Jörg Monar
Professor of Politics
Director of the Centre for European Politics and Institutions
University of Leicester

Flexibility and closer cooperation in an emerging European migration policy: opportunities and risks

1. Introduction 3

2. Existing forms of "flexibility" 7

3. Future possibilities of differentiation: "closer cooperation" 14

4. Opportunities 16

5. Problems and risks 20

6. Conclusions 26

Jörg Monar

Flexibility and closer cooperation in an emerging European migration policy: opportunities and risks

1. Introduction

"And he that will not apply New Remedies" wrote Francis Bacon "must expect New Evils: for time is the greatest innovator".[1] After a decade of unprecedented change in Europe, the governments negotiating the Treaty of Amsterdam in 1996-97 did not need any further evidence of the innovative force of time. They also could have little doubt that the integration process was at risk of engulfing itself in an 'evil' which – while not new as such – was acquiring a new threatening dimension: a potential failure of the Union to move beyond the *status quo* – regarded by many as an unstable halfway house towards political union – and to respond effectively to new internal and external challenges, and both of these because of the diversity among Member States. This diversity had two sides: persisting fundamental differences between existing Member States as regards the general approach to European integration on certain issues (such as the British position on internal border controls) and the prospect of increasing political and economic diversity through the next approaching enlargement.

Faced with the 'evil' of potential paralysis the governments (some of them not without considerable misgiving) came around to apply a 'remedy' which – although far from new – had never been applied so drastically and extensively in the history of the integration process:

not only was “flexibility” used on a massive scale in the Treaty of Amsterdam to exempt Member States from rights and obligations in certain policy areas, but it was also elevated to a new constitutional principle through the introduction of “closer cooperation” as a general possibility for a majority of Member States to proceed with deeper integration in areas of their choice[2] within the context of the EC/EU Treaties and their institutions.

The ‘remedy’ now having been applied or – in the form of “closer cooperation” – being ready to be applied even more extensively, the question arises whether it can actually play the beneficial role intended. Opinions continue to be very much divided on this issue: some authors regard the massive introduction of “flexibility” into the EU system as a basically positive and even inevitable development which will allow the Union to effectively accommodate diversity, to increase its capability for policy innovation and to enable the Member States willing (and able) to go ahead to do so, paving the way for the others to follow later.[3] Others, however, see more potential risks than benefits in the “flexibilisation” of the integration process, pointing in particular to risks of a potential erosion of political solidarity among the Member States, a fundamental departure from the Community method and the problems of political and legal fragmentation of the EC/EU system.[4] Yet any discussion of the advantages and disadvantages of “flexibility” in general acquires almost inevitably a rather abstract and philosophical character. It is not at the level of general principles that the utility of “flexibility” will be effectively proved or disproved but by ascertaining its problem-solving capacity in respect to certain issues or policy areas.

One policy-making area of growing importance for the Union in which the accommodation of diversity seems crucial for progress during the next few years is immigration policy. By communitarising major aspects of immigration policy and by establishing a range of new objectives in this area, the Treaty of Amsterdam has created for

the first time a basis for more comprehensive EU action in a field which during the 1990s has become a growing problem for many of the Member States. Yet divergences in exposure to immigration problems and in priorities and strategies have remained so substantial that there has been hardly any progress towards a comprehensive common immigration policy so far. It seems sensible, therefore, to ask whether "flexibility" in general or "closer cooperation" in particular could perhaps help the Union to overcome its current near-paralysis in the area immigration policy.

Initially, differentiation on immigration policy issues had clearly not been on the EU's agenda: when immigration issues made their way up on the European agenda at the beginning of the 1990s – mainly as a reaction to the transformation in Central and Eastern Europe and the increasing pressure on the German asylum system – the first reaction of European policy-makers was to look for a common response. A clear indication of this was the mandate given to the immigration ministers by the Luxemburg European Council of

1. Francis Bacon, *Essays, XIII*, "On innovations", (London, 1975) p. 100.
2. With the exception of Title V TEU – the Common Foreign and Security Policy.
3. See, for instance, Josef Janning, "Dynamik in der Zwangsjacke – Flexibilität in der Europäischen Union nach Amsterdam", in *Integration*, Vol. 20, No. 4 (1997) pp. 285-291; Andrew Moravcsik & Kalypso Nicolaïdis, "Federal Ideals and Constitutional Realities in the Treaty of Amsterdam", in *The European Union 1997. Annual Review of Activities, Journal of Common Market Studies* (1998) pp. 31-36; and (slightly more careful in their endorsement of the principle) Eric Philippart & Geoffrey Edwards, "The Provisions on Closer Cooperation in the Treaty of Amsterdam", in *Journal of Common Market Studies*, Vol. 37, No. 1 (1999) pp. 87-108.
4. See, for instance, José M. de Carvacal Areilza, "Enhanced Cooperations in the Treaty of Amsterdam: Some Critical Remarks", *The Jean Monnet Chair Working Papers*, No. 13 (Harvard Law School, 1998); Franklin Dehousse, "Les résultats de la Conférence intergouvernementale", Courrier hebdomadaire (Bruxelles: Centre de recherche et d'information socio-politiques, 1997), No. 1656-1566, pp. 50-53; and Giorgio Gaja, "How flexible is flexibility under the Amsterdam Treaty?", in *Common Market Law Review*, Vol. 35 (1998), pp. 855-870 (at 867).

