Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?

Maria Kendrick

Introduction

Divergence of views on the policy areas and laws of the EU, between its constituent Member States, is not a new phenomenon. Differentiated application of EU laws, put in place by Treaty Protocols, has been a feature of the Union since the Treaty of Rome. There are now various mechanisms of flexible integration in the Union. One of the most significant is that found in Articles 20 TEU and 326 to 334 TFEU, on enhanced cooperation. The constitutional impact of the mechanisms of differentiated integration and their theoretical underpinnings have and continue to be discussed at length in political and legal academic literature. However, what is discussed with comparative infrequency is the fact that these mechanisms are being tested in the judicial forum.

In considering some of the key cases involving the United Kingdom and flexibility mechanisms, this chapter will critique the Court's often haughtily detached decisions which leave Member States opting out without judicial protection. However, in fairness to the Court, it will also be argued that the Member States do not crown themselves in glory in their use of the system. This chapter will therefore submit that the judicial forum should be used as a system in which the non-participating Member States are protected, as are the mechanisms of flexible integration, and that responsibility lies equally with all of the parties involved; the Member States, the EU institutions and the Court. This would not only be beneficial for the Union in the long run but essential for the preservation of the rule of law through a complete and coherent system of legal remedies and procedures.

Flexibility and its Mechanisms

Dougan has 'roughly' defined flexibility as 'the possibility that one or more Member States may chose or even be obliged to remain permanently outside the scope of certain activities pursued within the Union's legal framework.'[1] Until the Treaty of Amsterdam, differentiation generally served more as a method to assist in the implementation of European Union law, for instance through minimum harmonisation or transitional measures, rather than as a method by which Member States, in disagreement with the general direction of the European exercise or with whole sections of policy ideology, could choose to 'opt-out' of what was not suited to taste. The drafters of the Amsterdam Treaty included a general mechanism of flexibility between some, but crucially not all, Member States. Gaja identifies two basic reasons for this; firstly, 'certain Member States are reluctant to take part in some form of integration in a given field while other States wish to pursue it' and the 'second reason stems from the fact that certain States are viewed as incapable of taking part in further integration because of their

[1]Michael Dougan, *The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and Their Constitutional Implications* in Andrea Ott and Ellen Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009) 157.

political, economic or social conditions.[2] However, due to the offensive nature of, at least, the latter reason, the general mechanism made no distinction between these two reasons.[3] It was thought that reluctant Member States may not want to advertise their reluctance and that incapable Member States would want to disguise their incapacity.[4]

Generally, flexibility is now achieved through a number of mechanisms including: opt-outs or opt-ins, within or outside of various Protocols, enhanced cooperation, derogations, transitional provisions upon accession, abstentions, constructive abstentions and passerelle clauses. It should also be noted that on five occasions prior to the first authorisation of a new enhanced cooperation, the Treaty provisions which apply to allow a Member State to join an established enhanced cooperation which is already in progress were used to permit the United Kingdom to opt-in to an area covered by one of its Protocol opt-outs.[5]

Whatever mechanism used or measure deployed, the Member States adopt an incongruous stance. On the one hand, there is the obtainment of an opt-out and a reliance on those negotiated provisions in order to keep them out of a measure they do not want to be part of or bound by. Whereas, on the other hand, there is the reluctance to be the subject of a forced exclusion and even isolation from an area that they may want to join in, or at least not be shut out of completely, especially in terms of future negotiations and deliberations. It is understandable that Member States which find themselves in either of these positions, or in both as is regularly the case with the United Kingdom, have been looking to the CJEU for judicial protection.

---

[2]G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?,* 35 CMLRev 855, 858 (1998).
[3]Ibid, 860.
[4]J. Weiler, *Prologue: Amsterdam and the Quest for Constitutional Democracy* in David O'Keefe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty,* (Hart Publishing, Oxford, Portland Oregon 1999) 3. For a navigation around the terminology in this area see A. Stubb, *A Categorization of Differentiated Integration,* 34 JCMS 283 (1996). The Treaty of Nice followed by the Treaty of Lisbon made some changes to the mechanisms of flexibility. The motivations behind the genesis of enhanced cooperation as well as the other mechanisms of flexibility inevitably vary between individual Member States and indeed different political parties within those States. However, one motivation in particular which stands out in the literature is to avoid a deadlock in decision-making within the Council. Some examples of the literature are: Foreword by AG Maduro in Andrea Ott and Ellen Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009); David O'Keefe and Patrick Twomey, *Legal Issues of the Amsterdam Treaty* (Hart Publishing, Oxford, Portland Oregon 1999) *Introduction by the Editors* XXXV; Michael Dougan, *The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and Their Constitutional Implications* in Andrea Ott and Ellen Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009); C. D. Ehlermann, *Increased Differentiation or Stronger Uniformity* in T.M.C Asser Instituut *Reforming the Treaty on European Union – The Legal Debate* J. A. Winter, D. M. Curtin, A. E. Kellermann and B. De Witte (eds) (Kluwer Law International, The Hague, Boston, London 1995); H. Wallace, *Flexibility: A tool of integration or a restraint on disintegration?* In Neunreither and Weiner (eds) *Amsterdam and Beyond: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, Oxford 1999).
[5]S. Peers, *Divorce, European Style: the First Authorization of Enhanced Cooperation,* 6(3) E.C.L. Review 339, 343 (2010). Philippart, Edwards and Stubb categorise flexibility in three basic forms: firstly, 'a general system of rules for any closer cooperation that meets certain preconditions' or as Stubb terms it 'enabling clauses', secondly, pre-determined flexibility which is 'closer cooperation in particular fields with special arrangements'. Stubb calls this pre-defined flexibility and considers that it covers Protocols and Declarations including Schengen, and thirdly, case-by-case flexibility, which includes constructive abstention and for Philippart and Edwards also opt-outs: E. Philippart and G. Edwards, *The Provisions on Closer Cooperation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union,* 37 JCMS 87, 89 (1999). A. Stubb, *Dealing with Flexibility in the IGC* in Best et al (eds) *Rethinking the European Union: IGC 2000 and Beyond* (EIPA, Netherlands 2000) 145, 148-150.

