

**FLEXIBLE INTEGRATION AND THE
AMSTERDAM TREATY:

NEGOTIATING DIFFERENTIATION
IN THE 1996-97 IGC**

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PhD

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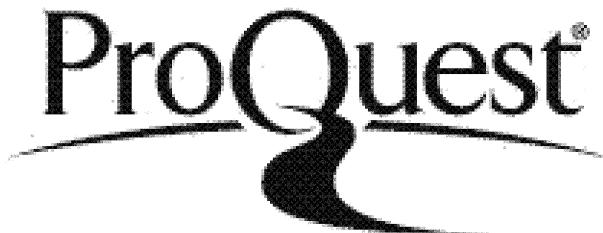
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Abstract

The thesis analyses the development of the concept of flexible integration in the 1996-97 Intergovernmental Conference (IGC) of the European Union (EU) and outlines an array of ideas, interests and issues at stake for the actors in the negotiations. The thesis has two objectives: (1) to explain the 1996-97 IGC *process* of negotiation which led to the institutionalisation of flexible integration in the Amsterdam Treaty and (2) to analyse the *substance* of the flexibility debate from the early 1970s to the present day. The research aims to show 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, (2) free movement, (3) defence, (4) enlargement and (5) the exclusion of recalcitrant member states. The 1996-97 IGC was exceptional in that it met all the five criteria which have a tendency to trigger the flexibility debate.

The thesis has three basic lines of argumentation. The first relates to the IGC *process*, the argument being that the 1996-97 IGC negotiations on flexibility were an incremental learning process where the basic positions of the member governments illustrated some continuity, but the specific positions of the negotiators fluctuated with the dynamics of the negotiations. The second line of argumentation relates to the concept of flexibility itself (*substance*), the argument being that one of the main difficulties with the flexibility negotiations was that flexibility meant different things to different people. Member governments did not necessarily agree about its purpose. The final strand of argumentation relates to the key players in the flexibility debate. Although all member states, large and small, played an important role in the IGC process, the most influential actors in the 1996-97 IGC were the civil servants of the respective Presidencies and the Council Secretariat.

Summary of Contents

Abstract

Acknowledgements

List of abbreviations

List of tables

INTRODUCTION - <i>Objectives, methodology, structure and sources</i>	1
--	----------

PART I – THE SUBSTANCE

CHAPTER 1 - <i>A framework analysis for the 1996-97 IGC negotiations on flexible integration</i>	12
CHAPTER 2 - <i>Towards clarity in the flexibility debate: definitions, categories and examples</i>	35
CHAPTER 3 - <i>An assessment of the flexibility clauses in the Amsterdam Treaty</i>	68

PART II – THE PROCESS

CHAPTER 4 - <i>The agenda setting stage: from Corfu (June 1994) to Turin (March 1996)</i>	95
CHAPTER 5 - <i>The decision-shaping stage: from Turin to Dublin II (December 1996)</i>	158
CHAPTER 6 - <i>The decision-taking stage: from Dublin II to Amsterdam (June 1997)</i>	211
CONCLUSION - <i>The process of the 1996-97 IGC and the substance of flexible integration</i>	262

Bibliography

Annex 1 – List of Interviews

Annex 2 – Expert Group Hearings and Participants

Contents

Abstract

Acknowledgements

List of abbreviations

List of tables

INTRODUCTION

Objectives, methodology, structure, argument and sources

INTRODUCTION	1
OBJECTIVES	2
METHODOLOGY	3
STRUCTURE	5
ARGUMENT	7
SOURCES	9

PART I – THE SUBSTANCE

CHAPTER 1

A framework analysis for the 1996-97 IGC negotiations on flexible integration

INTRODUCTION	12
1. THE NEGOTIATING ENVIRONMENT	15
1.1. Multi-level negotiation	16
1.2. Multilateral negotiation	19
1.3. The repetition of the negotiating pattern and the relationship between negotiators	21
1.4. The need to achieve agreement	22
2. THE NEGOTIATING PROCESS	23
2.1. Scope, layers and issue-linkage	23
2.2. Compromise and coalition building	25
2.3. Side-payments and time constraints	26
3. THE NEGOTIATING STYLES	27
3.1. Negotiating styles	27
3.2. Bounded rationality	29
CONCLUSION	34

