Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance

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INTRODUCTION

The decision in *Pringle*[1] was primarily concerned with whether the European Stability Mechanism was compatible with various substantive provisions of the Treaty, most notably the prohibition on bailouts in Article 125 TFEU. The judgement is nonetheless important for other reasons, including the legitimacy of the use of EU institutions outside the EU legal framework. It will be seen that the CJEU endorsed their use and reaffirmed earlier case law. These conclusions were analysed by Steve Peers in a helpful article in a previous issue of this journal,[2] in which he was largely sympathetic to the test used by the CJEU to determine the legality of such involvement.

I take a different view in the present article, which is principally concerned with the EU political institutions.[3] It will be argued that while the CJEU's decision may have been defensible on the facts, it raises several issues of constitutional principle which have not been explored. There is analysis of the case law, which provides the setting for the discussion

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[1] Case C-370/12 *Pringle* v. *Government of Ireland, Ireland and the Attorney General*, judgment of 27 Nov 2012, not yet reported.

[2] Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 *EuConst* 37.

[3] This article does not address detailed issues concerning the jurisdiction of the CJEU, on which, see Peers (*supra* n. 2), p. 55-70.

thereafter. This begins with the foundations of the rule, connoting in this respect its legal provenance and the values that underpin it. The focus then shifts to procedural concerns, given that the current legal formulation accords a broad substantive discretionary power to EU institutions to participate in such agreements, without procedural obligations to condition how or whether the power should be exercised. The final section addresses substantive concerns with the legal status quo, in which it is argued that the CJEU's conditions for the legality of such EU institutional involvement do not provide sufficient constraints on the discretion accorded to the institution that wishes to participate in such an agreement.

CASE LAW

Legal reasoning is ever fascinating. We craft rules with a particular problem or situation in mind. We apply them to analogous situations. We decide when to distinguish rules. We decide when not to distinguish them. We provide justification or not in varying degrees for the rules thus crafted. We think through the implications of the rules thus created to varying extent. 'We' for these purposes connotes courts, legislatures and academics who, albeit in different ways, contribute to the foregoing discourse. These features of legal discourse are powerfully exemplified by the case law considered in this paper.

The initial jurisprudence consisted of two cases dating from 1993. *European Parliament* v. *Council and Commission* was concerned with aid to Bangladesh. The ECJ held that the fourth indent of Article 155 EEC did not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council.[4] Advocate General Jacobs framed the principle as follows: in cases where Member States decided to act individually or

[4] Cases C-181 and 248/91 *European Parliament* v. *Council and Commission* [1993] *ECR* I-3685, para. 20.

collectively in a field within their competence, there was nothing to prevent them from conferring on the Commission the task of ensuring coordination of such action. It was for the Commission to decide whether to accept such a mission, provided that it did so in a way compatible with its duties under the EC Treaty.[5] In *European Parliament* v. *Council* dealing with the Lomé Convention, the ECJ stated that no provision of the Treaty prevented Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up.[6]

The normative rationale for the rule thus crafted was unclear, as was its ambit. It is however a feature of legal discourse that courts will, however, spend less time on consideration of the emergent 'rule' when its sphere of application is closely circumscribed on the facts of the case. Thus while the rule was potentially broad, its actual sphere of application was narrow, given that the preceding cases were dealing with limited use of Community institutions to act primarily as agents to coordinate the respective schemes and organize payment of money there under, this having been done with the assent of the Member States.

The issue concerning the use of EU institutions outside the framework of the constituent Treaties then came before the CJEU in *Pringle*,[7] which involved challenge to the legality of the European Stability Mechanism, ESM. The euro crisis generated two responses from the EU, assistance and heightened supervision over national economic policy. The ESM was the successor to earlier measures to provide assistance to Member States and entered into force on 8 October 2012. Article 136 TFEU had been amended by the simplified revision

[5] Ibid., para. 26, A.G. Jacobs.

[6] Case C-316/91 *European Parliament* v. *Council* [1993] *ECR* I-653, para. 41.

[7] *Pringle* (supra n. 1).

procedure, the result being a new paragraph 3, which stated that 'the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole',[8] the assistance being subject to conditionality. However this amendment was not in force in October 2012 and the ESM thus took effect as an intergovernmental organization based on an international treaty between the euro area Member States.

The Commission and the European Central Bank are central to the ESM. Thus for example loans[9] are designed to assist ESM Members that have significant financing needs, but cannot access funds in the markets, either because lenders are unwilling to furnish loans, or will only do so at high prices that cannot be sustained by the public coffers. The request for support is made to the Chair of the Board of Governors.[10] It is then for the Commission, in liaison with the ECB and wherever possible the IMF, to assess the financial needs of the applicant state and whether its public debt is sustainable. If a stability support loan is granted the Commission, together with the ECB, negotiates a Memorandum of Understanding (MoU) with the state, which specifies the conditions attached to the financial assistance. The Managing Director of the ESM prepares the financial assistance facility agreement (FFA).[11] It is however the Commission that signs the MoU on behalf of the ESM, subject to approval by the Board of Governors.[12] The Board of Directors then approves the FFA and disbursement of the first tranche of assistance.[13] It is the Commission once again that is

[8] European Council Decision 2011/199 of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

[9] Art. 16 ESM.

[10] Art. 13 ESM.

[11] Art. 13(3) ESM.

[12] Art. 13(4) ESM.