Judicial Protection

There are a number of cases involving the United Kingdom, either as an applicant or intervenor, in actions for annulment of legislative or administrative acts, relating to a flexibility mechanism. As the CJEU is the most significant forum post the enactment of a measure, it is important to ascertain the Courts' approach to such challenges. Moreover, Member States' consequently need to carefully consider their position when litigating in the CJEU in order to ensure that they, and indeed their opt-outs, receive judicial protection. As David Cameron is embarking on a renegotiation mission, the aim of which is to secure further opt-outs for the UK, it is increasingly important that the UK learns to get this right. However, the following cases demonstrate that this is far from easy and the success rate of the UK is mixed.

Most litigious challenges involving flexibility mechanisms relate either to the choice of the legal basis of a measure, the decision authorising an enhanced cooperation, or the exclusion of a non-participating Member State. The latter situation is typically where a Member State does not participate in certain EU competences by virtue of an opt-out, commonly contained in a Protocol, but is prevented or excluded from participation in either current or future measures where the provisions of the Protocol allow for inclusion. Applications for inclusion are subject to procedural and substantive conditions, which become the subject of litigation. Space precludes a detailed analysis of every case and even every recent case. Suffice it for present purposes to take a pertinent example of each of the three categories identified as illustrative of the Court's position.[6]

(1) Choice of Legal Basis

As it is the choice of the legal basis of a measure which dictates whether a Protocol opt-out applies, if a Member State does not succeed in utilising the EU institutions in their legislative capacity, to have a measure adopted on the basis of a Treaty Article, which allows it to avail itself of its opt-out, that Member State can find itself implementing provisions it thought it had not signed up for. The option for a Member State in this situation is to seek to have the measure annulled. In this respect, it is notable that applicant Member States do not always seek to challenge the detailed contents of the measure itself. It may not mind if the provisions apply to other Member States. Rather, the intention is to insist on the opportunity to opt-out.

A recent report by the House of Lords European Union Committee[7] reviewed the United Kingdom Government's strategic approach to litigating in the CJEU. The review was conducted in relation to the specific opt-out provisions of Protocol 21 of the Treaty of Lisbon.[8] This Protocol applies to the Area of Freedom, Security and Justice. The report details the approach of the Government to challenging the choice of legal basis as: requiring the Protocol opt-out to be considered first and then the aim of the specific contested measure afterwards. In the Government's view the opt-out should be prioritised. The report suggested

[6]See generally on the role of the European Court of Justice in relation to flexibility: C. Lyons, *Closer Co-operation and the Court of Justice,* in G. de Búrca and J. Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing, Oxford, Portland Oregon 2000) 95 to 113.
[7]House of Lords European Union Committee, *The UK's opt-in Protocol: implications of the Government's approach,* HL Paper 136, http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-law-and-institutions-sub-committee-e/news/opt-in-protocol-report-publication/ last accessed 24 March 2015.
[8]Article 1, Protocol (No21) ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE, C 326/295.

that the Court's approach is to look at the Protocol and measure in reverse order to that of the UK's view. The Court therefore does not prioritise the Protocol opt-out. In fact, according to the report, the CJEU focuses on the ultimate aim of the measure, without necessarily referring to the Protocol.

The EU institutions themselves have engaged in litigation on this issue. In the relatively recent case of *Commission v Parliament and Council*[9] the United Kingdom intervened in support of the Defendants[10] in an action to annul Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related traffic offences.[11] The choice of Treaty Article as the legal base was between Article 91(1)(c) TFEU, which specifically provides the basis on which 'measures to improve transport safety' can be laid down. Alternatively, Article 87(2) TFEU was available as a legal base, covering a range of possible measures for 'the collection, storage, processing, analysis and exchange of relevant information; … support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection; … common investigation techniques in relation to the detection of serious forms of organised crime.' The Commission had initially proposed Article 91(1)(c) TFEU[12] as the correct legal basis. As the legislative process progressed the Council and European Parliament reached an agreement to replace Article 91(1)(c) TFEU as the legal basis of the Directive with Article 87(2) TFEU. Consequent on this substitution, Protocol Number 21 which provides the UK with an opt-out in respect of the Area of Freedom, Security and Justice then applied. As a result, the UK was deemed not to be taking part in the Directive's adoption nor would it be bound by or subject to its application.

It was argued on behalf of the Commission *inter alia* that because the Directive put in place a mechanism for the exchange of information between the Member States on road safety related traffic offences, whether of an administrative or criminal nature, both the goal and the content of Directive 2011/82 fell within the field of transport policy and consequently Article 91 TFEU. This Article should therefore have been used as the legal basis of the Directive.[13] On the contrary, the Defendants, supported by the intervening Member States, submitted *inter alia* that the precise aims of the Directive are to collect information concerning offences, in order to help deter them, which are measures for which the European Union has competence under Article 87 of the TFEU.[14]

The Court held that the measure could not validly be adopted on the basis of Article 87(2) TFEU.[15] In coming to this conclusion it applied its familiar test that 'the choice of legal basis for a European Union measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure'[16] and then went on to reaffirm that when examining a measure to establish its aim, content and purpose, if a twofold purpose is