June 1991 to submit a work programme that would lead to a harmonised asylum and immigration policy – in formal and substantial terms – before the end of 1993. This request, which took the following Dutch Presidency somewhat by surprise, went far beyond what had been proposed in the Commission's 1985 White Paper on the completion of the Internal Market and in the 1988 Palma document, but it was based on the same rationale, i.e. that immigration was a challenge common to all Member States which in the light of the increasing pressure required a common response.

Yet it proved to be much easier to agree in principle on this rationale at the level of the European Council than to agree – at the level of the responsible ministers and senior officials – on the nature and the extent of this common response. The immigration ministers duly submitted their report to the Heads of State or Government at the Maastricht European Council in December 1991, but their report was slightly less ambitious that the European Council's mandate and up to the present day essential parts of it have not been implemented. The reasons for the failure of the Member States so far to arrive at a 'common immigration policy' are well known and do not need to be analysed in this contribution: the major differences between the Member States on the question of communitarising national migration policy competencies, political concerns in some Member States about increased immigration and internal security risks which might result from a common European policy, the differences between national legal and procedural arrangements and the unresolved problem of burden-sharing.

In spite of the these difficulties, however, it has also become clear that some Member States are willing to make more progress towards the aim of a common migration policy than others. As a result, differentiated integration and/or cooperation in matters of migration policy has become not only a possibility but also – in the case of the Schengen group – to a limited extent already a reality. In the following

we will, first, look at existing forms of differentiation in European immigration policy and future possibilities of "closer cooperation", then evaluate the risks and opportunities of such differentiation, finally draw some conclusions on the positive and negative impact "flexibility" may have on the development of a European migration policy. ■

2. Existing forms of "flexibility"

Although the European Union is still far from having a 'migration policy' worthy of the name, the few elements of such a policy that have emerged so far are already subject to a considerable degree of differentiation. The first and foremost factor of differentiation is the Schengen system, which after protracted and difficult negotiations over the splitting of the legal *acquis* between Title IV of the Treaty of the European Communities (TEC) and Title VI of the Treaty of the European Union (TEU) has been incorporated into the EC/EU framework with the entry into force of the Treaty of Amsterdam on 1 May 1999. The Schengen members have in fact set up their own 'regime' in respect to a number of issues of considerable relevance to migration issues:[5]

1) Rules applying to the crossing of external borders of the 'Schengen zone': the Schengen conditions of entry (Art. 5 of the 1990 Convention implementing the Schengen Agreement[6]) and the uniform principles on checks at borders (Art. 6 CISA) which include provisions on the verification of the conditions of entry, residence and work go a long way establishing a fairly

5. As a result of the communitarisation by the Treaty of Amsterdam of matters relating to asylum, immigration and border controls, most of the Schengen provisions and measures of direct or indirect relevance to migration policy have been allocated an EC legal basis (mainly Articles 62 and 63 TEC) in the context of their incorporation into the Union system.
6. Hereinafter referred to as CISA.

comprehensive system of entry controls which is a central element of any migration policy.

2) Cooperation on surveillance and enforcement aspects: the Schengen Information System (SIS) can be used as an enforcement instrument in the area of migration. According to Article 96(3) CISA Schengen members can file reports in the SIS on aliens who have been the subjects of expulsion measures, prohibitions of entry or residence or have not complied with national regulations on the entry and residence of aliens.

3) Conditions governing the movements of aliens once admitted to the territory of a Schengen member: Articles 19 to 22 CISA define central rules for the movement of migrants in the Schengen zone once they have been admitted by one Schengen member. Article 21 provides, for instance, that holders of a residence permit or a provisional residence permit may move freely within the territories of all Schengen members for a period of up to three months.

4) Rules on expulsion: Article 23 CISA defines basic procedures for the expulsion of aliens who do not fulfill (or no longer fulfill) the short visit conditions. This expulsion may be effected to another Schengen member (if the alien still has a valid visa or residence permit) or – if not – to the alien's country of origin or any other third country to which he may be permitted entry.

5) Rules regarding residence permits: Article 25 CISA obliges the Schengen members to consult any of their Schengen partners in case they are considering issuing a residence permit to a person which another Schengen member considers to be not admissible for entry. In case of objections by the other Schengen member, residence permits can only be issued for humanitarian reasons or because of international obligations.

