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EuropeanPolicyBrief

July 2005 • Issue 14 • The Federal Trust, 7 Graphite Square, Vauxhall Walk, London SE11 5EE • www.fedtrust.co.uk

No European Constitution, no European flexibility?

For some commentators, a centrally important aspect of the European Constitutional Treaty was the modified framework it envisaged for the setting up and running of sub-groups within the European Union, using the Union's institutions to further their integration in specific policy areas. In the enlarged Union, there are clearly substantial differences between the present member states as to the pace, nature and scope of the integration they wish to seek among themselves. It was a hope of at least some among the Constitutional Treaty's drafters that its arrangements for 'enhanced co-operation' might act as a safety-valve for these differences. The arrangements would allow those who wished to proceed more broadly and speedily in their integration to do so without involving the rest of the Union, at least initially, in the process.

The double rejection of the Constitutional Treaty in France and the Netherlands has postponed, probably indefinitely, the introduction of the specific procedures it envisaged for sub-groups within the Union. But individual member states and groups of member states continue to have widely differing aspirations for the Union and their place within it, a gap well illustrated by the varying and contradictory analyses which commentators throughout Europe have given of the referendum results. This Policy Brief considers three possible avenues the member states may explore in the short term for a more flexible European Union: the setting up of a European 'hard core' among a limited number of member states, greater use of 'enhanced co-operation' along the lines already permitted by the Nice Treaty and the development of a more integrative system of political and economic governance for the Eurozone.

'Core Europe'

Much of the debate over the past fifteen years about flexible instruments of European integration has had as its implicit background the threat or fear that a limited number of the Union's member states, probably led by France and Germany, would react in frustration to the slow pace of integration dictated by membership in a union of twelve or fifteen states, and declare among themselves an 'inner core'. This 'inner core' would then rapidly proceed to a wide-ranging political union. This was a fear particularly prominent in the mind of British politicians, many of whom saw a crucial advantage of Britain's membership in the Union as being the capacity to prevent from within the Union the setting-up of any such tightly-knit European arrangement potentially hostile to the United Kingdom. Fear that France, Germany and its closest allies might in the early 1990s simply set up a single European currency outside the Union's structures, was a powerful motive leading the United Kingdom to acquiesce in the signing of the Maastricht Treaty. Without this treaty, and its opt-outs for Britain and Denmark, it would not have been possible for the then twelve members of the Union to institute the Eurozone as a project of the European Union.

The passage of time and the further enlargement of the Union have, however, made much less plausible fears or hopes of a 'hard core', particularly one based around France and Germany. The concept has been specifically disavowed by the present German Foreign Minister, Joschka Fischer, although important echoes of the idea could be heard in the first speech to the French Parliament last month of the new French Prime Minister, Dominique de Villepin. The present German government is unlikely to survive beyond the autumn, and the incoming CDU/CSU government seems unlikely to make the furthering of European integration one of its most

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EDITOR's NOTE

This is the fourteenth in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union. Other Policy Briefs are available on the Federal Trust's website www.fedtrust.co.uk/policybriefs

This Policy Brief forms part of the Trust's ongoing project on 'Flexibility and the Future of the Union'. Further details are available at www.fedtrust.co.uk/flexibility

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pressing priorities. Beyond expressing her hostility to Turkish membership of the Union and giving some (rhetorical) support to Mr. Blair's criticism of the Common Agricultural Policy, the predicted next German Chancellor, Angela Merkel, has spoken little about her likely European policy. Her probable Foreign Secretary, Edmund Stoiber, shares the traditionally lukewarm attitude towards European integration which has in recent years been that of his party, the Bavarian Christian Social Union.