[9]2014 EUECJ C-43/12, not yet published.
[10]The UK was accompanied by a further six intervening Member States, namely Belgium, Ireland, Hungary, Poland, Sweden and the Slovak Republic.
[11]Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences, OJ 2011 L 288, p1.
[12]The proposal was actually made under Article 71(1)(c) EC however the Treaty of Lisbon numbered the Article 91(1)(c) and as the Court refers to the latter numbering throughout its judgement for ease of reference this chapter will use the Lisbon numbering.
[13]C-43/12 paras 19 to 20.
[14]C-43/12 para. 27.
[15]C-43/12 para. 50.
[16]C-43/12 para. 29 citing case C411/06 *Commission* v *Parliament and Council* EU:C:2009:518, para. 45 and case C130/10 *Parliament* v *Council* EU:C:2012:472, para. 42 and the case-law cited.

revealed and 'if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component'[17]. The Court concluded that the main aim of the Directive was the improvement of road safety[18] which the Court considered a 'prime objective'[19] of the transport policy of the European Union. The Court admitted that the Directive does establish a system for the cross-border exchange of information, but as that system related to information on the subject of road safety related traffic offences, the prime objective of this system was to enable the European Union to pursue the goal of improving road safety.[20]

The Court also looked at its previous interpretations of Article 91(1)(c) TFEU and what provisions had been adopted on the basis of that Article. It considered that measures aimed at improving road safety and transport safety which, in its opinion included the Directive, is apt to be adopted under Article 91(1)(c) TFEU.[21] In light of the similarly interpretive exercise it had conducted in relation to Article 87(2), the Court had satisfied itself that this was a stable interpretation.[22]

The Court consequently deprived the United Kingdom of the opportunity to avail itself of its Protocol 21 opt-out. It therefore appears, from the perspective of the United Kingdom, that in this instance protection of its opt-out was actually provided by the Council and European Parliament. At least this can be said to have been the position initially, by virtue of their action in changing the legal basis from Article 91(1)(c) TFEU to Article 87(2) TFEU. When it came to litigation, judicial protection was not, from the point of view of the Defendants and the intervening Member States, available.

This judgment came much, as the recent House of Lords report documents, to the dissatisfaction of the then UK Coalition Government, which suggested that despite its loss it would not change its approach in the CJEU.[23] According to Theresa May MP, the Court was, and continues to be, silent as to the scope of Protocol 21 and therefore the decision does not directly impact on or change the then Government's policy on its future strategy for litigating in regards to its opt-out. However, the report and the expert evidence provided to the Committee disagreed and confirmed essentially that whether or not the opt-out can be used is

[17]C-43/12 para. 30 citing case C137/12 *Commission* v *Council* EU:C:2013:675, para. 53 and the case-law cited.
[18]C-43/12 para.36.
[19]Ibid.
[20]C-43/12 para. 37.
[21]C-43/12 paras 43 and 44 referring to joined cases C184/02 and C223/02 *Spain and Finland* v *Parliament and Council* EU:C:2004:497, para. 30.
[22]C-43/12 para. 48.
[23]Theresa May MP's answer, when giving evidence, in response to question 49 as to the impact of the case law on Title V on the Government's opt-in policy 'in none of the decisions on *Turkey*, the *Philippines*, *road safety, Swiss social security* and *conditional access* did the court rule on whether JHA content alone could trigger the opt-in or whether incidental JHA content requires a JHA legal base. It has singularly so far avoided addressing what we feel is the fundamental issue of the correct interpretation of Protocol 21. … it may very well be that there is some difference of opinion and that some members of the court actually believe that Protocol 21 is not an exception but is actually part of the founding principles. I am not party to their decisions or why they have come to this decision, but the fact that they have not addressed this Protocol 21 issue suggests to me that there may be some discussion, or they feel there is an arguable point, about the correct interpretation of Protocol 21.' House of Lords European Union Committee Report, para. 162 and fn 157, oral evidence available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-institutions-and-consumer-protection-subcommittee/the-uks-optin-and-international-agreements/oral/17552.html last accessed 31 March 2015.

a matter of judicial interpretation as to the aim and predominant purpose of the relevant measure.

Given the opaque nature of the Treaty, and the fact that the parties to this case were the institutions themselves, if not even they can agree on the predominant purpose of a measure, what hope is there for the Member States? It may actually be hoped that the change of Government in the UK may see a wiser, less naïve approach to operating in the judicial forum. UK Recognition that the judges have their own view on things and that a dogmatic adherence to what has proven to be an unsuccessful policy could leave you alone in the CJEU, without being able to use your opt-out, would be a good start.

(1) Decisions Authorising Enhanced Cooperation

It must be noted that the enhanced cooperation provisions contained in the Lisbon Treaty provide for two stages in the operation of the mechanism. Firstly, it is necessary for the Member States that wish to embark on cooperation in a given area to obtain a decision authorising usage of the mechanism. The substantive and procedural hurdles for obtaining authorisation include: that there are at least nine Member States wishing to participate; the non-participating Member States should be able to join later i.e. that a spirit of openness applies to operation of the mechanism; that the authorising decision be adopted by the Council as a last resort (when it has established that the objectives of such a cooperation cannot be attained within a reasonable period by the Union as a whole); that the enhanced cooperation shall reinforce the process of integration; and the request for authorisation does not relate to one of the Union's exclusive competences.[24] Once authorisation has been granted, on which the vote in Council referred to by Article 20(2) TEU and Article 329(1) TFEU is by qualified majority of all Member States, whether participants or non-participants, the second stage in the process is to adopt measures that implement the subject matter of the specific cooperation. The decision authorising the enhanced cooperation is therefore crucial, because it dictates which Member States are excluded and which are included in the cooperation. This is not only of paramount importance to those Member States that wish to embark on further integration in a specific policy area, but as the next case under analysis demonstrates, it has significant consequences for those Member States which do not, or cannot, participate.