6) Cooperation with third countries on readmission: the Schengen members have elaborated a legal framework for the so-called "second category" of readmission agreements which do not make the readmission of people without residence permit dependent on a prior stay in the requested contracted party or a specific time limit for the stay in the requesting state. This is another important instrument of migration policy. It has been successfully tested by the conclusion of the 1991 Multilateral Readmission Agreement Between the Parties Contracting to Schengen and the Republic of Poland.[7]

All this means that the Schengen members have developed important instruments of control and some common rules applicable to the movement and residence of immigrants which are not shared by two EU members, the UK and Ireland. A further element of flexibility is introduced by the 1996 decision of the Schengen members to gradually integrate the Nordic Passport Union into the Schengen system, which was formalised in the 1996 Luxembourg Agreement between the Schengen members and Norway and Iceland. As a result, the rather peculiar situation has emerged that all Schengen instruments – including those of relevance to migration issues – have been extended to two non-EU members, Iceland and Norway,[8] while still not applying to two EU Member States.

In this context it seems appropriate to add a few critical remarks about the impact of Schengen on the emergence of an EU migration policy: the Schengen approach so far has been to regard action on asylum and immigration issues only as "compensatory" and subject

---

7. See on this issue Olaf Reermann, "Readmission Agreements", in K.Hailbronner, D. Martin, H. Motomura (eds.), *Immigration Admissions. The Search for Workable Policies in Germany and the United States* (Providence: Berghahn Books, 1997) pp. 121-145.
8. A corresponding agreement with the two countries was reached in April 1999.

to the requirements of ensuring the free movement of persons. This approach has also found entry into Article 61(a) TEC which provides that the Council shall adopt measures aiming at ensuring the free movement of persons in accordance with Article 14 TEC in conjunction with “directly related flanking measures”. These comprise measures with respect to external border controls, to the conditions of travel of third country nationals within the territory of the Member States and to asylum and immigration. It is true that Article 61(b) TEC provides for the Council also to take measures in the fields of asylum, immigration and in safeguarding the rights of third country nationals which are not explicitly linked to the aim of free movement. Yet these measures are subject to the general aim of Article 61 to establish an “area of freedom, security and justice”, which by virtue of Article 2 TEU is again mainly defined by the aim of ensuring the free movement of persons. This means that with the Treaty of Amsterdam the Schengen group has succeeded in implanting its relatively limited objective of ensuring free movement as the main rationale of action in Justice and Home Affairs (JHA) areas such as asylum and immigration policy. Yet both the challenges and the opportunities for the Union in these areas are far too great to look at these only as areas in need of some “compensatory” action. It is not surprising that the Schengen members have so far limited their own measures to selective elements of admissions and controls. The rationale of the system does not allow for more. Looking at the above mentioned provisions inserted by the new Treaty of Amsterdam there clearly is a risk that the Schengen members might continue with their rather narrow approach to migration issues, focusing more on free movement related to admission and control issues than on prevention and integration.

Yet it is not only by the incorporation of Schengen that the Treaty of Amsterdam brings major elements of “flexibility” into an emerging EU migration policy. It also grants a full opt-out to the United Kingdom and Ireland from the communitarised areas of Justice and

Home Affairs under new Title IV TEC.[9] This opt-out extends to all provisions dealing directly or indirectly with migration issues, i.e. not only the immigration policy measures listed in Article 63(3) TEC (conditions of entry and residence and measures against illegal immigration) but also the measures on the crossing of external borders referred to in Article 62(2) TEC (which include the important element of visa policy), the broad range of measures regarding asylum listed in Article 63(1) TEC and the measures on refugees under Article 63(2) TEC.

It is true that this opt-out is of a more "flexible" nature than the Social Protocol type opt-out the UK enjoyed previously: Article 3 of the Protocol on the position of the United Kingdom and Ireland offers each of the two Member States the possibility to notify the President of the Council in writing within three months after a proposal or initiative has been presented to the Council pursuant to Title IV TEC that it wishes to take part in the adoption and application of such proposed measure. Article 4 provides for the same procedure if Ireland or the United Kingdom want to accept a measure after it has been adopted. Yet this 'selective' opt-in possibility does not detract from the fact that the new "area of freedom, security and justice" has been constructed on the assumption that both countries will normally not participate in migration policy measures applying to this area.

At the Justice and Home Affairs Council meeting of 12 March 1999 the British Home Secretary Jack Straw announced that the United Kingdom would like to exercise its right under Article 4 of the above

9. On the whole range of "opt-out/opt-in" arrangements in EU Justice and Home Affairs after Amsterdam see Jörg Monar, "Schengen and Flexibility in the Treaty of Amsterdam: Opportunities and Risks of Differentiated Integration in EU Justice and Home Affairs", in M. den Boer (ed.), *Schengen, Judicial Cooperation and Policy Coordination* (Maastricht: European Institute of Public Administration, 1997) pp. 19-22.