[13] Art. 13(5) ESM.

accorded responsibility for ensuring that the conditions attached to the assistance are met.[14] The 'sanction' for non-compliance with the conditions is that further tranches of assistance can be withheld.

The applicant made numerous challenges to the legality of the ESM, the most forceful being that it infringed the no bail out rule in Article 125 TFEU.[15] The applicant however also challenged the use of EU institutions within the ESM. The CJEU rejected the argument. It reiterated the holding from previous case law that Member States 'are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance'.[16] It then added the caveat that this was subject to the proviso that 'those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties',[17] drawing this principle from case law concerning international agreements made by the EU.[18]

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[14] Art. 13(7) ESM.

[15] P. Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 *Maastricht Journal of European and Comparative Law* 1. The discussion focused principally on the objection to the ESM as infringing the exclusivity of the EU over monetary policy and the no bail-out rule. I touched very briefly on the institutional issue. My statement to the effect that the CJEU had not addressed the legitimacy of such involvement was not intended to connote that the ECJ had failed to address the issue at all, but merely that the legitimacy issues posed by such involvement are a good deal more complicated than is commonly acknowledged.

[16] *Pringle* (*supra* n. 1) para. 158.

[17] Ibid., para. 158.

[18] Opinion 1/92 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1992] *ECR* I-2821, paras. 32, 41; Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] *ECR* I-3493, para. 20; Opinion 1/09

The CJEU concluded that the duties allocated to the Commission and ECB in the ESM Treaty were of the kind referred to in the previous paragraph. Although they were important they did not entail any power to make decisions of their own, and moreover activities of the Commission and the ECB within the ESM Treaty only committed the ESM.[19] The CJEU further held that the tasks conferred on the Commission and the ECB did not alter 'the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[20] The Commission had the obligation under Article 17(1) TEU to 'promote the general interest of the Union' and 'oversee the application of Union law'.[21] The objective of the ESM Treaty was to ensure the financial stability of the euro area as a whole, and thus 'by its involvement in the ESM Treaty, the Commission promotes the general interest of the Union', and enables the Commission to ensure that the MoU concluded by the ESM are consistent with EU law. [22] The CJEU concluded in similar vein that the tasks allocated to the ECB by the ESM Treaty were in accord with those under the TEU and the Statute of the ESCB.[23]

THE LEGAL STATUS QUO: FOUNDATIONS

It is fitting to begin discussion with the foundations of the present rule, viz, its source and the values that underpin it. Simple inquiries are often the most difficult to answer. The rule must

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Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties [2011] *ECR* I-1137, para. 75.

[19] *Pringle* (*supra* n. 1) para. 161.

[20] Ibid., para. 162.

[21] Ibid., para. 163.

[22] Ibid., para. 164.

[23] Ibid., para. 165.

be based on a 'reading' of the constituent treaties, but the CJEU makes no attempt to locate its jurisprudence in any particular article or section of the constituent treaties. We must therefore press further to construct the foundations of the present rule. As a matter of principle the power accorded to the EU institutions must be grounded a priori, or it must exist for instrumental reasons or for an admixture of the two.

The a priori argument would justify the power given to the EU institutions by something that inheres in the very nature of such institutions. It is however difficult to fashion an a priori reason why EU institutions should have the power given to them by the rule under scrutiny. It does not flow from the nature of the EU as an entity, nor does it flow from the nature of its individual constituent components, such as Commission, Council, EP and ECB. It is moreover difficult to sustain the a priori argument when the rule was only 'discovered' over thirty years after the EEC was founded. The closest approximation to an a priori argument in the CJEU's formulation is that EU institutions have some inherent capacity to accept tasks entrusted to them by Member States in areas that do not fall within the scope of the EU's exclusive competence. This is nonetheless better viewed in instrumental rather than a priori terms. The reality is that the rule crafted in the 1990s, and reaffirmed in *Pringle*, was underscored by three different instrumental imperatives.

The original rationale in the early cases was largely Member State driven, as reflected in Advocate General Jacobs' formulation: if Member States decided to act individually or collectively in their field of competence there was nothing to prevent them from conferring on the Commission the task of ensuring coordination of such action, it then being for the Commission to decide whether to accept such a mission, provided that it did so in a way compatible with its duties under the EC Treaty.[24] Thus the foundational imperative was that Member States acted in their field of competence, but found it useful to ask the Commission

[24] *Supra* n. 5.

for help, which could accept or not as the case may. It would often be inclined to do so, because the subject matter was close to the terrain of Community competence, and because it was thought to be good for Community institutions to be involved in this manner. The rule was used to authorize participation by EU institutions in limited circumstances, such as disposition of aid to Bangladesh. The implicit legal metaphor here was contractual: the Member States could ask the Commission for assistance, which could choose whether to accept.

The rationale for affirmation of the rule in *Pringle* shifts. It is now driven as much by the needs of the EU as those of the Member States. The financial crisis precipitated the Euro crisis, with far-reaching consequences for the EU project. The reaffirmation of the rule was now premised on the need to legitimate whatever action was required by EU institutions within whatever institutional forum to stave off the impending collapse of Greece, Portugal and Ireland, with devastating consequences for the entire EU. The very fact that the ESM held out the promise of some permanent stability mechanism, and was integrally related to the aim of repairing the economic limb of EMU, made it all the more important to legitimate EU institutional involvement and the controls they were given under the ESM Treaty. The implicit legal metaphor now is governance and survival: the EU institutions had to be involved because of the proximate connection between the Euro crisis and the sovereign debt crisis.