CHAPTER 2

Towards clarity in the flexibility debate: definitions, categories and examples

INTRODUCTION	35
1. THE EVOLUTION OF THE THEORETICAL AND POLITICAL DEBATE ON FLEXIBILITY	38
1.1. The first wave of the flexibility debate - 1974-1978	38
1.2. The second wave of the flexibility debate - 1979-1991	40
1.3. The third wave of the flexibility debate - 1992-97	45
1.4. Lessons from the flexibility debate since 1974	48
2. TOWARDS CONCEPTUAL CLARITY: MERGING THEORETICAL AND PRACTICAL FLEXIBILITY	49
2.1. Some general considerations	50
2.2. From multi-speed to transitional clauses	53
2.3. From variable geometry to enabling clauses	57
2.4. From à la carte to case-by-case and pre-defined flexibility	61
2.5. Comparisons	63
CONCLUSION	66

CHAPTER 3

An assessment of the flexibility clauses in the Amsterdam Treaty

INTRODUCTION	68
1. ENABLING CLAUSES	69
1.1. General enabling clauses in the TEU (articles 43-45)	70
1.2. Specific enabling clause in the TEC (article 11)	75
1.3. Specific enabling clause in the TEU (article 40)	77
1.4. Summary of the enabling clauses	79
2. CASE-BY-CASE FLEXIBILITY	80
2.1. Article 23 - constructive abstention	81
3. PRE-DEFINED FLEXIBILITY	82
3.1. Protocol No. 2 – the incorporation of Schengen	83
3.2. Protocol No. 3 – the United Kingdom and Ireland on border control	86
3.3. Protocol No. 4 – the UK and Ireland in title IV	87
3.4. Protocol No. 5 – on the position of Denmark	89
3.5. Summary of pre-defined flexibility	91
CONCLUSION	92

PART II – THE PROCESS

CHAPTER 4

The agenda setting stage: from Corfu (June) 1994 to Turin (March 1996)

INTRODUCTION	95
1. THE POLITICAL CONTEXT – FROM MAASTRICHT TO CORFU AND BEYOND	98
2. FROM CORFU (JUNE 1994) TO ROME (JUNE 1995) – SCHÄUBLE AND LAMERS	101
2.1. Launching the flexibility debate – September 1994	102
2.2. Reactions to Schäuble and Lamers	107
3. FROM ROME (JUNE 1995) TO MADRID (DECEMBER 1995) - THE REFLECTION GROUP	128
3.1. The reports of the institutions – the first verdict	129
3.2. The work of the Reflection Group	131
3.3. The state of the flexibility debate in December 1995 – environment, process and style	145
4. FROM MADRID (DECEMBER 1995) TO TURIN (MARCH 1996) – THE REPORTS OF THE MEMBER STATES	147
4.1. The political impulse – the Franco-German push	147
4.2. Categories of member states' willingness and ability	148
CONCLUSION	154

CHAPTER 5

The decision-shaping stage: from Turin to Dublin II (December 1996)

INTRODUCTION	158
1. THE POLITICAL CONTEXT – THE ITALIAN AND IRISH PRECIDENCIES	162
2. FROM TURIN (MARCH 1996) TO FLORENCE (JUNE 1996) – THE EARLY STAGES OF THE IGC	164
2.1. Mapping out the early positions - first flexibility meeting with representatives in May 1996	166
2.2. “The Ten Commandments” – first flexibility meeting with Foreign Ministers in May 1996	172
2.3. The repetition begins – second flexibility meeting with the representatives in May 1996	174
2.4. The progress report of the Italian Presidency - Conclave and the European Council of Florence	175
2.5. Setting the stage for the Irish Presidency – a summary of the early stages of the flexibility debate	177
3. FROM FLORENCE (JUNE 1996) TO DUBLIN I (OCTOBER 1996) – FIRST ARTICLE ON FLEXIBILITY	182
3.1. The concrete issues take form – the third flexibility meeting with representatives in June 1996	182
3.2. The first draft article – fourth flexibility meeting with representatives in September 1996	186
4. FROM DUBLIN I TO DUBLIN II (DECEMBER 1996) – A SECOND WAVE OF IDEAS	193
4.1. The Franco-German push - fifth flexibility meeting with representatives in October 1996	193
4.2. Strengthening the political impulse – second flexibility meeting with Ministers in November 96	197
4.3. No article in the Irish Draft Document - December 1996	204
CONCLUSION	206

CHAPTER 6

The decision-taking stage: from Dublin II to Amsterdam (June 1997)