mentioned Protocol to seek participation in those measures of the Schengen *acquis* – now incorporated into the EU Treaties – that relate to police cooperation, mutual assistance in criminal matters, judicial cooperation, narcotic drugs and the Schengen Information System. This step – which was followed by a similar application by Ireland and received a favourable opinion from the European Commission on 20 July 1999 – certainly indicates a significant change of approach of the British Government towards the Schengen system. Yet this British opt-in is limited exclusively to law enforcement aspects. In the British application – formally forwarded on 20 May 1999 – it was made perfectly clear that this would in no way change British policy on frontier controls. The British position on this point remains for the time being as uncompromising as ever. This was shown by the fact that although the United Kingdom sought participation in all CISA Articles relating to the SIS, it formally declared that it would not access or enter information on the SIS relating to the movement of persons, the only element of the SIS with potential relevance to migration issues. During the intense public debate on the UK's new asylum bill over the last twelve months the British Government also repeatedly insisted on keeping asylum and immigration policies firmly under national control. As a result it seems rather unlikely that it will make use of Article 3 and 4 of the UK/Ireland Protocol in relation to migration policy issues. Because of its geographical position, Ireland is one of the Member States least exposed to migratory pressures. It is therefore likely to see little benefit in opting-in into an emerging migration policy of the Schengen-13 which could also cause problems to the Common Travel Area with the UK.

Further major elements of differentiation – some of them even more complex – are introduced by the peculiar position of Denmark under the Treaty of Amsterdam. The Protocol on the Position of Denmark grants this Member State an opt-out from Title IV TEC which is in substance and procedures very similar to the British and

Irish. Yet the Danish case is obviously more complicated because Denmark is a member of Schengen. Article 5 deals with this problem by providing that Denmark has six months time to decide whether it will implement any Council decision building on the Schengen *acquis* into national law. It cannot be excluded that the Schengen members will adopt some measures building on the Schengen *acquis* which are of relevance to aspects of migration policy, such as on entry controls, readmission and expulsion. Should Denmark decide to adopt these its decision will – by virtue of Article 5(1) of the Protocol – only create an obligation under international law between Denmark and the other Member States. This is a rather special feature because it effectively gives Denmark an opt out from the specific obligations of the EC legal order in this respect.

Yet this is not yet all as regards the peculiar Danish position. As a result of Article 4 of the Protocol on the position of Denmark this Member State has explicitly opted-in as regards two major elements of a common visa policy – the establishment of the 'negative list' of countries whose nationals must be in possession of a visa and all measures relating to a uniform visa format – but has maintained its opt-out as regards the other elements defined in Article 62(2)(b) TEC, i.e. the 'positive list' (ii), the rules on procedures and conditions for issuing visas by Member States (iii) and the rules on a uniform visa (v).

It seems reasonable to expect Denmark to be slightly more inclined to use its extensive opt-in possibilities in the area of migration policy than the UK and Ireland, and this for two reasons: one is that the Danish Government insisted on its opt-outs in Justice and Home Affairs mainly because the 1993 referendum was partly won on the promise that Denmark would not participate in a communitarisation of Justice and Home Affairs. With the Protocol giving Denmark a possibility to opt in to some measures relating to migration on a non-EC public international law basis, the government

might be able to avoid a difficult constitutional and political debate in case of some opt-in decisions. The second reason is that Denmark could find itself in a difficult position if Sweden and Finland were to be part of a strong emerging common migration policy: non-participation could be seen as undermining "Nordic solidarity" and even have negative implications for the Nordic Passport Union. ■

3. Future possibilities of differentiation: "closer cooperation"

With the incorporation of Schengen and the special positions of Denmark, of the UK and Ireland, a strong dose of "flexibility" has already been injected into major areas of possible EU action on migration issues. Yet one obviously also has to consider the possibility that Member States might use the new clauses on "closer cooperation" on migration issues.

Because most of the areas of relevance to migration fall under new Title IV TEC the main applicable clause would be the EC clause of Article 11. Should Member States decide to use it, they would need to fulfill not only the five preliminary conditions under Article 11(1) TEC but also the additional seven conditions of the "general" clause of Article 43 TEU. Together these make up quite a daunting list. To name only the most relevant conditions, their closer cooperation on the respective migration policy elements would

- need to fall outside of an area of exclusive EC competence;
- need to exclude any negative effect on Community policies, actions or programmes;
- need to exclude any negative effect on Union citizenship and any discrimination between MS nationals;
- need to be limited to Community powers as defined in the Treaties;
- need to be aimed at furthering the objectives of the Union and protect its interests;
- need to respect the principles and the single institutional framework of the Treaties;
- need to be only a measure of "last resort";

– need to concern at least a majority of the Member States;
– need to exclude any negative effect on the *acquis communautaire*;
– need to exclude any negative effect on the competencies, rights and obligations of non-participating Member States;
– need to be open to all Member States.

Nearly all of these preliminary conditions could constitute powerful obstacles to “closer cooperation” on migration issues and clearly reduce the likelihood of its application.[10] Economic measures in the context of trade agreements to combat the root causes of emigration in third countries, for instance, would most likely fall under the Community’s exclusive external trade powers and therefore be excluded from “closer cooperation”. With migratory issues certainly being far from figuring prominently among the Treaty objectives (see the extremely ‘thin’ reference to immigration in 2 TEU) it could be difficult to prove that a “closer cooperation” in this area would further the Union’s objective. Should the measures adopted lead to a diversion of migratory flows to the detriment of non-participating Member States this would clearly “affect” the interests of the latter in the sense of Article 43 TEU.