The third imperative underlying the rule is broader, this being differentiated integration. The rule enables Member States in areas which do not fall under the EU's exclusive competence to entrust tasks to the institutions outside the framework of the EU. The EU institutions can participate, subject to the twin caveats that such involvement must be compatible with the Treaty, and not alter the essential character of the powers conferred on the institutions by the Lisbon Treaty. It is easy to see the allure of this for an EU where there

are divisions between groups of Member States in different areas. A separate treaty outside the confines of the Lisbon Treaty, in which EU institutions participate, with powers sculpted for the particular purpose, may seem an attractive option. Indeed the ESM Treaty and the Treaty on Stability, Coordination and Governance, known as the Fiscal Compact,[25] may appear as exemplars of this and not merely ad hoc responses to a crisis. The rule as formulated could certainly lend itself to this reading.[26] The implicit legal metaphor here is governance and integration: the capacity of the EU institutions to respond to invitations from Member States provides a vehicle for differentiated integration in an EU where it is difficult to secure agreement among states on the pace or direction of change.

THE LEGAL STATUS QUO: PROCEDURE

There are, however, procedural and substantive concerns posed by the rule, which are considered in the remainder of this article.

The decision-making process: EU institutions

We can begin with fundamentals. Institutional action is normally premised on a rule specifying the manner in which the action must be taken, and if the decisional rules are not met the action will usually be invalid. These rules are important and embody substantive values.

[25] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 1-2 March 2012, available at http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=en .

[26] Peers (*supra* n. 2), p. 39-40.

Consider in this respect Article 288-294 TFEU. The decision-making rules are premised on a careful allocation of power between Commission, Council and EP, which varies depending upon whether the norm is a legislative act, delegated act or implementing act. This plays out once again when we consider the allocation of power as between Council, EP and Commission in the rules for making legislative acts in Article 294 TFEU.

Consider in this respect also the decisional rules specified in Article 218 TFEU for the making of an international agreement binding on the EU. It contains very considerable specificity as to which institution, Council, EP and Commission, has responsibility at different stages of the making of the agreement. The rules have evolved, and the changes reflect altered perceptions of the role that, for example, the EP should play in this process.

The preceding observations prompt an important query as to the decisional rule that pertains in this instance. We know that an EU institution can participate in a treaty signed by other states provided that the conditions in *Pringle* are met, but these conditions are substantive, viz, compatibility with the Lisbon Treaty and powers that are consistent with the essential character of those existing therein. There are, however, no formal legal requirements concerning process, whether relating to reasoned justification for the relevant action; the form of the institutional decision; consultation with other institutional actors; or agreement of other institutions. A brief word about each is warranted.

There is no indication that the process requirements used to legitimate EU policy initiatives, such as impact assessment and the provision of reasons, pertain here, notwithstanding the fact that they could be regarded as warranted given the importance of, for example, a Commission decision to participate in a Member State venture. The institution concerned must of course agree to such participation, but there is no specification as to the formality of the internal institutional decision-making process before such consent can be taken to have been expressed.

There is no indication from the case law that other EU institutions must be consulted, and Advocate-General Jacobs indicated that the decision resided solely with the institution concerned.[27] This might suffice for the relatively limited venture in that case. It surely cannot suffice for larger scale ventures such as the ESM, or the Fiscal Compact. It might be contended that consultation will occur in practice, and that this should suffice. The premise might or might not be true, but the conclusion is surely not. The extent to which such consultation takes place may vary depending on the venture that the EU institution seeks to be involved in. The nature of such consultation will be shaped by the applicable legal rules. If there are no formal rules mandating such behaviour, if the consultation is regarded as a matter of grace and favour by the institution seeking views, then this will necessarily shape the resultant process.

There is moreover no requirement in the case law for agreement from the other institutional players, expressed in some clearly prescribed manner. Participation by an EU institution in any major venture will necessarily affect all such institutions, which may have strong views as to the desirability of such participation from the perspective of the EU taken as a whole. There is no reason why the view of the institution that wishes to participate should be accorded any privileged status in the determination of what constitutes the 'EU good'. It is no answer to state that the treaty must be compatible with the Lisbon Treaty, since as will be seen below, there can be many ventures that would be regarded as compatible, but which would not secure the support of all EU institutional players.

It might be argued by way of response that rules determining the procedures that must be followed are only required for decisions that bind the EU, and that therefore the analogy with the decisional rules contained in Articles 218, 288-294 is not apt. This argument is not sustainable for two related reasons, formal and substantive.

[27] *Supra* n. 5.

There is formal authority for imposition of such procedural constraints. The rule allowing participation of EU institutions in Member State ventures outside the confines of the EU is a rule of EU law. It exists because the CJEU created it, based in some general, albeit unarticulated, sense on a reading of the Treaty. The rule embodies a very extensive implied discretionary power that can be used by each and every EU institution. It is subject to substantive limits, the agreement must be compatible with the Lisbon Treaty and the powers given to the EU institutions must not alter the essential character of their powers in the Lisbon Treaty. The CJEU created these substantive limits as well as the primary rule. The argument that the CJEU could not impose procedural constraints does not therefore withstand examination, given moreover the regularity with which it imposes such constraints on discretionary power in other contexts.