Despite its reputation for being a reluctant participant, the United Kingdom has shown willing to engage in enhanced cooperation. In *Spain and Italy v Council* and *Italy v Council*[25] the United Kingdom was among the initial twelve Member States that wished to engage in enhanced cooperation on the subject of unitary patent protection. Although the UK was included in the enhanced cooperation, the case is still important for the UK because it shows the attitude of the Court to protection of non-participants to enhanced cooperation, which could equally apply to the UK in another instance. The specific background to the case is thus: twelve Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, initially addressed requests to the Commission, by letters dated 7, 8 and 13 December 2010, indicating that they wished to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection. The request was submitted on the basis of the existing proposals which had been supported by the same Member States during negotiations,

[24]Article 20 (1) and (2) TEU, supplemented and supported by Articles 326 to 334 TFEU.
[25]2013 EUECJ Joined cases C-274/11 and C-295/11. This chapter will refer to the lead case, *Spain and Italy v Council* C-274/11 published in the electronic Reports of Cases.

but which were not proving successful during the legislative procedure involving the whole of the Union. They asked the Commission to submit a proposal to the Council to that end. In the meantime, thirteen more Member States, namely, Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia, wrote to the Commission indicating that they also wished to participate in the envisaged enhanced cooperation. Spain and Italy, were the two Member States which argued, in two joined cases challenging the Council's Decision to authorise enhanced cooperation, that they were being excluded because they were not able to adopt the language provisions proposed.[26] The United Kingdom, along with nine other Member States, the European Parliament and the Commission, intervened in support of the Council.

There were four main pleadings[27] submitted on behalf of the applicant Member States: firstly, lack of competence, secondly, misuse of power, thirdly, what the applicants termed 'infringement of an essential procedural requirement' whereas the Court termed it 'breach of a condition that a decision authorising enhanced cooperation must be adopted as a last resort',[28] and fourthly, infringement of the Treaty and any rule of law relating to its application. Taking the first argument, the applicants submitted that to provide uniform protection of intellectual property rights, as referred to in Article 118 TFEU, fell within the exclusive competence of the Union, as provided for in Article 3(1)(b) TFEU, concerning 'the establishing of the competition rules necessary for the functioning of the internal market'. Therefore, the Council lacked competence to authorise the enhanced cooperation in question, because authorisation cannot be granted in relation to an exclusive competence.[29] Italy added that Articles 3 to 6 TFEU do no more than set out a non-binding classification of the spheres of the Union's competences. Therefore, it would be permissible for the Court to treat as exclusive the competences conferred by Article 118 TFEU without relying on the list in Article 3(1) TFEU.[30]

Contrarily, the Council, with the intervenors in support, argued that the rules governing intellectual property fall within the ambit of the internal market, in the sphere of which the Union enjoys a shared competence under Article 4(2)(a) TFEU.[31] The Council therefore maintained that it had competence to authorise the enhanced cooperation proposed.

The Court rejected the argument of the non-participating Member States and approached its determination as to whether those competences were non-exclusive, and therefore may be exercised by way of enhanced cooperation, by considering the first paragraph of Article 118 TFEU. The Court decided that competence to create European intellectual property rights and to set up centralised authorisation, coordination and supervision arrangements were conferred by the first paragraph of Article 118 TFEU. As a result, where the second paragraph of that Article provides for the establishment of language arrangements for those rights, the competence conferred is as provided by the first paragraph of that Article. The two are 'closely bound up' together.[32] As those competences fall within the ambit of the functioning of the internal market, the Court held that in accordance with Article 4(2) TFEU, competence

[26]Council Decision 2011/167/EU of 10 March 2011, authorising enhanced cooperation in the area of the creation of unitary patent protection including language provisions, OJ 2011 L76, p53.
[27]An additional plea was numbered the fifth plea after the cases were joined and was considered by the Court. Space precludes consideration of this plea. This article will focus on the four most pertinent.
[28]C-274/11 para. 9.
[29]C-274/11 and C-295/11 paras 10 to 11.
[30]Ibid para.14.
[31]Ibid para.15.
[32]Ibid paras 16 to 26.

shared between the Union and the Member States applies to, *inter alia*, the area of the internal market. Under Article 2(6) TFEU, the scope of, and arrangements for, exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area and that for 'competition rules necessary for the functioning of the internal market' determination is by Part Three, Title VII, Chapter 1 of the TFEU, in particular in Articles 101 TFEU to 109 TFEU. The court was keen to avoid unduly extending the scope of Article 3(1)(b) TFEU and so concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences for the purpose of Article 4(2) TFEU and are non-exclusive for the purpose of the enhanced cooperation mechanism.[33]

As to the second argument of misuse of power on the part of the Council, it was submitted on behalf of Spain and Italy that all enhanced cooperations must contribute to the process of integration. In this case, however, they maintained that the true object of the contested decision was not to achieve integration but to exclude Spain and Italy from the negotiations on the issue of the language arrangements for the unitary patent. Thus depriving them of their right conferred by the second paragraph of Article 118 TFEU. The applicants alleged that the enhanced cooperation procedure had been used to keep Member States out of difficult negotiations and to circumvent the requirement of unanimity. They considered that this was an incorrect use of the enhanced cooperation procedure, which was actually designed to be used when one or more Member States is or are not yet ready to take part in the entirety of a legislative action of the Union.[34] In response, the Council submitted that if Spain and Italy do not play a part in this enhanced cooperation, it is because they have refused to do so and not because they have been kept out of negotiations. The Council pointed out that Recital 16 in the preamble to the contested decision stresses that creating protection by a unitary patent would promote the objectives of the Union and strengthen the process of integration. The parties intervening in support of the Council concurred with this view. They emphasised that those areas that require unanimity are by no means excluded from the spheres in which it is permissible for enhanced cooperation to be established. It is also a 'procedure that makes it possible to overcome the problems relating to blocking minorities'.[35] It was perhaps not that wise for the UK to point out this advantage.

