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PERIT BOKKA

# Flexible integration in the European Union: Effects on enlargement

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## Introduction

Flexibility, or according the wording of the Treaties closer cooperation, was institutionalized in the Amsterdam Treaty signed on October 2, 1997. This was undoubtedly an important step for the EU in the context of future European integration. Flexibility means a novel possibility for cooperation within the EU framework; it is no longer necessary that all Member States integrate at the same pace toward the same objectives - in fact, closer cooperation between some Member States in certain fields of activity is allowed provided that all the relevant criteria set by the Treaties are met.

The concept of flexibility in the European integration process is a debated and debatable issue in many respects. Flexibility possesses the power to move the orthodox understanding of the EU integration model to a completely new level. Therefore, the importance of the so-called flexibility debate can hardly be underestimated.

Most of the discussion about flexibility tends to be from the viewpoint of insiders, namely the fifteen Member States and the Community institutions. This article will deal with the issues of flexibility mainly from the standpoint of today's Applicant States - Central and Eastern European countries involved in the negotiation process for membership of the Union. This unexploited angle in the flexibility discussions is also of special interest to the Baltic States, because neglecting to notice the impact of possibilities introduced by flexibility - positive as well as negative - would undoubtedly not serve the best interests of these countries during or after accession negotiations.

The first part of this article gives an insight into the concept of flexibility. This is followed by a short discussion about existing examples and experiences of and regarding flexibility. The last part of the article is dedicated to flexibility issues in the context of forthcoming EU enlargement.

# 1. What is flexibility?

## 1.1. "Flexibility" or "closer cooperation"?

The first point of confusion relates to the term "flexible integration"; the Amsterdam Treaty actually employs the softer wording of "closer cooperation", which, however, is not defined anywhere in the Treaty. G.Gaja has explained:

*"Closer cooperation" appears to have been preferred because, unlike "flexibility" or other metaphors such as "two-tier Europe", "variable geometry", "hard core", "Europe à la carte", "closer cooperation" was regarded as a neutral term and was not linked in the political jargon to the visions of Europe that had been associated with the use of the other terms.*<sup>1</sup>

J.Shaw has argued that

*... it marks the general trend towards deleting or at least largely concealing the contradictory if rich ideological heritage brought into play by flexibility. Instead it encourages us to focus primarily on the mechanics, within the clear constitutional frame of a single institutional framework, the protection of *acquis communautaire* and the balancing of the autonomy of the individual Member States against the discipline which majority rule may impose.*<sup>2</sup>

The different terms used concerning flexibility reflect various, even contradictory, understandings as to what the notion should encompass. Member States advocating for flexibility did not necessarily have the same objectives in mind - as a notion, flexibility can have a wide range of interpretations, which are discussed in more detail below. For example, some Member States were in favour of closer cooperation, whereas for others it was important to cooperate less or even not to participate at all in some fields of activity. Both interpretations fall within the term "flexibility", causing uncertain political and administrative implications. As L.Metcalf has concluded:

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<sup>1</sup> G.Gaja, "How Flexible is Flexibility under the Amsterdam Treaty?", (1998) 35 *CML Rev. (Common Market Law Review)* at p. 855-856.

<sup>2</sup> J.Shaw, "Flexibility and Legitimacy in the Domain of the Treaty Establishing the European Community", in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 92.

*[e]mphasizing closer cooperation reflects political anxieties about the whole concept of flexibility and uncertainty about what its effects might be on the stability of the system.*<sup>3</sup>

Another interesting view on terminology is expressed by F.Snyder, who has interpreted that “ ...’closer cooperation’ implies a *telos*, a shared objective, while ‘flexibility’ does not at all imply a *telos* or shared objective.”<sup>4</sup> This way of reasoning better serves the well-established aims of the Community without reference to conflicts about ultimate objectives of integration.

## 1.2. Novelty of the concept of flexible integration

It is generally accepted that flexibility is not a new concept to the EU. According to K.Nomden “[f]lexibility has existed since the beginning of European integration”.<sup>5</sup> In his analysis, three forms of flexible integration are distinguished:

1) traditional flexibility which has existed from the outset (for example transitional arrangements; Article 306 of the EC Treaty, which allows closer cooperation between the Benelux countries; and Article 30 of the EC Treaty allowing bans or restrictions on imports, exports, or goods in transit on the grounds listed in that Article; also the cooperation and integration provisions that came into being outside the Treaties: for instance, the Western European Union, the European Monetary System);

2) elements of flexible integration dating from the Single European Act (for example Article 15 of the EC Treaty stipulates that the Commission, when formulating its proposals on the establishment of the internal market, shall take into account the different situations in different Member States. Varying provisions for specific Member States should be temporary and should disturb the functioning of the market as little as possible. Article 100a, paragraph 4, of the EC Treaty (now

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<sup>3</sup> L.Metcalf, “Flexible Integration in and after the Amsterdam Treaty”, in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 19.

<sup>4</sup> F.Snyder, “Comments”, in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 115.

<sup>5</sup> K.Nomden, “Flexibility: A Key Element in Future European Integration?”, in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 32.

Article 95, paragraph 4) made non-participation possible for the first time, when a Member State deemed it necessary, after Community harmonisation, to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment. Two other provisions dating from the Single European Act relate to supplementary research programmes within the European multiannual framework programme for research and technological development);

3) flexible elements in the Maastricht Treaty (the Protocols allowing the United Kingdom and Denmark to opt out of the final stage of EMU and a Social Protocol annexed to the Maastricht Treaty enabling a social policy to be pursued to which the United Kingdom is not subject).