There is also a strong substantive argument for imposition of such constraints. The agreements made with the participation of an EU institution may not formally bind the EU. They are nonetheless often integral to the EU as a whole, as was the case with both the ESM and the Fiscal Compact. The EU institutions that do not participate in such an agreement will therefore have a very strong legitimate interest in such agreements, and deserve a 'voice' that is based on something considerably more solid than political grace and favour. To deny this means subscribing to the following proposition: all agreements that formally bind the EU must comply with the panoply of decisional norms contained in Article 218 TFEU, even though a particular agreement may be of very limited importance, whereas no agreement in which a particular EU institution participates has to comply with any decisional norm where the agreement does not bind the EU itself, even though it may be of major importance for the entirety of the EU. This makes no sense and we should not subscribe to it. Nor does it suffice with respect to state simply that there was some sufficient showing of collective assent by the

Member States.[28] The legal status of this criterion is unclear, as too is its application, more especially where an EU institution seeks to participate in, for example, an agreement made by 10 or 12 states outside the confines of the EU.

The decision-making process: Member states

The discussion thus far has been concerned with decisional rules relating to process and EU institutions. That still leaves the rules that pertain to the decision-making process and Member States. The salient issue is whether all states must signal their consent before an EU institution can be invited to participate in that venture. The case law provides no certain answer in this respect, but Steve Peers, having reviewed the authorities, concludes that such unanimity should not be required and that the interests of dissenting states are adequately protected by the requirement that the powers exercised by the EU institutions via the external treaty must not alter the essential character of their powers in the Lisbon Treaty.[29] I do not share this view for the following reasons.

The Lisbon Treaty embodies requirements before change can take place. There are rules concerning Treaty amendment, viz the ordinary and the simplified revision procedure, which enshrine the proposition that the rules of the game should not be altered unless all agree, and contain criteria for when all do not agree, by the rules on enhanced cooperation. The Lisbon Treaty also contains many other decisional rules, such that unanimity is required for certain legislation, and a qualified majority mandated in other areas. The assumption is

[28] For consideration of the expression of institutional views in the context of the ESM, which in the view of the Advocate General demonstrated 'sufficient collective action on the part of the Member States', see *Pringle* (*supra* n. 1), paras. 172-173, AG Kokott.

[29] Peers (*supra* n. 2), p. 54-55.

that even though these criteria have not been met, and even though the rules on enhanced cooperation have not been used, it is legitimate to attain the desired ends by a different route and EU institutions can be integral to such a project. It can be accepted that Member States can pursue their desired ends through an international treaty where the Lisbon Treaty rules for change have not been complied with, provided that the subject matter is not within the EU's exclusive competence. It can be accepted also that a state that has refused to agree to EU action in accord with the decisional rules in the Treaty may nonetheless accept the participation of an EU institution in an agreement made with certain states outside the confines of the EU Treaty. The key issue is whether EU institutions can participate where such acceptance is absent.

The argument that they should be able to do so is premised implicitly on the normative assumption that where, for example, unanimity is required for a Treaty amendment or EU legislation, no injustice is done to the states who voted against such a measure by allowing it to be pursued by the other states coupled with an EU institution(s), provided that it is pursued outside the Treaty, is compatible with it and provided that the essential character of the powers of the EU institutions are preserved. The same conclusion would follow where it was not possible to secure a qualified majority in the ordinary legislative procedure. Thus on this view it is legitimate that the explicit Treaty rules concerning amendment and the making of legislation can be de facto qualified through reliance on the implicit discretionary power read into the Treaty by the CJEU, so as to allow the EU institution to participate in an agreement outside the Lisbon Treaty and pursue objectives that have failed to secure agreement in accord with the relevant Treaty rules.

There are however considerable normative difficulties with this argument. It is unclear why an institution that only exists as a creation of the Lisbon Treaty should be able to decide to pursue the vetoed objectives via a different treaty. It is no answer to say that the

other treaty is compatible with the Lisbon Treaty, nor that the essential character of the powers of the EU institutions is preserved. There are two difficulties with this argument.

It is premised on the implicit assumption that compatibility with the Lisbon Treaty 'means' only substantive and not decisional compatibility. The argument thus assumes a dichotomy between substantive competence, and the rules specified in the Lisbon Treaty to decide whether that competence should be exercised. Thus on this view a treaty made outside the confines of the Lisbon Treaty in which an EU institution chose to participate would be regarded as 'compatible' with the Lisbon Treaty judged by its substance, notwithstanding the fact that the same measure had failed to secure agreement in accord with the relevant decision-making rules laid down in the constituent treaties.

The argument is moreover predicated on an implicit assumption about the relationship between compatibility and substantive choice. There are, as will be explained below, many policy choices that are compatible with the Lisbon Treaty and with the institutional powers therein. The rules in the Lisbon Treaty are the medium through which decisions are made about these choices. If these rules are not met then this encapsulates the conclusion that the EU should not pursue that choice. It is then unclear what is the legitimate foundation for an autonomous capacity allowing a particular EU institution to lend its authority to that same particular schema just because it thinks that it would be a good way forward for the EU, given moreover the fact that it has no formal obligation to provide justificatory arguments why this should be so. This is more especially so given that the external treaty in which the EU institution chooses to participate will often be designed to shape what the EU does in the future, with the EU institution lending its weight and authority to this. It is of course true that the rules contained in such a treaty cannot be elevated into EU law without compliance with the law making rules provided for that kind of subject matter. This does not alter the fact that if, for example, the Commission has 'invested heavily' in such an external treaty this will

exercise a very strong influence on the way in which it presents any subsequent proposals for EU legislation.