The Court held[36] that the Articles which provide for the enhanced cooperation mechanism do not proscribe use of enhanced cooperation in areas where a competence must be exercised unanimously. Nor does the requirement that the enhanced cooperation mechanism be used as a last resort relate solely to instances where one or more Member States is simply not ready to participate. There are many valid and applicable reasons why the provision "the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" can occur.[37]

The Court therefore held in relation to this plea that the Council's decision was certainly not an attempt to circumvent the unanimity requirement provided for in Article 118 TFEU nor an attempt to exclude Spain and Italy as the Member States which did not join in making the request for authorisation of enhanced cooperation. The argument that there had been misuse of power by the Council was deemed to be unfounded, the Court actually found that the

[33]Ibid paras 16 to 26.
[34]Ibid paras 27 to 29.
[35]Ibid para 32 see generally paras 27 to 32.
[36]Ibid para. 33 citing C442/04 Spain v Council [1998] ECR I3517, para. 49.
[37]Ibid para. 36.

Council had contributed to the process of integration. Spain and Italy had yet another argument rejected.[38]

With regard to the third pleading, it was submitted that the Council had failed to give reasons, providing instead an 'excessively laconic explanation … why the Council considers the conditions laid down by the … Treaties in the sphere of enhanced cooperation have been satisfied'.[39] The Court re-phrased this pleading to essentially be an argument that the Council had not properly satisfied itself that the condition that enhanced cooperation can only be authorised as a last resort had been fulfilled, this had been demonstrated by the Council's poor explanation in this regard, and there had therefore been a breach of the condition laid down in Article 20(2) TEU. However, the Court decided that the Council is the best placed of all the institutions to assess the state of negotiations as to whether the condition relating to adoption of a decision as a last resort had been satisfied. Such decisions would consequently only be subject to a limited examination by the Court.[40] In this instance, the Court was satisfied that, having regard to the applicants' participation in the negotiations and to the detailed description of the fruitless stages before the contested decision became the subject of the enhanced cooperation, it cannot be concluded that the decision was vitiated by any failure to state reasons capable of resulting in its annulment.[41] The Council and the intervening Member States had successfully maintained an insistence that deadlock had been reached in the negotiations.

Finally, Spain and Italy argued that there had been an infringement of four separate Articles of the Treaties: Article 20(1) TEU, Article 118 TFEU, Article 326, second paragraph, TFEU and Article 327 TFEU. For present purposes and for reasons of space, this chapter will concentrate on those arguments which on the one hand, approach the issues of integration and uniformity, and on the other, consider most specifically the position of a non-participating Member State to an enhanced cooperation. In relation to the former, according to Spain and Italy, the Council was wrong to consider that the proposed enhanced cooperation would create a higher level of integration.[42] They disagreed with the Council's and the intervening Member States' observation that whereas both national patents and European patents validated in one Member State or more confer only national protection, the unitary patent contemplated by the enhanced cooperation would at least give undertakings uniform protection in twenty five Member States. The Court however was not convinced by Spain and Italy. It accepted that an enhanced cooperation would at least make it possible to draw closer to the objective of securing uniformity in the internal market therefore resulting in furtherance of integration.[43] It is unsurprising that the Court sided with the Council and the participating Member States on this point as it is hardly likely to adjudicate essentially against the express provisions of the Treaty. But where does this leave the non-participant Member States if they do not feel able to join in at a later date?

In citing Article 327 TFEU, the non-participating Member States complained that their rights had been infringed. They argued that, contrary to that Article, the enhanced cooperation did not respect their rights as non-participating Member States because their right to take part in the enhanced cooperation in future was compromised as they were unable to accept the terms

[38]Ibid paras 33 to 41.
[39]Ibid para. 45.
[40]Ibid paras 47 to 58.
[41]Ibid paras 52, 53 and 58.
[42]Ibid para. 60.
[43]Ibid paras 61 and 63.

of the proposed measure.[44] The response from the Council and the intervening Member States was to reiterate that the Treaty makes it quite possible for the non-participating States to join the enhanced cooperation later, consequently rendering this argument otiose.[45] The Court again decided not to uphold the application. According to Article 327 TFEU, the Court held, even if those taking part in the cooperation prescribe rules with which those non-participating States would not agree if they did take part in it, this 'does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation'.[46]

The Court appears to err on the side of protecting those involved in the enhanced cooperation rather than the non-participants, concluding that the non-participants are protected by virtue of the fact that they can apply to join the enhanced cooperation in future, regardless of how difficult or even impossible this may be. This has obvious consequences for uniformity and integration in the Union. However, this chapter's stance is that the numerous opt-outs and exceptions to participation in the Union's competences, granted not just to the UK, demonstrate that absolute uniformity is not required for the Union to function. Furthermore, the Treaty provisions and the Court's judgment ring true if the integration objective can actually be progressed by allowing a way around deadlock in negotiations in contentious policy sectors as a 'last resort'.

However much this particular judgment may have been good news for the United Kingdom, it does indicate that should they have been on the other side of the litigation they may have felt like a 'second class' Member State. Criticism of the judgment in a manner none too favourable from the perspective of judicial protection has been made on the basis that the "last resort" requirement 'which should be considered satisfied only when it is impossible to adopt common legislation within the foreseeable future'[47] was actually signalled by the Court to be in essence a political assessment due to the Court's acceptance that it is the Council which is the best placed to decide if the requirement has been met with 'only to a limited degree of external judicial scrutiny'.[48] This may leave non-participating Member States unprotected by the Court and therefore exposed.