As can be seen from the examples above, the earlier development of flexibility consists mainly of exemption clauses for specific Member States in specific areas. The insertion of generalized provisions of closer cooperation into the Amsterdam Treaty differs from this approach in that it enables groups of Member States to cooperate more closely than the rest, provided they fulfil the strict criteria set down in the Treaties. This allows Member States to embark on closer cooperation in areas yet undefined, which is a completely new dimension of flexibility. Closer cooperation would serve as a tool for governing a diverse Europe - a task difficult to achieve through the orthodox model of integration according to which any new development in European integration is agreed and implemented fully by all Member States. In the words of L.Metcalf: "[a] uniform standardized approach to managing European policies would prove cumbersome, overcentralized and perhaps even unworkable".<sup>6</sup> Flexible integration after the Amsterdam Treaty is according to K.Nomden:

*...aimed at making it possible to govern a Europe that in the future will be much more heterogeneous in economic, political, social and cultural terms. It creates the possibility of reconciling enlargement on the one hand with deepening on the other.*<sup>7</sup>

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<sup>6</sup> Supra 3, at p. 23.

<sup>7</sup> Supra 5, at p. 33.

Nomden refers to an important area where flexibility is probably to play a significant role, namely the enlargement which will certainly add to the diversity in the EU. It is quite likely that under such circumstances the orthodox model of integration will be increasingly difficult to apply.

Another new function of flexibility under the Amsterdam Treaty is also expressed by L.Metcalf, in whose opinion "...greater flexibility is needed to enable the EU to cope with more rapid and more complex changes".<sup>8</sup> It is probably easier to bring about bigger changes within smaller groups, where all the participants are actually interested in moving forward, than have the speed dictated by the slowest or unwilling Member States.

### 1.3. Types of flexible integration

The commonly accepted classification of different forms of flexible integration is made by A.Stubb<sup>9</sup>, who has distinguished between three types: multi-speed integration (mainly *when* integration takes place), variable geometry integration (mainly *what* Member States integrate in), and *à la carte* integration (mainly *who* integrates).

1) Multi-speed integration: a multi-speed Europe has objectives and policies that are binding on all Member States. Only the time at which the policy is adopted is different. Examples of this include transitional periods for new Member States and Economic and Monetary Union. Member States can only participate in the final stage of EMU if they meet the required criteria. The other Member States that are committed to the objective of EMU will only actually take part if they fulfil the criteria.

2) Variable geometry: integration characterized by a temporary or permanent division between a core of Member States that are more closely integrated in certain areas of policy on the one hand, and the remaining Member States on the other. Variable geometry is only binding on the more closely integrated Member States. The most important examples so far relate to structures

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<sup>8</sup> Supra 3, at p. 23.

<sup>9</sup> A.Stubb, "A Categorization of Differentiated Integration", (1996) 43 (2) *JCMS (Journal of Common Market Studies)* at p.283-295.

that have been developed outside the Treaties. These include the Schengen Convention, the Western European Union and the European Monetary System.

3) *Europe à la carte*: this concept gives Member States the opportunity to choose the policy areas in which they wish to integrate and work together. One clear example of *Europe à la carte* is the British opt-out from the Social Protocol annexed to the Maastricht Treaty.<sup>10</sup>

#### 1.4. Flexibility and the European integration process

One characteristic of flexible integration is that its effects or consequences are not yet known or even clearly predictable. There seems to be an accepted agreement about the need for more flexibility in the EU, but how exactly this flexibility would look and in which areas it will be exploited still largely remains to be seen. L.Metcalf has used the economic notions of demand and supply to describe this situation. According to him:

*...most of the debate about flexibility in the IGC and the provisions included within the Amsterdam Treaty were about meeting the demand for flexibility from the Member States. Flexible integration after Amsterdam needs to pay much more attention to increasing the supply of flexibility.*<sup>11</sup>

The next step from here would be to investigate what impact the flexible integration provided for in the Amsterdam Treaty would have on the process of European integration. Opinions seem to differ. Some warn about a split in the Community, which they see as an inevitable consequence of flexible (or as it can be called more descriptively here - differentiated) integration. It would certainly be a step away from the orthodox understanding of the integration of the EU, where all countries are engaged in basically the same actions and similar behaviour. P.Allott has described the Amsterdam Treaty to: "...mean the coexistence of dozens of different legal and economic sub-systems [...], a sort of nightmare resurrection of the Holy Roman Empire...".<sup>12</sup>

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<sup>10</sup> Supra 5, at p. 35-36.

<sup>11</sup> Supra 3, at p. 23.

<sup>12</sup> P.Allott in supra 2, at p. 85.

On the other hand, there are opinions less apocalyptic than that expressed in the last quote by P.Allott. Flexibility does bring differentiation, but not necessarily in the negative sense as being against the expectations and interests of the Member States or the Community as such, nor permanently. There also exists the understanding that flexible integration will, in fact, function as an accelerator for the European integration process, without much affecting the homogenous legal area and without causing permanent splits in the Community. S.Bär and others mention three factors why flexibility would have a positive impact on the European integration process: "...the 'threatening effect' of closer cooperation, its pull effect and the interests of the European institutions and the 'ins'".<sup>13</sup>

The "threatening effect" of closer cooperation alone could suffice to ensure that potential participants achieve satisfactory political results for deeper integration. It could also be that non-participation may cause a loss in political prestige and could indicate the status of a "second-rate" Member State. It could be that in certain cases non-participants have to bear additional political and economic costs.