The decision-making process: enhanced cooperation

The relationship between the rules on enhanced cooperation and the power of an EU institution to participate in an agreement made outside the framework of EU law must also be considered.[30] We need to tread carefully here.

It is clear from Article 20 TEU that states are not obliged to use the rules on enhanced cooperation. If therefore an EU legislative proposal fails to secure the requisite majority the Member States that wish to pursue the objectives laid down therein can choose to use the provisions on enhanced cooperation, but can also elect to further such objectives via an agreement made outside the Lisbon Treaty, provided that the subject matter falls within the sphere of the EU's non-exclusive competence, and provided that the Member States are not precluded from making an agreement by Article 3(2) TFEU. The discussion concerning enhanced cooperation normally stops here, but this is mistaken for the following reason.

It is also clear that the EU institutions are accorded discretion, but do not have a duty, by the principle reaffirmed in *Pringle*.[31] The relevant issue is therefore the considerations that should inform exercise of the discretion as to whether to participate in an agreement made outside the confines of the EU. The Lisbon Treaty provides that enhanced cooperation 'shall aim to further the objectives of the Union, protect its interests and reinforce its integration

[30] In *Pringle* (*supra* n. 1) paras. 167-169 the CJEU held that enhanced cooperation could only be established where the EU was itself competent to act in the area covered by the cooperation, and that the Treaties did not confer a specific competence on the EU to establish such a stability mechanism.

[31] Ibid., para. 176, AG Kokott.

process'.[32] It is the preferred mechanism for fostering integration while protecting EU values, where the requisite agreement among states cannot be secured. The default assumption must then surely be that where the contracting states have not used enhanced cooperation this should incline the EU institution against participation in such an inter-state agreement. This default position may be defeasible if, for example, there is some good objective reason for not using enhanced cooperation. This does not however alter the default position, which should be regarded as especially strong if the states have not even considered in good faith whether they might attain their objectives within the Lisbon Treaty via enhanced cooperation.

This view is reinforced by the wording of Article 20 TEU, which is framed thus: Member States that wish to establish enhanced cooperation may use EU institutions and exercise non-exclusive competences in accordance with the rules governing such cooperation. The explicit assumption is that the ability to use EU institutions is a benefit that comes from using enhanced cooperation. This has not thus far been interpreted so as to preclude use of EU institutions even where enhanced cooperation has not been used.[33] This does not however alter the force of the point being made here, which is that the wording of Article 20 lends support to the view that ability to use an EU institution is regarded in the Lisbon Treaty as a benefit that inheres from use of enhanced cooperation.

THE LEGAL STATUS QUO: SUBSTANCE

The discussion thus far has considered the foundations for the rule allowing EU institutions to be used outside the ordinary EU legal framework and the procedural issues that arise by enabling them to do so. The focus now shifts to concerns of a substantive nature.

[32] Art. 20(1) TEU.

[33] *Pringle* (*supra* n. 1) para. 174, AG Kokott.

Compatibility and choice

Let us recall the formulation in *Pringle*: the EU institutions can participate in an agreement with states outside the confines of the EU, subject to the twin caveats that such involvement must be compatible with the Lisbon Treaty, and must not alter the essential character of the powers conferred on the institutions by the Lisbon Treaty.[34] There are substantive concerns with EU institutions participating in such ventures, notwithstanding these caveats.

Compatibility is in reality a low substantive threshold, and should not be confused let alone equated with substantive choice as expressed through the EU decision-making process. A policy option chosen through the EU legislative process must be compatible with EU law, but there are many policy options that are compatible with EU law that are rejected by the EU legislative process because Member States do not agree on the legislative initiative. There are therefore very many choices that may be made in any substantive area within the EU's sphere of competence, all of which may be compatible with EU law, and none of which alter the essential nature of the powers conferred on the institutions by the constituent Treaties. It would be possible without difficulty to posit 50 different version of, for example, the Services Directive all of which might be formally compatible with the Treaty and none of which could secure agreement of the requisite number of Member States.

It is discourse about such choices that characterizes all that we do in the EU. It is the everyday life blood of the EU's existence. The discourse is resolved through the normal confines of EU decision-making. There are consultation papers published by the Commission. There is engagement with interest groups. There is the normal pattern of proposals being refashioned by the Commission in the light of observations received. There is

[34] *Pringle* (*supra* n. 1) para. 158.

the standard regime of the ordinary legislative procedure, with input from Council, European Parliament and Commission. There is the formal legislative process in which amendments are tabled, discussed and resolved.

We should at the least be wary before accepting that this discourse can be taken 'off line' and conducted by a limited group of states plus an EU institution, since this thereby privileges a particular choice for the development of an area, which will de facto shape and constrain any subsequent EU rules therein. This may occur without much by way of considered discourse within the EU as a whole as to whether this is indeed the desirable way forward in terms of substantive policy choice. The relationship between the rules thus made outside the EU Treaty with the participation of an EU institution and the rules that exist in the EU Treaty and legislation made thereunder may moreover be unclear.

The preceding concerns are exemplified by the Fiscal Compact. The core proposal in December 2011 was for reform that would strengthen EU oversight over Member State economic policy, and the new rules were to be incorporated in the Lisbon Treaty through amendment requiring unanimity. This was driven by the political preferences of Germany and France,[35] but amendment to the Lisbon Treaty was prevented by the UK veto. The majority of Member States nonetheless wished to press forward with the reforms, the result being the Fiscal Compact. It is arguable that almost everything in the Fiscal Compact could have been enacted pursuant to the Lisbon Treaty,[36] but this was not politically feasible. Merkel and Sarkozy had committed themselves to change to the primary Treaty, and sought

[35] P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *ELRev* 231, 233-234; S Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?' (2012) 8 *EuConst* 404.