INTRODUCTION	211
1. POLITICAL CONTEXT - THE DUTCH PRESIDENCY	214
2. FROM DUBLIN II (DECEMBER 1996) TO ROME (MARCH 1997) – GETTING STARTED	216
2.1. The legacy of the Council Secretariat - the unofficial draft article	217
2.2. Bringing flexibility back to centre stage – January 1997	219
2.3. Moving towards Schengen and new article drafts – February 1997	229
3. FROM ROME (MARCH 1997) TO AMSTERDAM (JUNE 1997) – GETTING GOING AND FINISHING UP	241
3.1. First draft article on the ministerial level - March 1997	242
3.2. Fine-tuning flexibility and tackling Schengen and free movement – April, May and June 1997	245
3.3. The end game at Amsterdam – 16-18 June 1997	253
CONCLUSION	258

CONCLUSION

The process of the 1996-97 IGC and the substance of flexible integration

INTRODUCTION	262
1. FLEXIBILITY IN THE 1996-97 IGC – THE PROCESS	264
1.1. The history of the flexibility debate	264
1.2. The stages of the 1996-97 IGC	266
1.3. From vision to practice	269
2. ASSESSING THE NEW SYSTEM - THE SUBSTANCE	270
2.1. The good news	271
2.2. The bad news	274
2.3. Where can the new provisions be used?	277
3. IMPLICATIONS FOR EUROPEAN INTEGRATION	279
3.1. Much ado about nothing?	279
3.2. Three IGC lessons - environment, process and style	281
CONCLUSION	283

Bibliography

Annex 1 – List of Interviews

Annex 2 – Expert Group Hearings and Participants

Acknowledgements

"Political science must be based on a recognition of the interdependence of theory and practice, which can be attained only through a combination of utopia and reality. A concrete expression of the antithesis of theory and practice in politics is the opposition between the 'intellectual' and the 'bureaucrat', the former trained to think mainly on *a priori* lines, the latter empirically".

E.H. Carr (1939)

I have always believed that the study of European integration, more than most sub-fields of political science, benefits from a symbiosis between theory and practice. The line between the academic and the policy world in European affairs has always been blurred. Mitrany, Deutsch, Spinelli, Haas and Monnet, among others, were in Carr's terms both 'intellectuals' and 'bureaucrats'. 'Intellectuals' because they tried to describe and explain the process of unifying separate nation states. 'Bureaucrats' because their input inevitably shaped the development of the European polity.

This thesis is a product of my academic and practical experiences of European affairs over the past eight years. It would have been impossible to write the thesis without the support, help and criticism of many colleagues from the world of academia and the world of EU bureaucracy. I am grateful to two mentors, Brent Nelsen and Aristide Tessitore, who planted the seeds of my intellectual engagement at Furman University (USA) in the early 1990s. I am also indebted to Simon Bulmer and Brigid Laffan, who at the College of Europe (Belgium), helped me to sort out my early ideas on flexible integration in 1994-95.

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Of course, despite the input of these many colleagues and friends, I alone remain responsible for the content of this thesis.

Alexander C-G. Stubb

London,
13 December

List of abbreviations

ARRC	Allied Command Europe Rapid Reaction Corps
AUS	Austria
B	Belgium
CEEC	Central and Eastern European Countries
CFSP	Common Foreign and Security Policy
COM	Commission
COREPER	Group of Permanent Representatives
CTA	Common Travel Area
D	Germany
DK	Denmark
EC	European Community
ECJ	European Court of Justice
EMS	European Monetary System
EMU	Economic and Monetary Union
ERM	Exchange Rate Mechanism
ES	Spain
EU	European Union
EUREKA	European Programme for High Technology Research and Development
EUROFOR	European (Rapid Deployment) Force
EUROMARFOR	European Maritime Force
F	France
FDP	German Free Democratic Party
FIN	Finland
G-7	Group of Seven
G-24	Group of Twenty-Four
GAC	General Affairs Council
GR	Greece
I	Italy
IGC	Intergovernmental Conference

List of abbreviations

IRL	Ireland
JET	Joint European Torus
JHA	Justice and Home Affairs
LUX	Luxembourg
NATO	North Atlantic Treaty Organisation
NL	The Netherlands
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
PASOK	Greek Socialist Party
POR	Portugal
QMV	Qualified Majority Voting
S	Sweden
SPD	German Social Democratic Party
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TOA	Treaty of Amsterdam
UK	United Kingdom
UN	United Nations
VAT	Value-Added-Tax
WEU	Western European Union

List of tables

Table 1 Responsibilities of the actors in the 1996-97 IGC (Chapter 1)

Table 2 Definitions, categories and examples of flexible integration (Chapter 2)

Table 3 General reactions to the Schäuble and Lamers paper (Chapter 4)

Table 4 Categorisation of member states in early 1996 (Chapter 4)

Table 5 Observations about the member states' IGC reports (Chapter 4)

Table 6 Conditions on flexible integration suggested by member states (Chapter 4)