(2) Exclusion of a Non-participating Member State

The exclusion of a non-participating Member State can occur mainly in two instances, either the State is not participating in an enhanced cooperation, as discussed in the section above, or the operation of a long standing opt-out contained in a Protocol means that the Member State does not participate in an area of EU policy. The United Kingdom has several such Protocols, including one in relation to the Schengen acquis. The Schengen provisions, initially an example of intergovernmental cooperation, were incorporated into the Union legal order by the Treaty of Amsterdam. Intergovernmental agreements were not in the past untypical as a way of achieving flexibility, and / or, as Tuytschaever states, as a way of preventing a deadlock in decision making on politically sensitive policy areas within the Union.

> On the most general level, there is of course the fact that the … issues … go to the heart of national sovereignty. Practice shows beyond any reasonable doubt that this

[44]Ibid para. 79.
[45]Ibid para. 80.
[46]Ibid paras 81 to 83.
[47]Editorial Comments, *What do we want? "Flexibility! Sort-of …" When do we want it? "Now! Maybe…",* 50 CMLRev 673, 676-7 (2013).
[48]Ibid.

> increases the sensitivity of the delegations and results in a stronger adherence to their individual negotiating positions. This may be an obstacle to establishing an overall vision of how to deal with issues and reduce negotiations in a quagmire of detail. Or, as it has done in the past, it may ultimately force a limited number of Member States to abandon any hope of attaining a workable compromise in the field and to start working together on an intergovernmental basis (which some of them did by means of the Schengen Agreement).[49]

The UK's Schengen Protocol does make it possible for the UK to participate in the policy area covered by its opt-out, but only in compliance with the procedure laid down in the Protocol, specifically Articles 4 and 5. *United Kingdom v Council*[50] concerned an action for annulment by the UK of Council Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States.[51] The UK argued that it had been refused permission by the Council to participate in the adoption of the measure and that the Council's refusal equated to a breach of Article 5 of the Schengen Protocol.[52] The Council's submissions in response were very illuminating in terms of outlining its perspective, in this instance on Schengen, but which could equally in theory be applied to almost any opt-out regime within the Union. It submitted that the objective of Article 5, is not to confer a right to participate on the UK, but to reassure the Member States participating in the Schengen acquis that their measures will not be jeopardised by the reluctance of other Member States to join in. The Council submitted further that the interpretation of Article 5(1) proposed by the United Kingdom would deprive the vetting procedure in Article 4 of the protocol of its effectiveness, because a Member State which had not been successful in participating by utilising Article 4 of the Schengen Protocol could then try again by using the procedure contained in Article 5. Consequently 'the integrity of the Schengen acquis would … no longer be guaranteed'.[53]

The Court held in favour of the Council to the exclusion of the UK. The question the Court had to answer was whether the content and aim of Regulation 2252/2004, was to build upon the Schengen acquis, or not, as this would dictate whether the UK could avail itself of a right to participate. The Court concluded that because the Regulation has the objective of combating fraud with travel documents and has sought to achieve this by harmonizing and improving minimum security standards, it categorized the measure as one from which the United Kingdom was to be excluded from participating.[54] In a rather damning commentary on the Court's judgment in this case,[55] Chalmers has criticised the Court's decision to uphold the Council's exclusion of the United Kingdom as being 'difficult to give due credit to the legal incoherence, intellectual poverty and political myopia'[56] of the judgment. Whilst the present

---

[49]F. Tuytschaever, *Differentiation in European Union Law* (Hart Publishing Oxford, Portland Oregon 1999) 74.
[50]2007 EUECJ C-137/05 [2007] ECR I-11593.
[51]Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States OJ 2004 L 385, p. 1
[52]C-137/05 see especially paras 32 to 36.
[53]Ibid paras 37 and 38.
[54]C-137/05 and J. J. Rijpma, Case note, *Case C-77/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported,* 45 CMLRev 835, 844 (2008).
[55]And case C-77/05 [2007] ECR I-11459 decided by the Court on the same day. Space precludes separate analysis of this case in this chapter however as the reasoning of the judgements are similar pertinent points from both judgments have effectively been considered.
[56]D. Chalmers, *Editorial. Cut off from Europe – the fog surrounding Luxembourg,* 33(2) ELJ 135, 136 (2008). For an alternative prediction as to the Court's reasoning particularly in enhanced cooperation cases see F. Amtenbrink and D. Kochenov, *Towards a More Flexible Approach to Enhanced Cooperation,* in Andrea Ott and

writer considers this rather strong, it does highlight the difficulty inherent in trying to assimilate the Court's approach. This is particularly so with regards to the position of the non-participating Member States which rely on the Court for their inclusion in the deliberations on the adoption of acts. Therefore planning their own policies, including litigation policies, in the light of the Court's approach. The present writer does consider the judgment a disappointing one because the Court at one point in the judgment acknowledges that the classification of Regulation No 2252/2004 as a measure developing provisions of the Schengen acquis will have a direct effect on the right of the UK to participate[57] then continues to exclude the UK in a judgment that is sparse in detail and reasoning. Chalmers summarises the effect this could have on integration: '[In the Lisbon Treaty] all 27 member States agreed to a series of unilateral Protocols and Declarations so that there is barely a Member State who adheres just to the Treaty. … The Court's rulings attach unanticipated penalties to asymmetric integration that are quite at odds with the tenor of these reforms.'[58] This judgment is disappointing from the UK's point of view because it has been historically difficult to get the UK to participate in some areas of EU policy. Therefore, on the occasions where the UK not only agrees to participate but does so in an area where it has already opted out, it would have been invaluable to have the court's assistance, if not protection, to ensure the UK is included in these circumstances.