There are also potential political obstacles: as things stand, a group of Member States opting for deeper integration on migration policy issues able to regroup a majority of the Member States would need to come from within the Schengen Group. The emergence of such a core group could be seen, however, as undermining or even splitting the Schengen Group on the central issue of migration policy. Most Schengen Member States could regard this as a rather high price to be paid.

10. See on this issue Sally Langrish, “The Treaty of Amsterdam: Selected Highlights”, in *European Law Review*, Vol. 23, No. 1, p. 6. She takes the view that the stringent constraints on flexibility in the first pillar may consign the concept of flexibility “to a position of theoretical rather than practical importance”.

In addition, there is the possibility that in accordance with Article 11(2)(2) TEC a Member State might declare in the Council that “for important and stated reasons of national policy” it intends to oppose the authorisation of “closer cooperation” by qualified majority. In that case the Council can refer the question to the European Council for decision by unanimity which means that one Member State could block the proposed “closer cooperation”. While a Member State is unlikely to use this heavy and potentially very damaging instrument easily, the mere possibility of its use could be seen as a factor of uncertainty to be counted on the “cost” side of “closer cooperation”.

Amongst the future possibilities of “closer cooperation” one should also think about a possible use of the enabling clause for the “third pillar” (Article 40 TEU). Some of the areas of police cooperation under Title VI TEU – such as measures against the traffic in human beings and the fight against forged documents – are of clear relevance to migration issues. With Member States – even within the Schengen Group – still having very different views about the development of Europol and its competencies, one should not exclude the possibility that “closer cooperation” in the area of police cooperation could emerge, which would have some implications for the ‘control’ side of an emerging European migration policy. ■

4. Opportunities

As indicated in the introduction there are sound reasons to ask whether “flexibility” could play a useful role in the development of a European migration policy. Although migration problems occupy a prominent place on each JHA Council meeting and although some Member States, like Germany, have now been forcefully advocating for years decisive progress towards a comprehensive common approach to migration issues, Union measures have so far remained both fragmented and of a very limited scope, going hardly beyond the affirmation of (vague) general principles, limited and primarily ‘re-

active' emergency measures in case of major refugee problems, and a number of small projects.[11]

It is true that there have been some indications since 1998 that the Member States and the Commission want to move towards a more pro-active attitude to common challenges in these areas. One of these was the decision of the General Affairs Council on 7 December 1998 to establish a High Level Working Group on Asylum and Migration for the purpose of providing the Council reports on countries of origin and transit from which large numbers of asylum seekers and migrants come and of developing integrated action plans in respect to these countries. The broad range of measures falling within the High Level Group's remit marked a significant step forward towards an integrated cross-pillar approach to asylum and immigration issues, which uses instruments from all three pillars to react to the increasing challenges. The German Presidency of the first half of 1999 then started with the ambitious aim of arriving at the formulation of a comprehensive migration strategy based on an effective system of burden-sharing and an increased use of cross-pillar measures.

Yet the failure of the Member States to agree on an obligatory system of burden-sharing, the obvious inability of the Council to respond effectively to the Kosovo refugee crisis and the absence of a strong lead by the European Commission (weakened anyway by the resignation crisis) meant that all efforts of the German Presidency in the end led to little more than some progress in the formulation of "Guidelines for a European migration strategy" which should be formally adopted by the special Tampere European Council on Justice

---

11. Such as the projects in favour of displaced persons having found temporary protection, asylum-seekers and refugees financed on the basis of Joint Actions 98/304/JHA and 98/305/JHA of 27 April 1998 and those aimed at providing practical support in relation to the reception and voluntary repatriation of Kosovo refugees based on the Joint Action 99/290/JHA of 26 April 1999.

and Home Affairs on 15 and 16 October 1999. Yet the draft of these "guidelines" which emerged from the Council working parties in June,[12] although more comprehensive and more "cross-pillar" oriented in its approach than any previous Council document on migration, was again limited to a range of statements on general principles and objectives which were not linked to concrete legislative measures or a new action plan with time limits. At the time of writing, therefore, although the Kosovo crisis has again exposed all the Union's problems and weaknesses in coping with migration issues, a 'common policy' worth the name appears as difficult to to be delivered at as ever.

It is against this background that one has to ask whether "flexibility" – by removing the need for participation of all Member States in any step forward – could help the Union to avoid a purely re-active, piecemeal policy-making – or even paralysis – in this field. There are indeed three major opportunities which, in principle, both the incorporation of Schengen – as the main existing "flexibility" arrangement – and any future form of "closer cooperation" on migration issues could offer the Union:

1) It could allow Member States which want to go ahead with the development of a common migration policy to do so with full use of the legal instruments, procedures and institutions of the EC/EU without having to wait for a reluctant minority to follow. Policy development and innovation could in that case take place within the EU context, avoiding any risk of intergovernmental cooperation on migratory issues between Member States outside the EU context.

