice. Would support for the developing concept of citizenship mean that the Court would have to take into account Articles 17-22 EC (on citizenship of the Union) when considering a flexibility issue? Article 11 (1)(c) expressly prevents closer co-operation concerning citizenship, but a wider and more significant consideration is the extent to which citizens of a given Member State (and, therefore, EU citizens) may input into a decision to participate or not in a closer co-operation development.

Much of the specific or predetermined flexibility concerns justice and home affairs. The EU Member States are still skating awkwardly around how to handle a common immigration policy. The particular rules under Title IV EC have attracted criticism as they go to the root of ECJ jurisdiction under the First Pillar, whereas other developments are outside the borders of that Pillar. In other words, the much called-for communitarisation was not accompanied by full ECJ jurisdiction, rather a kind of special, confined, intra-First Pillar variety of jurisdiction has been created. A consideration arising therefrom is whether or not this pattern is likely to be repeated, or, in other words, will the practice of special case jurisdiction even under the EC pillar become the norm for the future. If there are concerns such as these arising from the ToA changes, from a more positive perspective, it may also be envisaged that flexibility may encourage a more developed

[49] On the autonomy of EU law, see further H. Lindahl and B. van Roermund, "Law Without a State? On Representing the Common Market", Z. Bankowski and A. Scott (eds.), *The European Union and Legal Theory* (Blackwells, 2000).

debate and rejuvenation in the discussion of the Court's role. Flexibility under the ToA reflects an honest acceptance of the internal divisions in the EU. It lifts the veil on uniformity and provides a new lens through which to view the EU legal and political system. It is a sign of a mature polity to be able to divide without fundamental rupture. But the Court's role in adjudicating this diversity is therefore essential. The Court may be a kind of unitary, overall constitutional arbiter, even if the system has become a fragmented and diverse one.

The future role of the Court in a multi-dimensional juridical space cannot be guessed at. The Court is profoundly affected by closer co-operation but, even more than the political institutions, it also has the power profoundly to influence its future. The role of the ECJ in a fragmented legal order will emerge over time as it regulates the multiple speeds at which the EU now operates.

Part 5: Conclusion

The Amsterdam Treaty was a reflective moment in the process of European integration. European integration consists of such a process as well as the concrete development of a polity. The IGC system is a fundamental part of that process, and though its procedures may seem like playground politics as each state fights its corner, this is the core of the political constitution of the EU. The lack of sophistication of the IGC process which produced flexibility might be criticised, but this process forces out preferences and the ToA puts this practice on a more reasoned footing. The introduction of flexibility has forced a level of honesty or reality about the nature of the integrative process; "we Europeans"[50] do not have to do everything together outwith the common market core.[51]

Political unity has no determined or determinable end,[52] and closer co-operation is part of its current manifestation and a feature of dynamic integration. In other words, dynamic integration can and must encompass differentiated integration. It is a constitutional continuum,[53] which does not mean that closer co-operation will distort the main goals or risk negating the progress of the integration process. The analysis of the Court also has to be seen in this light. Flexibility provides a new and different phase for the Court, not necessarily a worse or better one.

Closer co-operation can be viewed from both a constitutional and a substantive perspective. The revised role of the Court too can be viewed from both of these angles. The rules and new divisions of jurisdiction

[50] *Ibid.*
[51] See further, G. de Búrca, Ch. 7, this collection.
[52] N. 49 *supra*, at 12.
[53] H. Lindahl, "European Integration: Sovereignty and the Politics of Boundaries", research paper presented at Aberdeen Law School 1999, forthcoming (2000/2001), at 18.

create a complex substantive set of sources for seeing where the limits of Court jurisdiction are. But the appreciation of this structure is more significant than the *ad hoc* or arbitrary gathering of these pockets of varied jurisdiction. The overall, global impact on the Court as a constitutional actor has to be appreciated. Flexibility establishes a system to mediate and manage governance of the EU, but it is also subject to and will affect the judicial ordering, the legal order of the Union and more specifically the institution at its heart, the Court of Justice.

As with previous phases of fundamental reform of the EU, the impact of enhanced co-operation on the "constitution" of the EU is now partly within the power of the Court. In a European Union with a divided power system[54] and a fragmented legal order, it is likely that, however complex and developed the flexibility regime, in its challenge to the very idea of a uniform legal order, uniformly adjudicated, it will, paradoxically, allow the adjudicator a significant role in forging a new conception of legal order.

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[54] J. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited" (1999) 36 *CMLRev.* 703 at 707.