Moreover, flexible arrangements were required in order to achieve the incorporation of Schengen into the union legal order due to political sensitivities, in fact it was 'only possible due to the fact that a number of Member States were granted important opt-ins and opt-outs.'[59] The Court's position in this evolution was touched upon by Advocate General Trstenjak in *United Kingdom v Council,*[60] the judgment which was decided on the same day as the present case under discussion. The Advocate General stated that 'the Court is called on to interpret protocols which relate in particular to closer cooperation. The traditional concept of European integration flows from the notion of unity of integration, that is to say the creation of uniform rules that are valid in all the Member States.'[61] However, the Advocate General outlines that what she perceives are the causes of a change from uniformity to flexibility in integration are essentially extensions of competences and enlargements of the Union, 'which involve greater heterogeneity of structures and interests. Enhanced cooperation is a legal expression of the balancing exercise between making the Union wider and making it deeper.'[62] Therefore judicial protection in cases where the protocols regulate the position of non-participating Member States is crucial in encouraging integration within the Union legal order, not just from the perspective of the United Kingdom but for all Member States.

Contrary to the progressive movement of the Union toward flexible integration and therefore flexible accommodation of the differing views of the Member States, the Court's judgment indicates an approach which is not sufficiently protective of the non-participatory Member States. Rather, Rijpma considers that the Court concluded that the exclusion of the UK was

---

Ellen Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009) especially 198.

[57]C-137/05 para. 55.

[58]D. Chalmers, *Editorial. Cut off from Europe – the fog surrounding Luxembourg,* 33(2) ELJ 135, 136 (2008).

[59]J. J. Rijpma, Case note, *Case C-77/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported,* 45 CMLRev 835, 835 (2008).

[60]C-77/05.

[61]C-77/05 Opinion of AG Trstenjak para. 83.

[62]Ibid.

justified possibly because it 'wanted to bring back into focus the underlying rationale of the Schengen *acquis*, namely the free movement of EU citizens as part of the wider single market project. … The Court in so doing sent out a clear signal disapproving of a "pick and choose" approach regarding the Schengen *acquis*.'[63]

The consequential impact of these judgments on the Union as a whole and as a group of Member States combining efforts in a joint enterprise is unfortunate in its negativity. It could be argued in favour of the United Kingdom's inclusion that it would reinforce solidarity between Member States, solidarity being a broader value underpinning Member States' cooperation in general.[64] On the basis that the Protocols and enhanced cooperation authorisations referred to in the above analysed cases are actually integrative mechanisms, not least because the Lisbon Treaty states as such, but also by acting as a safety valve for those Member States that want to join in with most, but not all, of the European project, the fact that these judgments evidence insufficient judicial protection for the non-participant Member States when availing themselves of the provisions negotiated importantly as part of or annexed to the Treaty itself, is unfortunate to say the least. It is this that could have a detrimental effect on solidarity in the Union, not the existence of opt-outs. Furthermore, as it seems to be difficult to confidently ascertain in such a complex situation when a State can avail itself of an opt-out, and even an opt-in, because it is not sufficiently certain or predictable as to when judicial protection will be engaged, the consequence this may have on the continued membership of the States involved is a regrettably if not irresponsibly negative one.

There are also constitutional ramifications for the Union legal order arising from the Court's approach. In the momentous *Les Verts* judgment it was expressed that the Treaty is the basic constitutional charter,[65] according to which the Court must function. Concomitant with this statement is the principle that the Union is based on the rule of law, therefore each actor – the Union institutions, the Member States and the CJEU – is responsible for the inviolability of the system, that is the complete and comprehensive system of legal remedies and procedures. How does this apply to mechanisms of flexibility? There should not be inequality in the protection afforded by the Court to the Member States, whether fully participating, opting out or opting back in again, or to the institutions in those circumstances. Lenaerts identifies that one of the fundamental elements of *Les Verts* is the fact that 'it fell to the Court of Justice to uphold the observance of equal judicial protection in the Community legal order notwithstanding the Member States' lack of consensus on the matter'.[66] In that specific case the protection was of the European Parliament, which was not provided with standing in the Single European Act. This chapter submits that the principle similarly applies to other EU institutions and the Member States. The operation of an opt-out should not divest a non-participating Member State of its protection. Of course this does not dilute the Member States' responsibility, it is essential for the preservation of the rule of law within the Union for which judicial protection is a requisite that each actor plays their part. However, in order to

[63]J. J. Rijpma, Case note, *Case C-77/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported,* 45 CMLRev 835, 836 (2008).
[64]Quote from J. J. Rijpma, Case note, *Case C-77/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05, United Kingdom v Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported,* 45 CMLRev 835, 850 (2008).
[65] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23.
[66] Koen Lenaerts, *The Basic Constitutional Charter of a Community Based on the Rule of Law,* in Maduro and Azoulai (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* Hart Publishing, Oxford and Portland, Oregon 2010, p297.

ensure a coherent and complete system so that 'in effect, the court verifies that the institutions are acting in conformity with the rules of the Treaty … and that the proper legal basis setting forth the decision-making procedure to be followed in the adoption of such measures has been used'[67] and to avoid a lacuna which compromises the completeness of the system, judicial protection and equality before the court must apply not just to individuals but also to non-participating Member States. The constitutional significance of this system cannot be overstated. For the CJEU to not play its part, protecting the Member States when they utilise the flexibility mechanisms, would compromise the coherence of the system and consequently preservation of the rule of law in the Union.[68]

Staying In, Even When Not Opting In

Despite the criticism of Court's the judgments discussed in this chapter, it ought to be acknowledged that the UK has benefitted from the outcome of some of the judgments, even if they would not necessarily have been pleased had they been supporting the opposing side. This highlights the fact that in the Union system judicial protection in the CJEU is not a one way street. The onus is not solely on the Court. Member States are also responsible for ensuring that they use the system well in order to obtain judicial protection. The practical reality is that after the recent UK general election which saw a majority Conservative government elected, David Cameron is embarking on a mission to negotiate more British opt-outs. Consequently, the more opt-outs the UK has, the more proficient it needs to become at utilising the system of judicial protection, because whether the UK government likes it or not, they will inevitably become more reliant on it.