2) It could provide the Union with a core of Member States acting as a "laboratory" for the agreement on and even the testing of new common approaches to migration issues. By trying to agree on substantial elements of prevention, admissions and integration,

participating Member States could acquire valuable experiences with the potential and the limits of various forms of harmonisation, integration and cooperation in the sphere of migration.

3) The Schengen group in the context of Title IV TEC and any other form of "closer cooperation" could act as an effective precursor on migration issues. If obviously successful – i.e. if being more successful in tackling certain immigration problems than the non-participating Member States – it could act as a positive model and, over time, draw the other Member States into joining up. Schengen has to some extent been successful both as laboratory and a model and, at least in principle, this could also be possible in the sphere of migration.

It has sometimes been argued that the "new flexibility" could also help with the enlargement process in Justice and Home Affairs by allowing to temporarily leave out new Member States from the requirements of more advanced policies. Yet this seems far from evident. It is true that at any time after accession new Member States would have the option of staying out or joining into new frameworks of "closer cooperation" on migration issues on the basis of the procedures provided for by Articles 11(3) TEC and 40(3) TEU. Yet this option exists neither in respect to the migration policy *acquis* built up under Title IV TEC (in which Ireland and the UK do not participate) nor in respect to the Schengen *acquis*: Article 8 of the Protocol integrating the Schengen *acquis* provides that this *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted "in full" by all candidates for accession. The exclusion of flexibility as regards both the Title IV TEC and Schengen deprives the new flexibility clauses of most of their potential in respect to enlargement situations. ■

12. Council document 8815/99 (ASIM 23).

5. Problems and risks

Whatever form of flexibility has emerged or will emerge in the area of migration it undermines the common objective – as enshrined in Article 2 TEU – to "maintain and to develop the Union as an area of freedom, security and justice". Migration is clearly a central issue to the development of this new "area", not only because – as the Action Plan of December 1998[13] has emphasized[14] – illegal immigration constitutes a security challenge, but also because basic rights and conditions of stay of legal immigrants are at stake. Any differentiation in the formulation and geographical applicability of migration policy will split up the "area of freedom, security and justice" into two or more zones with different immigration regimes and contradict the principle that the "area" should extend to the whole of the EU.

The emergence of different immigration regimes within the European Union could create two major elements of political tension, conflicts of interests between the "ins" and the "outs" and 'exclusive flexibility'. As regards conflicts of interests it is far from clear to what extent the migration policy interests of Member States not participating in "closer cooperation" on migration issues could be effectively protected. In the sphere of migration such conflicts could easily arise: any immigration policy measure adopted by some Member States in the context of "closer cooperation", but not by others, is likely, at least to some extent, to divert migratory flows from some Member States to others. This could lead not only to tensions between Member States but also to new restrictive measures adopted by those which find themselves under increased pressure and to negative reactions against EU action in the field of migration in general.

It is true that the general clause on "closer cooperation" stipulates that "closer cooperation" shall "not affect the competencies, rights, obligations and interests" of non-participating Member States (see above). Yet this apparently rather comprehensive set of protected national domains is not further clarified and is not taken up again in

the specific flexibility clauses of the EC Treaty and of Title VI. Could non-participating Member States bring those engaged in closer cooperation before the European Court of Justice for an infringement of their interests? The reference made in Article 11(1) TEC and 40(1) TEU to the general clauses on "closer cooperation" open a possibility for the Court to come in also on the interpretation of the conditions in the general clauses. Yet the "interests" of Member States are a political rather than legal term which the Court might find hard to define. The same applies to the condition that "closer cooperation" should only be used "as a last resort" which non-participating Member States could also invoke against a form of "closer cooperation". One also has to say that an action before the Court which may take many months is unlikely to fully satisfy a Member State faced with a sudden increase of immigration pressure as a result of other Member States' "closer cooperation". The reintroduction or reinforcement of border controls and serious political tensions are a more likely result.

The second major element of potential political tension is the possible emergence of 'exclusive flexibility' which means that Member States participating in "closer cooperation" exclude one or more other Member States from joining into that cooperation. On this point Article 43(1)(g) TEU starts reassuringly enough by providing that [closer] "cooperation is open to all Member States and allows them to become parties to the cooperation at any time". Yet this is immediately followed by the condition that Member States wanting to join in must at the moment of entry "comply with the basic decision and with the decisions taken within that framework". Although this condition seems natural enough – new members should after all not be allowed to undermine an existing "closer cooperation" – it has its

13. *Official Journal of the European Communities*, No. C 19/1 of 23.1.1999.
14. See Paragraph 32 of the Action Plan.

problematic side. Member States wanting to join could for prolonged periods be prevented from doing so because the "ins" (or even only one or two of them) take the view that the "outs" have not yet done enough (or are not yet able) to comply with all decisions taken within their "closer cooperation". The delay in the inclusion of Austria, Italy and Greece into the Schengen space after their formal adhesion to Schengen has shown the problems which a strict interpretation of the conditions for 'accession' can generate: there were polemical exchanges between Austria and the bordering German Land of Bavaria, the Italian Government resented renewed inspection tours by its Schengen partners and further delays during 1997 and, to its considerable frustration, Greece remains still excluded from the Schengen space seven years after its formal accession to the Schengen agreements in November 1992.