Table 7 Flexibility positions in June 1996 (Chapter 5)

Table 8 Flexibility positions in November 1996 (Chapter 5)

Table 9 Flexibility positions in February 1997 (Chapter 6)

Table 10 Flexibility positions in April 1997 (Chapter 6)

Introduction

OBJECTIVES, METHODOLOGY, STRUCTURE, ARGUMENT AND SOURCES

INTRODUCTION

The past three decades have witnessed major changes in the membership of the European Community (EC). Four enlargements from 1973 to 1995 have increased the membership of the Community from 6 to 15. Radical policy changes in four Intergovernmental Conferences (IGC) from 1985 to 1997 have transformed the Community into the European Union (EU), moving from a free trade area and customs union to a fully integrated single market on the way to full Economic and Monetary Union (EMU). Accompanying these institutional and policy reforms has been an ongoing debate about the challenge of further integration and enlargement in an increasingly heterogeneous EU. Can the Union as it is cope with both deepening and widening, or will a certain degree of flexibility become essential in order for the EU to function efficiently into the next millennium?

On 29 March 1996 the European Council of Turin asked the Intergovernmental Conference of the EU to "examine whether and how to introduce rules either of a general nature or in specific areas in order to enable a certain number of member states to develop strengthened cooperation, open to all, compatible with the Union's objectives, while preserving the *acquis communautaire*, avoiding discrimination and distortions of competition and respecting the single institutional framework" (European Council of Turin 1996, p.5). This was a request to investigate what is generally called flexible integration, i.e. the possibility for a number of member states to cooperate more closely than others in specific areas using the institutional framework of the Union¹. In the early hours of 18 June 1997 the European Council of Amsterdam concluded the 1996-97 IGC. The Amsterdam Treaty - amending the

¹ This thesis uses flexibility as the overarching term because it is the broadest term signifying all forms of differentiation. For a discussion on the semantics of flexibility see chapter 2.

Treaties establishing the European Communities (TEC) and the Treaty on European Union (TEU) - was signed by the Foreign Ministers of member states on 2 October 1997. The treaty introduces new provisions on the free movement of people, internal security, various other policy areas, external relations, decision-making and the institutions of the Union. One of the main innovations of the Amsterdam Treaty was the institutionalisation of the principle of flexible integration. This thesis analyses the development of the concept of flexible integration in the 1996-97 IGC and outlines an array of ideas, interests and issues at stake for the actors in the negotiations.

OBJECTIVES

The original aim of this thesis was to look at the political, legal and economic implications of past, present and future arrangements of differentiation in the European construction, but the sheer number of policy sectors and member states that have been subject to some form of flexibility precluded a detailed study of the whole package. The focus of the thesis has therefore been narrowed to concentrate on two objectives: (1) to explain the 1996-97 IGC *process* of negotiation which led to the institutionalisation of flexible integration in the Amsterdam Treaty and (2) to analyse the *substance* of the flexibility debate from the early 1970s to the present day. In other words, the aim of the thesis is to gain a better understanding of the substance of the concept of flexibility and to analyse the process of how the concept was introduced into the new treaty.

By looking at the *process* of the negotiations the aim is to learn about the institutional set up of an IGC²; why governments behave the way they do; the ebb and flow of IGC negotiations; the evolution of a subject that is being negotiated; the actions of the participants; the chaos and uncertainty that prevails throughout the negotiations; the "human factor" in negotiations; and domestic constraints and pressures. By looking at the *substance* of flexibility the aim is to learn about a new principle in the European construction; assumptions of exclusion and inclusion; the will and ability of member states to participate in different policy areas; general integration strategies; and visions, or the lack thereof, relating to the future of the EU. By focusing on the *process* and the *substance* of the 1996-97 IGC negotiations on flexibility this thesis hopes to: (1) learn how an issue evolves from a vision to a

² Throughout the thesis reference is made to EU IGCs only.

legally binding article in an EU treaty and (2) understand the concept of flexible integration which has such a broad impact on all forms of cooperation inside and outside the Union.

There are three main reasons for writing this thesis. Firstly, though flexible integration seems to be one of the “sexiest” subjects in EU scholarship, there is a lacuna in the literature dealing with the subject. No one to date has written a comprehensive study on flexibility which encompasses the history, typology and examples of the substance of the flexibility debate and the process which led to its institutionalisation at Amsterdam. This study aims to fill that gap. Secondly, flexible integration is one of the most important political and legal issues in the EU, influencing all aspects of Union activity now and in the future. The thesis makes a contribution by shedding light on the subject and by assessing its implications on the current and an enlarged Union. Thirdly, the thesis is important because it dissects a set of IGC negotiations from beginning to end. Much of the IGC literature analyses only the final bargain that takes place in the European Council (Moravcsik 1991, 1993). The objective of this thesis is to look in detail at the whole IGC process. Moreover, the thesis provides an analysis of the flexibility positions of all the member states, and thus departs from traditional analysis which is based on either one or a limited number of member states (Moravcsik 1998).