Using the environment example, S.Bär and others explain that closer cooperation may result in economic effects that prompt manufacturers in non-participating countries to comply with the higher regulation level for their entire production - the so called pull effect of closer cooperation. Non-participation could also cause additional costs, for example, with regard to catching up with technological developments. In addition to economic costs, there can also be administrative and political costs. Those that cooperate more closely create political and administrative facts that can hardly be reversed in the Community since the relevant regulations have already been adopted and applied in practice by the majority of Member States and the Commission. This means that potential later-joiners cannot really affect the type and level of regulation, because they were not involved in the adoption. This may result in more Member States

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<sup>13</sup> S.Bär, T.Gehring, I.von Homeyer, R.A.Kraemer, A.-G.Mazurek, A.Klasing, R.G.Tarasofky, "Closer Cooperation, a new instrument for European Environmental Policy?" (2000) 4 (13) *EIoP (European Integration online Papers)* at p.18-19 (11 October, 2000) <http://eiop.or.at/eiop/texte/2000-013a.htm>.

cooperating more closely and integrating in the orthodox manner since this is the only way to influence the further elaboration of regulations.

Moreover, the institutions not directly controlled by Member States: the Commission, Parliament and ECJ, have an institutional interest in preventing the splitting of the Community and they will most likely take measures to counter any such tendency. For example, assistance to non-participants could be given to enable them to catch up sooner; assistance could also come from participants in closer cooperation to avoid competitive disadvantages, especially when the lower regulation level of non-participants gives them a competitive edge in business. However, there exists no legal obligation of participating Member States to provide any help to those not participating.

The analysis described of the impact of flexibility on the European integration process gives a positive evaluation of the effect of the former to the latter. However, S.Bär and others seem to neglect, save in the last argument of interests of the European institutions and the "ins", that two elements are needed for a group of countries to cooperate more closely - namely, willingness and ability. Their reasoning only takes into account the willingness of countries to engage in closer cooperation and proceeds by explaining how this willingness could come about or be enforced on the countries initially unwilling to participate. The element of ability is perhaps less important in the EU of today, but will considerably increase in significance after planned enlargement to Central and Eastern Europe and cannot therefore be left aside. The problem then might not be the willingness of a country to participate in closer cooperation, but rather the ability of that country to meet the relevant criteria needed for participation. And the solution to the possible problem of splitting the EU should be sought from different factors than those mentioned above. The problems of flexibility relating to enlargement will be discussed in more detail below.

## 1.5. Closer cooperation provisions in the Treaties

The provisions of closer cooperation as a basic principle were institutionalized with the Amsterdam Treaty. Changes to these provisions were made by the Nice Treaty, signed on February 26, 2001. It must be kept in mind, however, that the Nice Treaty is not yet in force at the time of writing this article.

The general provisions on closer cooperation are to be found in the Treaty on European Union (Articles 43, 44 and 45 in Title VII), a specific provision relating to cooperation in the third pillar (Article 40 of the TEU), and a specific provision in the EC Treaty.

In the field of Common Foreign and Security Policy the TEU does not expressly speak of closer cooperation, nor is there a list of conditions for adopting closer cooperation. The role played by closer cooperation in the first and third pillars was considered to be sufficiently filled by the notion of "constructive abstention" in Article 23 of the TEU, which provides that this abstention does not prevent the adoption of a decision taken under the relevant Title.

The flexibility clauses in the Amsterdam Treaty have been classified into three types: enabling clauses, case by case flexibility, and predefined flexibility.<sup>14</sup> This explanatory division is important for understanding the different forms in which flexibility can emerge. It also shows that flexibility can be understood to be more than only the express closer cooperation provisions in the Treaties. Enabling clauses (Articles 43-45 of the TEU, Article 11 of the EC Treaty, and also Article 40 of the TEU) enable certain Member States to integrate more closely, subject to strict conditions, even if some Member States do not participate. Enabling clauses are especially important, because they will shape the future integration of the EU. They will probably gain even more significance after EU enlargement in Central and Eastern Europe. Case by case flexibility mainly permits certain Member States to opt out from certain activities. An example of case by case flexibility, which is not expressly called closer cooperation but nevertheless is a form of flexibility, is the constructive abstention in the second pillar (Article 23 of the TEU). Predefined

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<sup>14</sup> For example in L.Metcalf, *supra* 3, at p. 20, and A.Stubb, "Dealing with Flexibility in the IGC", in E.Best, M.Gray, A.Stubb (eds), *Rethinking the European Union: IGC 2000 and Beyond*, Maastricht, European Institute of Public Administration, 2000, at p. 148-150.

flexibility can be either an opting-in or opting-out clause and examples can be found in protocols and declarations attached to the Treaty. For example, Protocol No 2 integrating the Schengen agreement, Protocol No 3 on the application of certain aspects of Article 14 of the EC Treaty to the United Kingdom and to Ireland, Protocol No 4 on the position of the United Kingdom and Ireland in Title IV on Visas, Asylum, Immigration and other policies related to the free movement of persons, and Protocol No 5 on the position of Denmark in Schengen and the new Title IV. Previous examples have been the British opt-out from the Social Protocol and EMU, and the Danish opt-outs from EMU, defence, citizenship and police cooperation.

## 1.6. Closer cooperation in the Nice Treaty

Closer cooperation provisions have not so far been used in practice. Their inclusion to the Treaties triggered vigorous debates, but the outcome has been described by many as a disappointment. L.Metcalf, for example, has pointed out that:

*the most striking feature of the flexibility provisions in the Amsterdam Treaty is that they are intentionally extremely limited in scope [...] Apart from giving hardly any room for manoeuvre, they are also difficult to activate [...] They do not provide a foundation for major reform of European public management.*<sup>15</sup>

It could be argued that the conditions and mechanisms of closer cooperation after the Amsterdam Treaty were too strict and extremely difficult to use. The enabling clauses of flexibility in the Amsterdam Treaty provide for the right of veto for every Member State that opposes closer cooperation, even if that Member State does not wish to participate. In this way unwilling Member States can impede the further integration of others.