Yet even if there were no doubt about a Member State's capability to fully comply with decisions adopted within "closer cooperation", the door towards joining might not automatically spring open: within the EC framework it is left to the Commission to decide on the non-participating Member State's application (Article 11(3) TEC) and within the framework of Title VI it is up to the Council, on the basis of a recommendation of the Commission, to decide on it[15] (Article 40(3) TEU). As regards the Schengen *acquis* the United Kingdom and Ireland need the unanimous support of the Schengen members before they can join.[16] In all three cases the right to join is not automatic but dependent on the support of Commission and/or Council which in some ways contradicts the "at any time" promise in the general clause. This also tends to deepen the gap between the "ins" and "outs" and could well lead to political tensions. A foretaste of these was already given immediately after the Amsterdam European Council when the British and Irish delegations disputed the unanimity requirement for their possible adherence to the Schengen *acquis* as provided for by Article 4 of the Protocol on Schengen. They claimed – unsuccessfully – that the procedure actually agreed upon during the

Amsterdam Summit had been that of qualified majority. It seems that Spain – engaged in the bitter Anglo-Spanish dispute over Gibraltar – insisted on the unanimity rule which would allow it to block the United Kingdom's adherence to Schengen. At the moment of writing it is still not clear whether Spain will accept even the limited opt-in the United Kingdom formally applied for in May 1999. This shows how easily the politics of "in" and "out" can be abused for other political purposes, with potentially very negative consequences for the political climate within the European Union.[17]

The next aspect one has to consider is the impact of "flexibility" on the effectiveness of common measures on immigration. In many cases effectiveness is also likely to be undermined if not all Member States participate. Some of the immigration policy measures identified in the December 1998 Vienna Action Plan may serve as examples in this respect: it would make little sense, for instance, to seek among Member States a common determination of the rights and conditions under which third country nationals who are legally resident in a Member State may reside in other Member States, as long as only some Member States have made progress towards harmonisation of the rules of entry and residence including common standards on procedures for the issue of long-term visas and residence permit.[18]

Similarly it would appear to be rather futile for all Member States to try to agree on an effective balance of efforts between them in

---

15. The decision is deemed to be taken unless the Council, acting by a qualified majority, decides to hold it in abeyance. In that case the Council is obliged to state the reasons and set a deadline for a reexamination. This means that in formal terms a negative decision by the Council has only a suspensive effect, but nothing prohibits the Council from extending this suspension.
16. Article 4 of the "Protocol integration the Schengen *acquis* into the framework of the European Union".
17. See *Europe*, No. 7014, 11 July 1997, p. 2.
18. See Paragraph 38(c)(ii)-(iii) of the Action Plan.

receiving and bearing the consequences of receiving displaced persons as long as not all of them have agreed on minimum standards for giving temporary protection to displaced persons.[19] Finally it seems difficult to envisage how all member States could agree on a coherent EU policy on readmission and return while only some of them would participate in the comprehensive assessment of countries of origin, which is aimed at country specific integrated approaches, as envisaged in Paragraph 36(a) of the Action Plan.

Most types of preventive action in the area of immigration require cooperation with third countries. The EU's external trade and development policy instruments could make an effective contribution to the combat of root causes of emigration in third countries. Yet the effectiveness of the use of these instruments would be undermined if not all Member States were to participate. Readmission clauses are a good example in this respect. It has been suggested by some Member States that readmission clauses should in the future be inserted into all trade and cooperation agreements with third countries. Yet the willingness of third countries to accept such clauses could be drastically reduced if these would be insisted upon and applicable to only some of the EU Member States.

Next one has to consider the impact of flexibility on the legal construction of a European migration policy. Any legally binding acts on migration issues adopted under "flexibility" arrangements – be it through the incorporation of Schengen or "closer cooperation" – will contribute to the emergence of different sets of immigration legislation with a corresponding fragmentation of the EC and EU legal order. Disputes over the scope and conflicts between flexibility and non-flexibility legal acts are likely to arise. The need to distinguish, for instance, between legal acts applying to all 15 EU Members, to the Schengen 13 or to the Schengen 13 without Denmark is unlikely to favour the establishment of a clear and comprehensive legal *acquis* in the area of immigration. Members of parliament, immigration officials

and, last but not least, immigrants could be faced with a bewildering range of different sets of legislation and legal uncertainty.

The quite comprehensive role given to the European Court of Justice in all the different cases of differentiated integration makes the emergence of differentiated case-law in the Union inevitable, at least as regards Schengen and non-Schengen case-law. This will add considerably to the complexity of the legal system and most likely to the case-load of the Court. There will also be differences in judicial protection of individuals. The cases of migrants threatened by expulsion, problems of the legal status of immigrants, the rights of migrants under visa and residence permit arrangements can reach the ECJ in some Member States but not in others.