[36] Subject to problems with Art. 8 of the SCG Treaty.

some other method of enshrining the desired precepts in 'primary law', even if this was a treaty distinct from the Lisbon Treaty.

There were five major versions of the Fiscal Compact prior to signature of the final agreement, any of which could in a general sense be regarded as compatible with the Lisbon Treaty. The debates that informed amendment to the Fiscal Compact were conducted largely behind closed doors, with none of the more open discourse that is a normal feature of the EU legislative process. The closed discourse concerning the Fiscal Compact overlapped with the 'parallel universe' of legislative measures enacted[37] under the Lisbon Treaty to strengthen oversight of national economic policy, which were subject to the normal rigours of EU legislative oversight. The net result was a set of overlapping measures, which diminished

[37] The six-pack: Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* [2011] L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* [2011] L306/33; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, *OJ* [2011] L306/1; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, *OJ* [2011] L306/41; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, *OJ* [2011] L306/25; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area, *OJ* [2011] L306/8. The two-pack: Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, *OJ* [2013] L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, *OJ* [2013] L140/11.

overall transparency and rendered this complex area of the law ever more difficult to comprehend.

Agreements and institutional powers

We now turn to the other constraint placed on EU institutional involvement in a treaty made outside the framework of the EU, which is that the tasks accorded to it do not alter the essential character of the powers conferred on that institution by the Lisbon Treaty. There are a number of concerns about this criterion.

First, it is not self-evident why the inquiry should be attenuated in this manner. The requirement that there should be no alteration in the essential powers conferred on the institution by the Lisbon Treaty is rightly regarded as a necessary condition for the legality of such institutional involvement, but this does not explain why it should also be sufficient. The CJEU's formulation was taken from case law concerning agreements made by the EU. We reason by analogy, but must ensure that the situations are analogous, and they are not. Where the agreement is made by the EU and has gone through the discourse required by Article 218 TFEU it can validly be assumed that the relevant players have agreed on the particular disposition of power in the agreement, the only remaining live issue being whether the agreement does not alter the essential character of an institution's power. There is no basis for any such assumption where a particular EU institution participates in an agreement made with other states outside the confines of the EU legal framework. It would be easy to posit 20 specific powers that might be accorded to an institution, none of which alter its essential character and all of which would nonetheless be rejected by the EU decision-making process because it was felt that the particular powers were not necessary, suitable, fitting or appropriate. This reflects the reality that debate is almost always focused on the desirability

of according particular powers to a particular institution, and not the meta-issue of whether the power fits with its essential character.

Secondly, the degree of constraint imposed by the CJEU's test depends crucially on how it is interpreted: other things being equal the broader the interpretation of the 'essential character' of an institution's powers, the less will it act as a constraint on the powers accorded to the institution in the agreement made outside the confines of EU law. This is readily apparent from the CJEU's reasoning in *Pringle*. In reaching the conclusion that the tasks conferred on the Commission and ECB by the ESM did not alter the 'essential character of the powers conferred on those institutions' by the constituent Treaties, the CJEU held that under Article 17(1) TEU the Commission had the duty to 'promote the general interest of the Union' and 'oversee the application of Union law'.[38] The ESM was designed to safeguard the financial stability of the euro area as a whole, and thus 'by its involvement in the ESM Treaty, the Commission promotes the general interest of the Union'.[39] The CJEU reinforced this conclusion by holding that the tasks allocated to the Commission by Articles 13(3)-(4) ESM enabled it to ensure that 'the memoranda of understanding concluded by the ESM are consistent with European Union law'.[40] Analogous reasoning legitimated the ECB's role, the CJEU holding that its tasks under the ESM were in accord with those in the Lisbon Treaty, given that the ECB was charged with the duty of supporting the general economic policy of the EU under Article 282(2) TFEU.[41] The CJEU's approach means that it will be very rare for participation of an EU institution in an agreement made outside the confines of the EU to fail this test. If the essential character of, for example, the Commission's powers is to be

[38] *Pringle* (*supra* n. 1) para. 163.

[39] Ibid., para. 164.

[40] Ibid., para. 164.

[41] Ibid., para. 165.

judged in terms of the very general objectives contained in Article 17(1) then it is difficult to imagine any instance in which it could not be claimed that it was acting to 'promote the general interest of the Union', or 'oversee the application of Union law'.

Thirdly, if this minimal hurdle is surmounted then it seems that any power accorded to an EU institution pursuant to an agreement made outside the confines of the EU is regarded as legitimate, including a new power.[42] There is certainly authority for the proposition that an international treaty concluded by the EU can confer new power on an EU institution, provided that it does not change the essential character of that institution's power, but these cases concerned treaties concluded by the EU that had gone through the formal procedure in Article 218 TFEU, thus ensuring deliberation about the change in accord with the decisional procedure in that Article.[43] The situation where the international agreement has not been concluded by the EU, but where an EU institution participates therein, is quite different.[44] The powers and functions of EU institutions are specified in the formal Treaties after considerable deliberation. The desirability of any addition to the functions of any EU

[42] The reason for uncertainty is as follows. The authorities cited in *Pringle* ibid., para. 158, which concern agreements made by the EU, are framed so as to include the capacity for the international agreement to create a new power for an EU institution, subject to the caveat that it must not change the essential character of the powers conferred by the constituent treaties. The formulation in *Pringle* itself makes no specific mention of new power, and states simply that the powers under the international agreement made outside the confines of the EU must not alter the essential character of the powers conferred by the constituent treaties. The implication from the question posed by the national court (ibid., para. 154), the CJEU's reasoning, and the authorities cited appears nonetheless to point to the broader formulation, viz that it can include a new power. This would also follow from AG Kokott, who stated that it followed from existing case law that an EU institution could act outside the tasks conferred by the Treaties, ibid., para. 171, and that it could do anything not forbidden by the Treaties, ibid., para. 176.