Quite apart from the present uncertainty of the German political scene and the obvious political weakness of Mr. Chirac, it is clear that, in general, France and Germany have not adapted their strategic analysis to the changes arising from a European Union of twenty-five member states. Confusion in both Paris and Berlin seem the order of the day. A small but significant example of this anachronistic thinking was the German Chancellor's attempt to call after the Dutch referendum a meeting of the six original signatories of the Treaty of Rome, an attempt which was rebuffed by the Dutch themselves and the Italians. Such division even among the founding member states of the Union is a highly implausible backdrop for anything that could be depicted as a 'core Europe' in any traditional sense of that term. Nor have French or German representatives shown themselves adept at winning new friends in, for instance, Eastern Europe, to replace uncertain partners in European integration like Mr. Berlusconi. It may be that waning enthusiasm in Eastern and Central Europe for Britain as a long-term diplomatic ally (largely, but not exclusively arising from Britain's attitude to the maintenance of its budgetary rebate) will give new opportunities for France and Germany to regain influence in 'New Europe'. There is, however, much ground still to be made up. European diplomatic constellations can certainly be imagined which in the medium term might once again make plausible the prospect of a European 'inner core', but for the foreseeable future any such prospect seems in the highest degree unlikely.

Enhanced co-operation under the Nice Treaty

Although it is on balance true that the European Constitutional Treaty would have made, if adopted, the overall workings of 'enhanced co-operation' sub-groups easier and more effective, the already existing Treaty of Nice sets out a general framework for such sub-groups. Indeed, on the specific question of the initial setting-up of sub-groups for 'enhanced co-operation', the Treaty of Nice is more permissive than the Constitutional Treaty, demanding only that eight member states agree to enter such an arrangement, compared to the nine implied by the Constitutional Treaty. Those who doubt the general viability of the concept of 'enhanced co-operation' reasonably point out that the present provisions of the Nice Treaty in this area have never been implemented, nor even come near to being so. It is an open question whether after the negative votes in France and the Netherlands, 'enhanced co-operation' as foreseen by the Nice Treaty will now become a reality.

If 'enhanced co-operation' is ever to be other than a marginal and occasional phenomenon, it seems likely that a number of preconditions will need to be met. The arrangement(s) must apply to an important policy area or important policy areas; they must affect significant numbers of European citizens; the sub-group must be able through its activities to add to (without endangering) the existing Union acquis; and above all, there must exist the political will of a significant number of national governments to deepen their integration through the 'enhanced co-operation' procedure. A number of potential areas for the procedure have been suggested. Not all of them meet the necessary preconditions.

'Social Europe'

When the European Constitutional Treaty was signed, Mr. Chirac in particular expressed the hope that its provisions would help those countries that wished to deepen their 'social integration'. He seems particularly to have had in mind that element of the Treaty which permitted sub-groups established under 'enhanced co-operation' to choose for their internal decision-making majority voting rather than the unanimity still prescribed for a number of important policy areas by the European Treaties. Majority voting in a sub-group dedicated to constructing a 'Social Europe' would have been, in Mr. Chirac's analysis, a way of circumventing the successful British insistence that unanimous voting should remain the norm for matters important for Mr. Chirac's 'social' agenda, such as taxation.

The probable disappearance of the Constitutional Treaty, at least in its present form, will certainly limit the scope for majority voting within a sub-group 'Social Europe'. But it is far from clear that Mr. Chirac's original analysis of the potential impact of the Treaty was in any case correct. Many aspects of what usually figures on the 'Social Europe' agenda can just as well be realised under the Nice Treaty as under the Constitutional Treaty. Those aspects which are problematic under the former would not have become less so under the latter.

If, among themselves, ten or twelve member states including France and Germany wish to agree that they will observe more demanding standards of employment and social protection for their citizens than the present state of EU law prescribes, both the Nice Treaty and the Constitutional Treaty would allow them to do so. Both the Nice Treaty and the Constitutional Treaty would also allow them to form a sub-group which renounced fiscal or social 'dumping', although the Constitutional Treaty would have allowed this sub-group to proceed by majority voting on fiscal matters, an approach excluded by the Nice Treaty. But it is difficult to see what interest members of such a potential sub-group might have in this form of 'enhanced co-operation'.