The statement about difficulty in initiating closer cooperation would be especially strong if flexible integration were the goal, but not all Member States agree as to the degree of flexibility permitted. The Amsterdam Treaty is in fact a fine balance between varying standpoints of different Member States. This is also reflected in lively debates about the issue of flexibility in the Treaties. If a

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<sup>15</sup> Supra 3, at p. 20.

consensus on the necessity of closer cooperation provisions in the Treaties were achieved, these provisions should then also be workable and not merely declarative or virtually impossible to implement in practice.

The complexity and difficulty in using the flexibility provisions of the Amsterdam Treaty in practice inevitably called for changes to be made; there is little benefit in clauses that are virtually impossible to use, as was felt by many of the Member States. The provisions of the Amsterdam Treaty could be seen as a start or foundation needing certain improvements. Once the general agreement about the "big question" - existence of possibility of flexibility in the Treaty framework - was achieved, it was easier to work on details to make it work. The need for workable solutions was dictated by several factors, for example the forthcoming enlargement being certainly an important one of these.

In the Treaty of Nice there were made four principal changes concerning closer cooperation. Firstly, the minimum number of Member States required to initiate closer cooperation is eight in all three pillars. Secondly, the possibility to veto is abolished, but Member States can refer a matter to the European Council. The decision authorizing closer cooperation is taken by the Council by qualified majority. In the second pillar the final decision is taken by the European Council acting unanimously. Thirdly, in the first pillar closer cooperation may be initiated in a field subject to co-decision only with the assent of the European Parliament. Fourthly, there would be a possibility to initiate closer cooperation in the second pillar, i.e. common foreign and security policy, in order to implement a joint action or common position, but it may not involve matters with military or defence implications.

## 2. Flexibility emerging

The discussion so far has concentrated on what is meant by flexible integration of the EU via the closer cooperation provisions in the Treaties. Much of the discussion about flexibility is, in fact, on the theoretical level for there is not yet what one might call an ample supply of examples as to how it would work in practice. For those not enthusiastic about institutionalizing flexibility this situation may be satisfactory, but with the prevailing opinion recognizing the necessity for more flexibility in a widening and ever more diverging EU, it is somewhat disturbing that a door has been opened for something quite different from the orthodox model of European integration and there is no clear common understanding what exactly this might bring about. It is, of course, not precise to say that flexibility is absolutely untested in the EU - EMU and integration of the Schengen Agreement are the most often cited successful examples of it so far.

The general question about flexibility in the EU is why or when it comes up. Why does the EU need to sidestep the described orthodox model of integration at all? What are the reasons, the benefits, and costs? A.Stubb has noted that:

*flexibility comes to the fore whenever at least one of the following five issues is debated on the European level: (1) Economic and Monetary Union (EMU), (2) Justice and Home Affairs (JHA), (3) Common Foreign and Security Policy (CFSP), (4) enlargement and (5) the exclusion of reluctant Member States.*<sup>16</sup>

A.Stubb put together this list based on the flexibility debate starting from the seventies. The list should not, however, be interpreted as exhaustive, but rather in the sense that it is these items which necessarily almost always trigger discussion about flexibility. There can be a number of other fields where flexibility does or could come up, for instance environmental and tax harmonization, to name just two. As A.Stubb has very neatly and aptly summarized: "flexibility becomes an issue every time the Union is about to undergo deepening and/or widening."<sup>17</sup> The reasons here are obviously manifold. As for deepening, not all Member States are

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<sup>16</sup> A.Stubb, "Dealing with Flexibility in the IGC", in E.Best, M.Gray, A.Stubb (eds), *Rethinking the European Union: IGC 2000 and Beyond*, Maastricht, European Institute of Public Administration, 2000, at p. 146-147.

<sup>17</sup> *Supra* 16, at p. 147.

necessarily equally eager to integrate at the same pace; as for widening, it will become increasingly difficult to manage a Union of up to double the size it is today according to the models designed for a Union of six Member States; objective differences between the Member States will also have their influence.

The three pillars will be briefly looked at below with regard to examples of the flexibility they have so far provided, with special emphasis on flexibility within the context of EU enlargement. One area triggering debate on possible flexible integration in the EU, namely the exclusion of reluctant Member States, can actually be found in almost any field of Union activity. The idea behind this is that willing Member States should not be hampered by those unwilling, or in other words: the further process of deeper European integration supported by a majority should not be undermined by minority action provided that all the criteria set down in the Treaties are followed and closer cooperation is open for all Member States willing and able. Reluctance on the part of certain Member States regarding deeper integration or closer cooperation in general or in specific fields of activity is not unknown to the EU and is most likely expected to grow after foreseeable enlargement to Central and Eastern Europe.

## 2.1. Examples of flexibility from the first, second, and third pillars

As already mentioned, one of the reasons for flexibility in the EU is that not all Member States are equal in their political, economic or social conditions or approach. This reason concerns the ability, not always just the willingness, of a state to integrate more deeply. Existing examples of flexibility in the EU are so far those of pre-defined flexibility, as enabling clauses under the first and third pillars and constructive abstention in the second pillar have not yet been used. By establishing closer cooperation and for that purpose making use of the institutions, procedures and mechanisms laid down in the Treaties achieve a result when it is impossible for the Union to make progress in a given area and a group of Member States decides jointly to pursue a specific aim without affecting its operation or weakening the collective nature of the integration process. The best known previous examples of pre-defined flexibility are EMU and the Schengen agreement.