Finally, the financial consequences of differentiated integration on migratory issues should also not be overlooked: the development of a comprehensive migration policy will sooner or later require substantial funding. The debate over burden-sharing as regards the reception of displaced persons is still a major unresolved issue on the Council's agenda. Member States accepting a larger number of refugees on a temporary basis which often turns into a more permanent situation will expect some help or compensation. This could be achieved relatively easily by using the Community budget. The same applies to programmes which could be aimed at facilitating the return of immigrants or their social integration. Yet by virtue of Article 44(2) TEU the costs of measures in which not all member States participate need to be borne by the participating Member States only. This means that separate negotiations of participating Member States will be necessary, specific financial mechanisms will need to be worked out and Member States may be more reluctant to participate in migration policy measures under which they would

19. See Paragraph 37 of the Action Plan.

need to make separate national contributions. This could reduce the chances of providing an emerging EU migration policy with a regular and adequate budget. ■

6. Conclusions

Asylum and immigration policy has been singled out as one of three key areas on the agenda of the first ever special European Council dedicated to Justice and Home Affairs in Tampere in October 1999. This is a further indication that migration problems have become central in EU policy-making, important enough to be dealt with by the Heads of State or Government themselves. The preparations for the Tampere summit have again shown persisting difficulties to define common European interests and objectives in this field: some Member States are willing to engage in a harmonisation of rules on legal immigration and of measures against illegal immigration, others reject any major interference with national legislation. Some Member States would like to arrive at a comprehensive obligatory system of burden-sharing, others are at most willing to accept an institutionalised mechanism for voluntary burden-sharing as this was used during the Kosovo crisis. Some Member States want to reduce immigration pressure, *inter alia*, through the use of EU trade and development policy instruments, others take the view that the use of the latter should be consistent with their primary objectives, i.e. liberalisation in the context of trade policy and poverty reduction in the context of development policy. None of the Member States has so far suggested overcoming these and other fundamental differences of position through the use of "closer cooperation". Both the difficulty in surmounting the many political and legal obstacles (see section 3) and the potential risks (see section 5) are obviously powerful deterrents.

Is there nevertheless a feasible scenario for the emergence of "closer cooperation" on migration issues? It seems unlikely that any group of Member States will engage in the cumbersome process of

launching a "closer cooperation" only for comparatively minor immigration issues, such as, for instance, the agreement on a common lawful status of legal immigrants or the establishment of a European Border Control Academy providing training and research for both Member States and applicants on the fight against illegal immigration.[20] In respect to such minor issues – whose potential risks would be correspondingly smaller – one may ask whether the clauses on "closer cooperation", with all their conditions and procedural requirements, are not defeating the original purpose of providing "flexibility".

One should not rule out the possibility, however, that some or all members of the Schengen group could consider using the instrument of "closer cooperation" on a broader scale if the governments of one or two Member States take a consistently negative attitude towards more progress on migration issues. Under the current EU system the coming into office of a single government with a totally inflexible view on retaining full control over national asylum and immigration instruments could mean that at least during the five year transitional period (during which unanimity is required) no progress could be achieved on migration policy even if all the other Schengen members would be willing to go ahead.[21] In such a situation "closer cooperation" could be seen as the only way out of a deadlock producing complete paralysis. One should also not discard the possibility that the mere threat of resorting to "closer cooperation" – with its potential effects of exclusion – could help to bring reluctant governments into line with the majority.

---

20. Both of these issues were discussed during the "*tour des capitales*" in preparation of the Tampere summit in April 1999.
21. It should be recalled that by virtue of Article 67 TEC even after five years the passage to majority voting will be dependent on a unanimous decision of the Council.

On balance, however, the risks and problems generated by "flexibility" in the sphere of migration policy seem to be far greater than the opportunities it offers. They include political and legal fragmentation, reduced effectiveness of measures agreed upon and the risk of a diversion of migratory flows which could cause political tensions within the Union. The risks and problems are likely to increase disproportionally together with the number of Member States which are not participating. The only (slightly) positive message therefore seems to be that if the Schengen 13 – in the form of measures building upon the Schengen *acquis* or more generally under Title IV TEC – were to go ahead with the development of a European migration policy this would at least leave only two Member States out. An additional framework of "closer cooperation" on migration issues regrouping a smaller number of Member States would not only cause additional fragmentation but could also undermine the cohesiveness of the Schengen group which at the moment clearly offers the best prospects to serve as a "laboratory" and "precursor" for the EU.

We have started with Francis Bacon, we can finish with him: striking a more careful note after his emphasis on the need for new remedies to prevent new evils cited at the beginning, Bacon wrote: "It is good also, not to try Experiments in States; Except the Necessity be Urgent, or the utility Evident."[22] For the time being both the urgent necessity and the evident usefulness of an application of "closer cooperation" to an emerging EU migration policy still have to be proven. While its use (or threat of use) may not be excluded in a situation of complete and prolonged paralysis of EU policy-making, it should always be regarded as an extreme 'remedy' whose problems and risks can easily outweigh its potential benefits. ■

---

22. Francis Bacon, *Essays, XIII,* "On innovations", (London, 1975) p. 101.