Those who believe that the economic and social equilibrium of the European single market is threatened by what they characterise as social or fiscal 'dumping' normally regard the United Kingdom, and more particularly the countries of Eastern and Central Europe who have recently joined the European Union, as the source of this perceived problem. These countries, it is argued, are able to compete 'unfairly' within the European single market by the less developed and therefore less expensive social and fiscal regimes which national governments impose upon local employers. But, ironically, the nearer this analysis is to being correct, the less incentive there is for countries which do practice such 'dumping' to join a sub-group which might make their current social and fiscal arrangements more burdensome for employers. By doing so, they would simply deprive themselves of the competitive advantage which, fairly or unfairly, they now enjoy.

In effect, a 'Social Europe' sub-group could only succeed in its probable goals if it either embraced the vast majority of the Union's member states, which is highly unlikely; or if it were able somehow to isolate itself from the 'non-social' member states of the Union unless the goods and services they provided met the sub-group's social and fiscal standards. Any serious moves in this latter direction would inevitably lead to the destruction of the European single market. Whatever the frustrations felt in some member states at the 'unfair' competition offered by Polish plumbers to their French or German counterparts, it is difficult to

imagine that any member state government would run that risk. If seriously pursued, 'Social Europe' along those lines would be a potentially divisive, even destructive force within the European Union.

Foreign Policy

Because foreign policy is the purest expression of executive discretion, the member states of the Union (particularly the larger states) have always been extremely reluctant to envisage any generalised sharing of sovereignty in this area. This underlying reluctance, however, has co-existed with the widespread understanding among European governments that their influence in the world is greatly enhanced if Europe can speak with one voice and pool its military, diplomatic and external economic resources in support of its common interests. Over the past fifteen years, successive European treaties have sought to establish an equilibrium between these two contrasting approaches. The result has been a series of mechanisms which allow varying categories of co-operation between some or all member states on specific areas of foreign policy. Although the Constitutional Treaty proposed potentially important changes to the representation and formation of the European Union's foreign policy, it did not greatly change the well-established avenues for 'flexibility' in this area already open to the member states.

The nearest that the European Union has hitherto come to a sub-group of 'enhanced co-operation' has been the close and growing co-ordination in this field between the three largest and diplomatically most active members of the Union, the United Kingdom, France and Germany. This co-operation has been particularly marked in the common policy and diplomacy which the three governments have pursued towards Iran, marking out a specifically European approach to Iran which at least initially was in contrast to that of the United States. Some commentators have seen the Iranian policy of the French, British and German 'Directoire' as a hopeful augury for a developing European foreign policy, which will build on the existing arrangements for 'flexibility' within European foreign policy-making. While this optimism may be justified in the long term, there remain for the Union a number of unresolved political and institutional issues in the field of foreign policy.

The foreign policy assets of the European Union are disproportionately concentrated in the hands of three states, France, UK and Germany. Of these, the first two (both members of the UN Security Council) have traditionally favoured an approach to the European Union which emphasises the intergovernmental aspect of the Union generally, and particularly so in matters of foreign policy. Where, as on Iran, France, the United Kingdom and Germany agree, they will act on their agreement and will usually expect to be able to persuade most of the rest of the European Union to follow them. When they disagree, there will be little chance of an effective external European policy on the issue in question. France and the UK in particular, and increasingly Germany, appear unwilling to envisage any reinforcement of European mechanisms which would force the 'Directoire' to agree on matters which divide them. This political reality must form the backdrop to any realistic discussion of institutional proposals or indeed existing institutional arrangements designed to facilitate the emergence of a genuinely European foreign policy.