In both of these cases the general clause for closer cooperation does not apply but is substituted by other predetermined rules in the EC Treaty. The significance for EMU and the Schengen *acquis* for flexibility in the EU is also underlined by F.Alvargonzalez:

*There are two very substantial areas where closer cooperation will be fully implemented [...]. Those will undoubtedly be the main fields where enhanced cooperation will take place in the foreseeable future. It should finally be noted that these two areas could expand considerably and perhaps include unexpected turns.*<sup>18</sup>

In connection with EMU, flexibility became a so called constitutional force in the EU legal framework. This early appearance is in the form of opt-outs - individual Member States excluding themselves from specific elements of the Treaty - by the UK and Denmark. The reasons behind these opt-outs from the TEU were somewhat political at the time, when only a minority of countries were against the deepening of integration in the framework of EMU. A.Scott has convincingly argued that the system of opt-outs is essentially rather *ad hoc* and that:

*Despite the obvious attractiveness of the opt-out as a practical and political response to the opposition in both Denmark and the UK with respect to proposals to establish a Economic and Monetary Union, its status as a putative constitutional device capable of delivering a stable variable-geometry architecture for the governance of the EU was less compelling.*<sup>19</sup>

Understandably, with a number of practical, including institutional, and legal problems, opt-outs are incapable of facilitating a stable development for the EU. They might function as a one time answer for some specific situation, but not as a constitutional principle for laying down a pattern for future EU development. The long term and general guidelines should be more abstract to fit the variety of situations that the EU could encounter in its development, even such kind of which we have yet no knowledge. However, EMU has proved the necessity for more

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<sup>18</sup> F.Alvargonzalez, "Treaty of Amsterdam: Expectations and Results", in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 56.

<sup>19</sup> A.Scott, "Comments", in M.den Boer, A.Guggenbühl, S.Vanhoonacker (eds), *Coping with Flexibility and Legitimacy after Amsterdam*, Maastricht, European Institute of Public Administration, 1998, at p. 143.

flexible solutions for the EU and the possibility of their functioning. In the development of EMU, increased possibilities to make use of closer cooperation provisions are available and could become more than simple examples of opt-out.

The most important examples of flexibility instituted in the Amsterdam Treaty are the opt-outs for the UK, Ireland and Denmark from the area of freedom, security, and justice. The new Title IV was created, which communitarizes parts of the old third pillar concerned with visas, asylum, immigration and other matters related to the free movement of persons and a Protocol integrating the Schengen *acquis* into the framework of the EU with parts of it to the first pillar and parts to the third. However, Title IV is to operate without prejudice to the Protocol on the application of certain aspects of Article 14 of the EC Treaty to the UK and Ireland, and the Protocols on the UK and Ireland, and on Denmark. According to these Protocols, Britain, Ireland and Denmark are in principle not involved in the adoption by the Council of measures proposed pursuant to Title IV and are insulated from the effects of these measures. The provisions made for qualified majority and unanimity in substance correspond with those already contained in Article 44 of the EC Treaty, already discussed above. From this it may be seen how Article 11 of the EC Treaty would work in practice. Of course, the Protocol concerns an area - citizenship - where closer cooperation is not possible according to Article 11.

Due to the resistance to communitarization by Britain and Denmark (because of its freedom of movement of persons according to the Common Travel Area with Britain, Ireland is tied to the British position), Article 69 of the EC Treaty provides for exceptions for these Member States. These exceptions are laid down in two protocols for Britain and Ireland on the one hand, and a further one for Denmark on the other. Additionally, cooperation previously under the Schengen Agreement has since the Treaty of Amsterdam, been brought into the EU institutional and legal framework with Protocol No. 2 of 1997 whose Article 1 authorizes the thirteen signatory Member States of the original Schengen Agreement:

*[...] to establish closer cooperation among themselves within the scope of those agreements and related provisions [...] hereinafter referred to as the "Schengen acquis". This cooperation shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant*

*provisions of the Treaty on European Union and of the Treaty establishing the European Community.*

However, after the Amsterdam Treaty it is not entirely clear when the new Title IV is to be applied, nor indeed the Schengen Protocol; as yet there is no answer as to which kind of closer cooperation or further development of the Schengen *acquis* might be expected.

In the second pillar, as already noted above, there is no explicit provision about closer cooperation. The proposal to incorporate such was, in fact, dropped shortly before final discussions on the Amsterdam Treaty. However, it cannot be said that there exists no flexibility whatsoever in the field of Common Foreign and Security Policy. On the one hand, many forms of flexibility can be found in the second pillar since a majority of Member States are also members of NATO and the WEU, few Member States are neutral, and Denmark is a NATO member but only an observer in the WEU and Article 17(1) stipulates that the Treaty shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States which see their common defence realised in the framework of NATO - a form of flexibility allowing for existing divergence only in the area of security and defence policy; there are also examples of closer cooperation between some Member States outside the Union framework (for example the Contact Group on former Yugoslavia with Germany, France, Italy and the UK taking part in their national capacity, or the Alba policing operation taking place after lack of support within the Union framework); in addition, the so called constructive abstention discussed above qualifies somewhat as a form of flexibility.

On the other hand, there is Article 17(4) allowing for a more active kind of flexibility in the area of security and defence policy, permitting closer cooperation between two or more Member States on a bilateral level, within the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in Title V on Common Foreign and Security Policy. This Article actually sets the possibility for cooperation outside the Union network and could provide for a variety of possibilities, but as with most aspects of flexibility - it is not yet clear how, precisely, this will work in practice.

### **3. Flexibility and the enlargement of the EU to Central and Eastern Europe**

One of the most important contexts in which the issues of flexible integration of the EU appear is the future enlargement of the Union to Central and Eastern Europe. It seems reasonably safe to assume that the question about eastward enlargement is no longer whether it will happen; rather, there is a strong express political consensus that it will happen. There is not yet clarity as to the countries to be accepted to the EU nor a specified date, but there is reason to be optimistic that a relatively large number of countries will be accepted and that this will occur quite soon. Therefore, it is difficult to underestimate the significance of flexibility in relation to enlargement. Indeed, extreme opinions have even been expressed to the effect that flexibility is all about enlargement, namely how to cope with a Union of almost twice the size of today's and naturally involving considerably greater diversity and heterogeneity. This is perhaps too radical a statement and too narrow a view - the reasons behind institutionalising flexibility are surely manifold, but nevertheless forthcoming enlargement forms a substantial part thereof. The remainder of this paper analyses the relationship between flexible integration in the EU and enlargement itself, with some thoughts on the possible impact of the former on the latter.