[43] (*Supra* n. 18).

[44] Craig (*supra* n. 35) p. 241-242.

institution is something on which all other EU institutions and all states might have a view, irrespective of whether a particular EU institution or state is party to a treaty made outside the formal confines of the Lisbon Treaty. There is no guarantee whatsoever that there will be opportunity for this deliberation when new powers are granted to an EU institution in a treaty made outside the confines of the Lisbon Treaty. The EU institutions and states might differ as to whether they believe that an additional function is compatible with current powers and also as to whether the new function can be 'hermetically sealed' from those performed by the institution within the Lisbon Treaty. They might also feel that the new power wielded by the EU institution is simply not desirable or appropriate because it could have negative consequences for how that institution is viewed and hence for its authority in pursuing policies that are within its EU remit. The idea that those affected will distinguish between an EU institution that is acting in its formal capacity and in its role as participant in an agreement made outside the confines of the EU is implausible.

Fourthly, the implicit assumption underlying the reasoning in *Pringle* is that if an institution possesses power of a certain kind under the Lisbon Treaty it is therefore legitimate for it to exercise the same type of power pursuant to a treaty made outside the confines of the EU in which it participates. This assumption is however doubly problematic. The fact that the Treaty framers or EU legislature after all due deliberation decide upon a certain disposition of power as between EU institutions cannot plausibly be taken to mean that they thereby accept that such power can be used by a particular institution outside the context of the EU. This would mean acceptance of an implicit term in, for example, all EU legislation to the effect that the powers therein can be used by an institution in an agreement as yet unknown outside the EU. There is no plausible basis for such a term. This is more especially so because the power granted to an EU institution under the Lisbon Treaty or EU legislation will be exercised subject to the limits, formal and substantive, contained in the empowering

provision. The idea that one can legitimate power of an EU institution exercised pursuant to a treaty outside the confines of the EU by pretending that it is the 'same' as the power exercised within the limits in the Lisbon Treaty or EU legislation is just that, a pretence.

Finally, the CJEU's reasoning creates a counter-intuitive legal paradox. When an EU institution acts within the framework of the EU Treaty it must ground its action on a specific Treaty provision, and in certain instances on powers contained in EU legislation. When the EU makes an international agreement it must ground its capacity in Article 216 TFEU. When however a particular EU institution participates in an agreement made with states outside the formal confines of the EU, it can exercise whatsoever powers it chooses, provided only that they do not alter the essential character of the powers conferred on that institution by the Lisbon Treaty.

Dynamic agreement and legal test

A further substantive concern with the principle reaffirmed in *Pringle* is the tension between a dynamic agreement and a static legal criterion. The agreement in which the EU institution participates will develop over time. The EU institutions that participate in the agreement will be influential, but their role in the formal decision-making system may be limited.[45] The legal test in *Pringle* will be applied at a particular point in time. The test might be reapplied if there were amendments to the agreement that changed its nature, but this does not alter the fact that the test will be applied to the agreement as it currently exists, and if it is approved by the CJEU this will disincline any later challenge, even if circumstances have changed. It is in this sense that there can be a tension between a dynamic agreement and a relatively static legal test.

[45] As it was in the ESM Treaty, Arts. 5-6.

This tension is exemplified by experience in this area. The CJEU in *Pringle* rejected the claimant's principal argument that the ESM infringed the no-bailout principle in Article 125 TFEU.[46] Its reasoning was that the ESM did not diminish the incentive for financial probity by the Member States and hence was consistent with Article 125 TFEU. There are difficulties with this economic reasoning,[47] which are exacerbated by the realization that the terms of the rescue package can be modified significantly, thereby further weakening the CJEU's reasoning. Thus the ministers representing the Eurogroup and Ecofin decided to increase the weighted average repayment period for Ireland and Portugal by seven years in relation to assistance provided pursuant to the EFSM[48] and EFSF,[49] the precursors to the ESM, in order thereby to 'smooth the debt redemption profile of both countries and lower their refinancing needs in the post-programme period'. [50] This may well be correct as judged by the relative capacity of those countries to repay the debts within the original shorter time frame. It does not, however, alter the fact that the extension of repayment time thereby further weakens the CJEU's argument that grant of such assistance does not diminish the incentive for financial probity on the part of the recipient state, since it is designed to ease the burden on the state.

Substantive protection and accountability

[46] *Pringle* (*supra* n. 7) paras. 133-146.

[47] Craig (*supra* n. 15).

[48] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

[49] European Financial Stability Facility, http://www.efsf.europa.eu/about/index.htm .

[50] Statement by the Eurogroup and Ecofin ministers, 12 April 2013.

The participation of an EU institution in an agreement made outside the EU legal framework also has implications for substantive protection and for accountability. The Charter of Rights can be taken by way of example. It will not be applicable against the Member States, and even if it is formally applicable to the participating EU institution it will be difficult to make the claim for the reason explicated below.