None of this is to deny that in coming years the 'Directoire' may more often find itself of one mind on controversial foreign policy issues and that this consensus may often find its expression in a common European approach to these issues. Provided that the three countries of the 'Directoire' do not provoke by heavy-handed exploitation of their leading position a negative reaction from the smaller countries, this will obviously be a positive development for Europe. But other than the intergovernmental 'Directoire', it is difficult to imagine any coherent sub-group of the European Union emerging in any significant European foreign policy field. Such a sub-group would be ineffectual if the 'Directoire' were divided and redundant if it were not. Arguably, such an analysis applies with even greater force in the military sphere, where the failure of the Constitutional Treaty represents a significant setback for the integration of military matters (the supreme expression of 'hard power') into the European Union's structures.

Justice and Home Affairs

Despite the at least temporary disappearance of the European Constitution, Justice and Home Affairs is an area of the Union's activities in which important developments seem likely over the coming years, and in which two models of differentiated integration are likely to play a significant role.

Under the Amsterdam Treaty of 1997, the United Kingdom and Ireland obtained the right to remain outside a major component of the Justice and Home Affairs agenda, namely the Schengen Accord, which was incorporated into the EU structure by the Amsterdam Treaty. The UK and Ireland did, however, maintain the right to opt into individual elements of the system on a piecemeal basis, an opportunity of which they have since made use on a number of occasions. This arrangement was to have been maintained in the European Constitution. It will now be for the United Kingdom and Ireland to decide over the coming years how far they wish to make use of the possibility offered them to participate in the further development of the Schengen system. The insular geography of the United Kingdom and Ireland is widely accepted by their partners as creating for these two countries objective circumstances that justify a specific border regime. The choices of the British and Irish governments to opt in or opt out of new Schengen-based legislation are unlikely to cause fundamental divisions within the Union.

More likely to cause controversy and even bitterness within the Union may be attempts to use the 'enhanced co-operation' procedures of the Nice Treaty to create sub-groups co-operating intensively among themselves on matters of internal security, the fight against organised crime and judicial reciprocity. These are comparatively underdeveloped areas of European law, and might well be attractive fields in which to reinforce their integration for the more 'federalist-minded' of the member states. Nor can it be excluded that the United Kingdom might wish to participate in one or other of these sub-groups. The 'war against terror' has powerfully reinforced the British government's interest in shared repressive mechanisms, be they at the European or international level. It is interesting, for instance, to see the British government fully co-operating with the G5 Group on issues of illegal immigration.

There is, however, a danger that 'enhanced co-operation' in the field of Justice and Home Affairs might create, or be seen as creating, a new dividing-line within the European Union, that between the administratively more advanced states and those less so. At both the public and the political level in 'old' Europe, there are fears that the police and other security forces of Central and Eastern Europe are not wholly reliable partners in delicate questions of internal security. There are already first indications that some member states are in no hurry to extend the functioning of the Schengen Accord completely to all the states that joined the Union in May 2004.

The European Commission will no doubt wish to satisfy itself that any sub-groups which are set up within the sphere of Justice and Home Affairs genuinely do help to realise the underlying objectives of the Union and that the sub-groups remain open in the longer term to all who may wish to join. There is a parallel danger within the 'third pillar' to that potentially posed by the concept of a 'Social Europe', namely the postponement or even obstruction of the full integration of new member states into the Union's policies and workings.

Economic Governance in the Eurozone

Of all the current activities of the European Union in which flexible integration plays or may play a role, the single European currency is undoubtedly the most important. Even before the Union's enlargement last year, three member states remained outside this central plank of the Union's economic and political integration. Now, more than half the Union's membership are outside the euro, with differing dates envisaged for their joining the single currency, although all have the right to do so when they meet the 'convergence' criteria. The probable disappearance of the Constitution in its present form will not lessen the need for the Union to resolve the questions of economic and political governance which the evolution of the single European currency increasingly poses. These questions and their resolution are inevitably made more complex by the need to balance the interests of the current members of the Eurozone, those of future members of the Eurozone and those of EU members such as the United Kingdom which are unlikely to join the euro for many years to come, if ever.