#### **3.1. Effects of flexibility on the enlargement process**

The provisions of flexibility, or more specifically of closer cooperation, inserted into the Treaties certainly have their influence on the enlargement process and is under way before actual accession takes place. There is a general consensus that any form of enlargement of the present EU is unthinkable, unless certain institutional changes and adjustments in decision-making are made. This trend of thinking was already apparent in negotiations prior to the Amsterdam Treaty and was strongly expressed in the IGC leading to the Nice summit and finally agreed in the Nice Treaty itself. Now it can be said that the necessary changes are made and the door can be opened for new Member States from Central and Eastern Europe.

The insertion of flexibility can be viewed as a part of these changes to the EU system, the aim of which is to facilitate enlargement, and therefore the whole enlargement process has received a strong boost now that technical obstacles are out of the way. To put it another way, insertion of flexibility has probably made it easier for existing Member States to accept the idea of enlargement. It is probably safer to support the acceptance of a number of new members, with obviously lower levels of living standards and economic development, when one can rely on the possibility of flexible integration where not all Member States must achieve the same goals according to the same pace. This is not to imply that the current members would be actively looking for possibilities to leave the newcomers behind, but surely they cannot be interested in integration where the speed is dictated by the slowest, considering the actual differences between the slowest and the more developed. In one sense, institutionalising flexibility has contributed to the formation of the political determination on the part of the existing Member States to go forward faster with the enlargement agenda than they otherwise would have been willing to do.<sup>20</sup>

### 3.2. Flexible integration and Applicant States

It cannot be said that flexibility in the EU directly affects Applicant States, since these countries are not legally bound by the Treaties nor affected by their provisions; however, it is not possible to look at the whole picture of the effects of flexibility and forget the process of enlargement and the Applicant States therein. There certainly exist effects of an indirect nature and institutionalisation of closer cooperation in the Amsterdam Treaty in conjunction with its further development in the Nice Treaty is not simple to evaluate from the point of view of Applicant States. On the one hand, it is positive as it facilitates a faster negotiation process and a possibly more inviting attitude from the current Member States. After all, most of the Applicant States are in favour of accession as soon as possible. Flexibility could perhaps help to relieve some anxieties the Applicant States might

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<sup>20</sup> The relative unpopularity of the Eastern enlargement inside the EU has also been repeatedly stressed by D. Dinan in "The 2000 Intergovernmental Conference and the Treaty of Nice", 2000, <http://wwics.si.edu/wes/dinan.htm> [at p. 2, 6].

have about their future integration within the EU - they will also enjoy the possibility for differentiated integration as far as these countries might wish and is foreseen by the Treaties. At least this is an option that should be kept in mind by the Applicant States, even if it is not very likely to facilitate opt-outs from existing fields of activities, but rather function as a tool in future developments.

On the other hand, the existence of possibilities for flexible integration within the EU could seem quite alarming to the Applicant States. First of all, without going into the substance of the flexibility process, it can be said that the introduction of closer cooperation provisions to the Treaties does not make the Treaties more comprehensible, coherent, or simple. As, for example, C.D.Ehlermann has pointed out:

*... the further complication of the EU inevitably associated with use of the new cooperation mechanisms [...] Additional forms of closer cooperation within the EU will further intensify this complexity. This will not bring "Brussels" closer to the citizens, but take it further away from them. Nor, presumably, will the - theoretically quite justified - argument that cooperation outside the EU institutional framework is still harder to "read" and understand than cooperation inside it, change anything here. Closer cooperation inside the EU may thus very well have negative repercussions on the EU's acceptance and legitimacy, unless the positive practical results of the cooperation can balance out the institutional loss.<sup>21</sup>*

C.D.Ehlermann does not, of course, talk about complicating the EU system for understanding by Applicant States, but for citizens of the EU today. However, the argument can legitimately be extended for the purposes of the Applicant States and citizens of these countries who are also to become citizens of the EU in the relatively near future. This is important for those already in the EU as well as to those now looking forward to joining. From the point of view of an Applicant State an understandable Union would be the best Union to join. This also includes the "citizen's Europe" for the people of Applicant States, whose acceptance matters to the legitimacy of their country's future membership of the EU.

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<sup>21</sup> C.D.Ehlermann, "Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty", 1998, <http://www.iue.it/RSC/WP-Texts/ehlermann.html> [at p. 9-10].

Another substantial fear that Applicant States might experience springs from the very essence of flexibility, namely as the result of closer cooperation provisions the existing Member States might initiate deeper integration in some areas and thus cause, at the very least, confusion in an Applicant State, and possibly also raise questions there about the goals and priorities of the EU they are about to join. The question concerns this: towards what the Union is moving. The provisions on closer cooperation, namely Article 43 of the TEU, stipulate that the aims of certain closer cooperation must be in accordance with the objectives of the Treaties, but sometimes even the emphasis can be important. In principle, different groups of current Member States are allowed to integrate differently, provided they follow the rules and criteria laid down in the Treaties. This variety could cause difficulties for the Applicant States, because of the complexity in European integration. However, as soon as Applicant States have become Member States and closer cooperation is not by that time developed into a common pattern in the integration process, these kinds of fears should disappear. Then all the countries that are now Applicant States could influence decisions and developments from inside the Union.