Becoming proficient at utilising the judicial protection available in the CJEU is still preferable to opting to leave the Union altogether. For example, there has been a long standing provision in the Treaty that all Members of the Council may participate in the deliberations over a legislative measure which is part of an enhanced cooperation.[69] It is doubtful that a Member State that wished to withdraw its membership would be assured of such involvement in any policy area negotiations, especially those part of a flexibility arrangement. European Union law is pervasive and therefore it would be counter-productive for the United Kingdom to leave a position from which there is an opportunity to influence its direction. An Article 50 TEU negotiated withdrawal package could see the UK lose control and influence over the laws it would still inevitably be bound by through trading and generally operating in the EU sphere. There would be a real risk of reform packages and EU laws being presented as a *fait accompli*. At least flexibility within the Union framework, through the enhanced cooperation provisions, means that all Member States can be closely involved in the policy processes,[70] extra-Union flexibility is not necessarily a desirable model.

In any event, an Article 50 TEU withdrawal would inevitably see the United Kingdom negotiate a package deal with the rest of the Union over the mass of laws and administrative

[67] Ibid p298 and further see T. Tridimas *The General Principles of EU Law* Second Edition, Oxford EU Law Library, Oxford University Press 2006.
[68] Further on coherence see Case C-461/03 *Gaston Schul Douane-expediteur BV* [2005] ECR I-10513.
[69] Presently in Article 330 TFEU and Article 20(3) TEU.
[70] Editorial Comments, *What do we want? "Flexibility! Sort-of …" When do we want it? "Now! Maybe…",* 50 CMLRev 673, 679 (2013). Also see S. Peers, *Divorce, European Style: the First Authorization of Enhanced Cooperation,* 6(3) E.C.L. Review 339, 357 (2010).

provisions that already regulate its relations. To make this withdrawal package workable for all parties there would need to be access to the CJEU. For the UK to be able to litigate over the arrangements and agreements reached through both the withdrawal negotiations and the operation of future dealings with the EU, it would need to be provided with legal standing before the Court. The UK would consequently be equally reliant on CJEU judicial protection of its rights and interests whether or not it chooses to withdraw from the Union. Whatever the arrangement, the CJEU would not lose its significance.

Perhaps, in the humble suggestion of the present writer, the UK government may benefit from a greater concentration on putting itself in the Court's shoes. The Secretary of State for Foreign and Commonwealth Affairs has recently stated that any renegotiation package David Cameron achieves will probably require Treaty change in order to protect it from an adverse judgment in the CJEU.[71] Working with rather than battling against the system would surely be preferable to the political difficulties associated with obtaining agreement to change the Treaty or receiving adverse judgments.

The consequence of not using the system of judicial protection well enough can be illustrated by *Spain v Council,*[72] the Grand Chamber judgment delivered on 5 May 2015, which is the action to annul the implementing enhanced cooperation Regulation[73] following on from the *Spain and Italy v Council*[74] challenge to the authorisation decision for enhanced cooperation on unitary patent protection, discussed above. It will be recalled that Spain was unsuccessful on numerous grounds in challenging the authorisation decision and similarly submitted a comparably long list of pleadings, including: infringement of the principle of non-discrimination on the ground of language; infringement of the principles set out in the *Meroni* judgment; lack of legal basis for Article 4 of the contested regulation; infringement of the principle of legal certainty; and infringement of the principle of the autonomy of EU law. Again each pleading was rejected by the Court, which is not at all surprising. Concerns about infringements of the principle of non-discrimination, on the ground of language or otherwise, in relation to the operation of the enhanced cooperation mechanism have been alleviated by the Court and recognised by academia some years ago. Arguments that a mechanism enshrined in the Treaty and therefore agreed by all Member States can operate in a discriminatory manner against those States which have agreed to it has proven historically to be a non-starter.

Space precludes detailed analysis of the Court's reasoning on every pleading. Suffice it for present purposes to suppose that what is noteworthy about this case is that it demonstrates that if a Member State is not skilful at litigating in the CJEU at the first opportunity, particularly as far as enhanced cooperation is concerned, it is demonstrably more difficult to challenge the disliked legislation at a later date. The UK therefore needs to get better at utilising the system of judicial protection.

[71]BBC Andrew Marr Show, Sunday 7 June 2015.
[72]C-147/13 *Spain v Council* not yet reported.
[73]Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements OJ 2012 L 361, p. 89.
[74]C-274/11 and C-295/11.

Conclusion

The above discussion on the system of judicial protection demonstrates that Britain is not necessarily alone in the CJEU, however, it should certainly become more adept at using the judicial forum. It should not be forgotten that it is the most important post legislative forum and that Britain's reliance on it is unlikely to dissipate as David Cameron embarks on negotiating further opt-outs. This is still the case even though the House of Lords European Union Committee has concluded that it is 'highly unlikely'[75] that the CJEU will change its approach to interpretation in this area, especially where it relates to determining the legal basis of a measure.

This chapter submits that the Court should also look to review its position in order to maintain a comprehensive and coherent system of judicial protection which crucially provides for adherence to the rule of law in the Union. This does not absolve the Member States, including the UK, from their obligation to maximise the utility in the system. Rather, for the system to work both practically and constitutionally each actor has to play their part. For the flexibility mechanisms, which at the end of the day assist in fulfilling the integrative objective of the Union, to work, the importance of the proper functioning of the system cannot be underestimated. This will continue to be the case for the UK in, or out, of the Union.

[75]House of Lords European Union Committee, *The UK's opt-in Protocol: implications of the Government's approach,* HL Paper 136, p6.