In *Pringle* the CJEU held that the Charter did not bind the Member States because the EU did not have specific competence to create a stability mechanism. It followed that Member States were not implementing EU law when creating the ESM, and hence did not fall within Article 51(1) of the Charter.[51] This leaves open the possibility that Member States might be bound by the Charter in instances where there is shared competence with the EU. This conclusion might be normatively desirable, but cannot be squared with the wording of Article 51. If Member States decide to make an agreement outside the confines of the EU in an area of shared competence where the EU has not yet occupied the area, then the Member States are acting outside the scope of EU law and not implementing it.[52]

This leaves open the issue as to whether the EU institutions can be bound by the Charter in relation to their actions under the ESM or some other such treaty. The CJEU did not pronounce on this matter, but Advocate-General Kokott stated that an EU institution was bound by the full extent of EU law including the Charter.[53] This view is normatively desirable and legally sustainable given the wording of the first sentence of Article 51(1), although it is somewhat more strained in the light of the second sentence. There will nonetheless be formidable difficulties in making a Charter claim against EU institutions, even assuming they are bound by the Charter. This is because the decision that gives rise to the

[51] *Pringle* (*supra* n. 1) paras. 178-180.

[52] Peers (*supra* n. 2), p. 52.

[53] *Pringle* (*supra* n. 1) para. 176, AG Kokott.

Charter claim may not formally be made by the EU institution at all,[54] even though it may have substantial influence over it, or the decision may be shared in some way with Member States that are not bound by the Charter.

The participation of EU institutions in agreements made outside the framework of the EU will also have negative implications for accountability, both ex ante and ex post. The former connotes the veritable array of mechanisms put in place in the post-Santer world to improve agenda setting, planning and personnel allocation within the Commission, as reinforced by tools such as impact assessment that are designed to test whether it is worth pursuing a particular policy initiative.[55] There is no guarantee that institutional resources used when participating in an agreement made outside the EU legal framework will necessarily be subject to these procedures, and the default assumption is that they will not feature directly in such planning, precisely because such agreements are not formally part of EU decision-making, even though they may have a marked impact thereon. There are analogous difficulties with ensuring ex post accountability, in relation to action of the EU institution within the international agreement in which it participates. Thus some channels of accountability will be effectively foreclosed because the normal 'keys' to open them such as access to documents and transparency will not be applicable. Even assuming that other channels of accountability, such as the Ombudsman, are available there may be difficulties in assigning 'blame' to an EU institution for reasons analogous to those set out above, viz, that it may not be the formal decision-maker, and/or the responsibility will be shared with states over whom the Ombudsman has no responsibility.

CONCLUSION

[54] Ibid., para. 161 CJEU.

[55] http://ec.europa.eu/atwork/planning-and-preparing/index_en.htm .

There will be no attempt to summarize the preceding argument. It is nonetheless worth highlighting certain features that are of particular importance. They are distinct, albeit related.

First, all power requires justification and the broader the power the better must be the justification. This is equally true for the implied substantive discretionary power reaffirmed in *Pringle*. We must therefore test the foundations of such power and the values that underpin it, not simply proceed on the assumption that the requisite foundational assumptions are sound.

Secondly, the judicial creation of a very broad substantive discretionary power without procedural constraint, and without addressing attendant procedural issues that follow from the rule is, with respect, not satisfactory. This is more especially so given that the procedural dimension is a necessary, albeit not sufficient, condition for the legitimacy of the discretionary power.

Thirdly, we must take care when crafting the substantive constraints on the discretionary power to ensure that we draw on case law that really is analogous. The CJEU reasoned by analogy to the case law on agreements made by the EU with an international organization or third state, but the analogy is imperfect. Such agreements have been through the procedure in Article 218 TFEU, and all EU institutions have participated in the discourse concerning the agreement to the extent mandated by this Article. It can thus reasonably be concluded that any application of, or modification to, an institution's power has been considered by the institutional players, such that scrutiny is limited to determining whether the agreement is compatible with the constituent treaties and does not alter the essential character of the institution's powers in those treaties. There is no basis for any such assumption where a particular EU institution chooses to participate in an international agreement that is not formally part of EU law.

Fourthly, we must be cognizant of the dangers of the 'false positive', which implicitly underpins discourse in this area. The assumption is that if we find that a treaty made outside the confines of the EU is not incompatible with the EU Treaty, and does not alter the essential character of the institution's powers under the EU Treaty, then it is unproblematic. The denial of the negative leads to the assumption of the positive. This is wrong, given the way in which these substantive criteria have been judicially interpreted. The finding of compatibility tells one nothing as to whether the treaty, which may be intended to impact on the EU, is felt by non-participating EU institutions or Member States to be a good way to develop an area that falls within the remit of the EU. The finding that the essential character of the institution's powers under the Lisbon Treaty are not altered by particular powers accorded by a treaty made outside the confines of the EU tells one nothing as to whether those powers are felt to be necessary, problematic or undesirable by other EU institutional players and/or Member States, given that the external treaty may impact directly and indirectly on the EU itself. This is more especially so given the absence of procedural obligations through which this could be tested.

Finally, while the participation of EU institutions in the ESM might be justified by the special circumstances surrounding the case, we should not readily allow the rule legitimated in *Pringle* to serve as the foundation for differentiated integration, because of the problems discussed above.[56]

[56] For a different view, Peers (*supra* n. 2).