### 3.3. Flexibility and the enlarged EU

Most of the effects which the closer cooperation provisions are expected to have, will come about after enlargement to Central and Eastern Europe has taken place. It is when today's Applicant States will have become actual Member States that one can talk about the concrete and direct impact of flexibility on these countries. According to C.Deubner talking about flexibility clauses:

*More than one government therefore expressed the expectation, that only after the coming Eastern enlargement of the EU the new EC clauses could move up on the agenda again and show their value.*<sup>22</sup>

Governments, then, have institutionalised flexibility having the prospect of enlargement in mind and having possibly designed the provisions of closer

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<sup>22</sup> C.Deubner, "A Comparison of National Views", in A.Missiroli (ed) *Flexibility and Enhanced Cooperation in European Security Matters: Assets and Liabilities*, 1999, [under the heading "The differences between member countries"]. <http://www.weu.int/institute/occasion/occ06.html>

cooperation to function at their best in the enlarged Union. Keeping in mind developments in the EU, most importantly the relatively short period of time until the first accession is expected, that is, within a couple of years, there is reason to believe that the flexibility provisions are most likely going to show their value after enlargement. So far only theoretical analysis can predict the positive and/or negative sides of flexibility to the enlarged Union and the new Central and Eastern European Member States therein.

A distinction can be drawn between different types of accession of new Member States: namely the accession of a small or a large group of countries. Obviously, the EU must face an objectively different situation when enlarging by one country, up to five countries, or more than five, perhaps around ten, countries. Coping with enlargement from the point of view of the EU seems to be easier in the case of a smaller group. The integration of a minority (a few newcomers) into the majority (the existing fifteen Member States) is a task the Union can consider successful, but the accession of all the Applicant States would have more complicated consequences, possibly even more complicated than the Union could cope with without serious difficulties. The hypothesis can be constructed that the EU would need and make use of the flexibility provisions more if the enlargement includes more new Member States; or, *vice-versa*, the fewer countries that accede, the lower the probability would be of using closer cooperation after enlargement. If there are only a few countries joining, the other Member States have a greater possibility to support them, wait for their development and take their specific needs into consideration in order to pursue the same goals with the same speed throughout the Union. Flexible integration triggered by enlargement (leaving aside other causes for flexibility, for example the reluctance for further integration by some of the "old" Member States) is therefore less likely, the smaller the number of Central and Eastern European countries involved.

A number of somewhat negative effects of institutionalising flexibility have been pointed out. These effects would not leave the new Member States untouched and deserve, therefore, some comment. First of all, the possibility for closer cooperation among groups of Member States could lead to a general decline in the

willingness of the Member States to work together. For example C. D.Ehlermann has drawn attention to the fact that:

*[a]ll those Member States that do not count on practically always being in the vanguard will fear that a system of easier closer cooperation might lead to a general decline in willingness to compromise among Member States (quite apart from purely financial aspects). [...] this would undoubtedly have disadvantageous consequences, especially for the laggards.*<sup>23</sup>

There would be less incentive to seek the consent of all the Member States to push through some agenda or activity. It might be easier to decide to go further with a smaller group only, and those not eager to push forward can more easily decide not to participate. Everything becomes easier, but at the expense of cohesion of the Union. It seems that the requirement in Article 43(1)(c) of the TEU about closer cooperation being used as the last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein, might not be a sufficient safeguard in that respect, because it is not clear when, precisely, the line is crossed and all else has failed, or when it simply has to do with the negative attitude of a Member State. Similarly, a willingness to find common solutions with new Member States could be endangered by the existence of the possibility of flexible integration. This could be even more so after the new members enter the Union, because of the objective differences, both economically and otherwise, between the current Member States and Central and Eastern European countries. It is probable that it requires more effort from both sides to be able to integrate at the same pace - the kind of integration still preferable from the point of view of the development of the EU as we know it today.

Another possibly negative impact the closer cooperation provisions - more specifically their application in practice - could have is that it might facilitate emergence of a Europe *à la carte* - a concept giving Member States the opportunity to choose policy areas in which they wish to integrate and work together - also described as a pick-and-choose model. This is quite the opposite of the orthodox understanding of European integration and generally not considered as a recommendable model for the EU, because it is believed to dilute the Union. It

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<sup>23</sup> Supra 21 [at p. 11].

could lead to the emergence of the so-called core Europe, consisting of certain Member States and although formally open to all, in practice it could become more like a closed club. Most of the criticism of such development naturally comes from those that fear being left out of the core. There have been opinions that the core could be formed of Germany, France and the Benelux countries<sup>24</sup>, but these initiatives have generally been rejected. Suffice to add that Central and Eastern European countries are not likely to form part of the core Europe and there are no obvious benefits for them from the concept of an *à la carte* Europe. Rather, it makes it all the less likely for them to become equals among the Member States with a practically closed core.

Related to the *à la carte* concept is the possible emergence of blocks of countries within the EU. The model of *à la carte* suggests a core, but there can be more differentiation into blocks than merely one core. In fact, there could be several blocks consisting of different Member States. In the words of C.D.Ehlermann: "The emergence of blocks is seen as incompatible with the idea, principles or good operation of the EU."<sup>25</sup> For the future Central and Eastern European Member States the formation of blocks, as also the formation of a single core, magnifies the risk of becoming somewhat second rate Member States, mainly left behind by the other more advanced and integrationist Member States. They could, because of the circumstances, even find themselves in a block of their own, with less possibility to integrate with the "old" Member States.

As seen from the analysis above, the new Member States (when the enlargement to the Central and Eastern Europe has taken place) will have to deal with several fears directly or indirectly derived from the flexibility provisions institutionalised within the Amsterdam Treaty. The prospects discussed have been, of course, theoretical for there is no clarity nor true-to-life vision of the functioning of the enlarged Union or the closer cooperation provisions in practice. Yet in this situation of uncertainty it is important and of interest to assess the impact of flexibility on these countries that are involved in the negotiations for membership of the EU: on the one hand to see what the expectations of these

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<sup>24</sup> As suggested by the *Lamers-Schäuble* (1994) document, supra 21 [at p. 11].