The main provision of the Constitutional Treaty regarding the European single currency was the setting up of a Eurozone Council made up of Finance Ministers from the member countries of the currency bloc. In anticipation of the Treaty's adoption, such a Council has already been instituted, under the Chairmanship of Jean-Claude Juncker. It shows no sign of disappearing after the unsuccessful referendums in France and the Netherlands. A number of converging political and economic arguments now strongly suggest that the Eurozone Council will wish in the near future to review the euro's workings in such a way as to refine the relatively crude system of governance established for the European single currency when it was set up by the Maastricht Treaty.

The introduction and functioning of the euro over the past five years has been a remarkable technical success. Occasional speculation about its likely demise has rarely been other than wishful thinking. But it has not been the demonstrable economic success that many of its advocates hoped. In the mind of many Europeans, the single currency has been associated with the difficult budgetary adjustments necessary for some countries to join the euro in the first place, the alleged price rises which accompanied the euro's introduction and continuing mediocre economic performance, for which the European Central Bank and national politicians try to blame each other. In the Dutch referendum in particular, the single European currency contributed to the Treaty's rejection, with questions being raised about whether the Netherlands entered the euro at the appropriate rate of exchange and universal criticism being voiced of France and Germany's failures to observe the provisions of the Growth and Stability Pact.

There seems throughout the Eurozone little or no appetite for the abandonment of the euro. Even the occasional Italian voices raised in this sense reflect purely internal political skirmishing having little to do with real political or economic choices open to the Italian government. But national governments and political elites are increasingly asking themselves whether the economic benefits and political profile of the euro cannot be improved by a more coherent and visible collaboration between the political component of the Eurozone's governance (the national ministers) and their technical equivalents in the European Central Bank.

The setting up of the Eurozone Council and recent proposals from the Luxembourg and French governments for a structured dialogue between the Council and the European Central Bank reflect this new, more co-ordinated approach. With the passage of time, the unconstrained independence given to the Central Bank in the Treaty of Maastricht is increasingly seen within the Eurozone as a historical anomaly, which may well have generated in recent years a sub-optimal mix of monetary and fiscal policies and certainly failed to provide a transparent structure of political responsibility for the Zone's economic management. It is clear that the coming years will see a lively discussion within the Eurozone to produce a more sophisticated political and economic infrastructure for it. It would be very surprising if the recent cautious reform of the Growth and Stability Pact has staunched the flow of debate and proposed reform on this subject. While the UK will clearly have no position in this continuing controversy, the role of such countries as Slovenia, which firmly intends to join the euro in 2007, may be a delicate issue. There may well be a temptation for the existing members of the Eurozone themselves to agree on new governance structures for the Zone and then to present aspiring members with a fait accompli. The possibility cannot even be ruled out that the need to revise the euro's governance structures will be seen by some member states as an argument or pretext for postponing entry into the single currency of new members beyond the existing twelve. Once again, 'flexibility' is accompanied by the risk of division.

Conclusion

On balance, it is probably true that the loss of the European Constitution in its present form will act as a brake on the development of a more flexible European Union. Sub-groups taking decisions among themselves by qualified majority voting (as foreseen by the Constitution) would have been an important innovation for those member states chafing at the constraints of unanimity. But in the overall equation to which 'enhanced co-operation' is supposed to be an answer, strictly institutional questions are only one variable. Much more important are the depth of political will to accelerate integration and the scope for such integration permitted by the existing attained level of shared sovereignty within he European Union's present legal structure. It is now eight years since the Amsterdam Treaty first envisaged the possibility of 'reinforced co-operation', and neither its provisions on 'flexibility' nor the less stringent provisions of the Nice Treaty have ever been used. In theory, the expansion of the Union to twenty-five members might be taken as underlining the case for a more flexible European Union. The reality may be less straightforward. Over the coming decade Europe's leaders will have seriously to ask themselves whether the danger of dividing the European Union through institutional flexibility is greater than that arising from institutional stalemate.

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