<sup>25</sup> Supra 21 [at p. 12].

countries are, and on the other hand what could in reality correspond to these expectations once the long, difficult and exhausting negotiation process is successfully concluded by actual accession. Support for or the basis of the more or less theoretical speculations about the impact of flexibility on future new Member States comes among other sources from the Treaties themselves. It is not accurate to say that the Treaties give no indication of what flexible integration under the closer cooperation provisions might look like, because of a lack of practical examples.

An important Treaty-based statement is that the closer cooperation provisions introduced by the Amsterdam Treaty do not include, alongside other safeguards expressly provided for, obligation of the countries cooperating more closely to provide any help to the Member States left out of that particular cooperation. The help meant here is such that the cooperating Member States would have as one of their objectives in that closer cooperation to facilitate the participation of all the Member States in it. This problem becomes especially acute if these Member States fulfil the criterion of willingness and are only left out because of their inability to participate. This means that countries are left out of an activity under the closer cooperation provisions because they do not meet the relevant, mostly economic, criteria required for such particular closer cooperation. It is not, therefore, unthinkable that there would be listed for example in Article 43 of the TEU a requirement to provide some form of help, either in general terms or concretely stated, by the participants of closer cooperation to other Member States who are willing but not able in order to guarantee the maximum possible coherence of the Union. This help could be economic or possibly of some other kind to help willing non-participants to catch up with the participants by meeting the criteria set for a particular closer cooperation. If there is no requirement to help, this could raise the question as to the motives behind the decision not to include it as one of the safeguards. The negative approach here could be that Member States were fully aware of the prospect of enlargement and therefore tried to minimize their responsibilities by not taking on any more obligations than would be absolutely necessary. After all, among the current Member States participation in closer cooperation depends rather on the willingness of countries and the requirement of ability is not so current; whereas after enlargement this would

mainly be about ability. To complete the concept, in a situation where a Member State does not want to cooperate more closely, it does not need any help from the participating Member States in relation to being able to join that particular closer cooperation activity - that is the situation in the currently existing EU. It is in the enlarged EU that the questions of ability and the related concept of help come up. Can the exclusion of a requirement of help be interpreted as the Union's safeguard against widening into Central and Eastern Europe?

Of course, one need not be so pessimistic as described in the previous paragraph and look for a malicious intent where it might not exist. Perhaps the requirement of help was simply not considered as relevant, perhaps obvious via the steps taken by the Commission in the procedures for closer cooperation, or perhaps indeed it would be too great and unjustified a burden on the participating Member States. In any case, it must be taken notice of when looking at flexibility issues from the point of view of the Applicant (soon to be Member) States.

One further implication of flexibility in the context of enlargement has been pointed out by C.D.Ehlermann, who has written that:

*...it is by no means certain any longer that transitional arrangements for new Member States will remain without consequences for their full participation in the Community decision-making process. [...] Unrestricted involvement in the Community decision-making process was among the essential and natural features of every accession, even if associated with long transitional periods.*<sup>26</sup>

C.D.Ehlermann comes to the conclusion that flexibility, namely by the example of EMU with the provisions of temporary non-participation in the EURO, has set a precedent according to which transitional provisions lead to diminished participation in EU decision-making procedures - a kind of development unfamiliar earlier. In the enlargements that have so far taken place the new Member States have been able to fully participate in decision-making, in spite of transitional agreements. The treatment of the transitional provisions in the coming enlargement is not yet settled: on the one hand, the Applicant States try to negotiate for transitional arrangements in favour of their needs and, on the other, the Union is trying to restrict the possibilities for any transitional arrangements for

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<sup>26</sup> Supra 21 [at p. 6].

future new Member States. If the precedent really is set for future enlargements of the EU, then transitional provisions are brought closer to the concept of flexibility in closer cooperation provisions. They would qualify as examples of multi-speed integration where all members are moving towards the same objectives. It is only the speed at which member states are progressing that is different. The Member States that are not participating in closer cooperation do not take part in decision-making regarding that closer cooperation. Similarly, transitional periods would exclude that country's participation in decision making. In any case, it is a noteworthy prospect from the point of view of those countries applying for membership of the EU.

## Conclusion

Institutionalising flexibility in the Treaty of Amsterdam is undoubtedly a big step taken by the Union. It is a huge step beyond the orthodox understanding of the European integration model according to which all members integrate at the same pace toward the same objectives. And the impact of this can hardly be underestimated for there is a possibility of the Union obtaining an entirely new face.

Flexibility can be considered a welcome addition to the Union framework with the possibilities it offers for future European integration. As with almost any issue, flexibility can also have its down sides. It could be tempting to consider the option of flexibility as a solution to the problems that the EU is facing regarding large-scale enlargement in Central and Eastern Europe. Superficially this may be so, if one looks at it from the point of view of the fifteen Member States that the Union has today. But the position of today's Applicant States should not be neglected. These are the countries looking forward to being partners with the "old" Member States once accession has taken place. They are not expecting to find themselves in a Union where they could at best play only second fiddle; in other words be excluded from a variety of activities pursued by the more advanced Member States, because they are not good enough. Formally this could look fair: they would not meet the objective criteria for closer cooperation even if they might be willing. But could this lead to a serious split between Member States? One must not forget the differences in development of Central and Eastern European countries - first of all economically, but also institutionally, politically and socially.

There exists a danger of facile or fictitious enlargement, where the division between the so-called Western and Eastern Europe still persists. However, this is not, of course, an absolute prediction, but rather a theoretical scenario. It should be easier to solve the problem and find the best solution when all the possible problems are not put to silence but clearly identified and discussed. Hopefully, this will also add to the odds of avoiding the negative developments brought out therein.

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