METHODOLOGY

The thesis is based on qualitative, as opposed to quantitative research. The difference between the two is that “quantitative research is structured, logical, measured and wide”, whereas “qualitative research is more intuitive, subjective and deep” (Bouma and Atkinson 1995, p.207). The essence of the qualitative approach is to examine a set of events through the perspective of people who are being studied (King, Keohane and Verba 1994). Another characteristic of this approach is that it is focused on a set time period. Thus there is an emphasis on *process*, i.e. how things change (Bouma and Atkinson 1995). In addition this form of research provides a detailed description of the setting that is being examined. Consequently qualitative research is relatively unstructured and instead of “formulating hypotheses before an investigation as in quantitative research, investigation and testing of theories ... go on together” (Bouma and Atkinson 1995, p.207).

The primary methods of qualitative research are participant observation and unstructured interviews. Participant observation is open-ended and the details of the approach are often modified as the research proceeds (Bouma and Atkinson 1995). Much of the empirical evidence of this thesis is based on my experience in the 1996-97 IGC as a member of the Finnish negotiating team. The strength of this approach is that it is based on first hand experience and observation of the negotiations. Moreover this approach is based on wealth of data – documents, interviews and observations - which are otherwise difficult to obtain. I do, however, recognise that participant observation brings with it problems linked to the perceptions of the observer and the difficulty of documenting primary sources. In order to avoid a subjective analysis I have tried, wherever possible, to triangulate the research by cross-referencing my own observations from the negotiations against publicly available documents and interviews. The second main technique of qualitative research is to carry out unstructured interviews. Since the aim is to understand a sequence of events in which a number of individuals have participated, an effective way of achieving this aim is to ask them about it. Their statements can then be analysed just like other data. I have carried out over thirty interviews with IGC negotiators and participated in a number of roundtable discussions for this purpose (see sources).

The principal means through which this thesis tries to meet the above objectives is an empirical analysis of the 1996-97 IGC negotiations on flexible integration. The bulk of the thesis comprises an empirical examination of the negotiating positions of all 15 member states' positions. Because the thesis examines the positions of all member states, thus giving a broad picture of the negotiations, the case study approach is limited to one subject with a multitude of facets. By definition the principle of flexibility affects a large number of policy areas such as economic and monetary union (EMU), common foreign and security policy (CFSP) and justice and home affairs (JHA). Buried in the flexibility negotiations are issues of power, interests and institutions, and as such the flexibility negotiations provide an interesting subject of study ranging over the whole EU spectrum.

The thesis is not concerned with proving or disproving a particular theory such as liberal intergovernmentalism (Moravcsik 1993), neofunctionalism (Haas 1957), historical institutionalism (Pierson 1996) or multi-level-governance (Marks, Hooghe and Blank 1996). Nor is it concerned with establishing whether the European Union

is an intergovernmental conglomeration of independent nation states (Hoffmann 1966, Moravcsik 1991 and 1998, Milward 1983 and 1994), a neofunctional or functional entity (Haas 1957 and 1964, Lindberg 1963, Lindberg and Scheingold 1970, Sandholtz and Zysman 1989, Burley and Mattli 1993, Mitrany 1966, Monnet 1962, Taylor 1975), a federation (Spinelli and Rossi 1941, Levi 1973 and 1987, Pinder 1986 and 1991), a system of multi-level-governance (Marks, Hooghe and Blank 1996) or some other form of evolving polity or network (Sbragia 1992, Bulmer 1994, G. Peters 1992, B. Peters 1994, Majone 1993, Peterson 1995, Pierson 1996). This does not, however, mean that the thesis ignores the instruments that these theories provide. On the contrary, as chapter 1 will illustrate, most of the above mentioned theories, combined with considerations from negotiation theory, provide helpful tools for the analysis of the 1996-97 IGC negotiations on flexible integration. In addition the conclusion of the thesis speculates as to what kind of political entity the EU is likely to become after the institutionalisation of flexibility.

STRUCTURE

The thesis sets out to answer four basic questions:

- (1) How has the flexibility debate evolved since the early 1970s?
- (2) What kind of flexibility does the Amsterdam Treaty provide and what are its implications for the integration process?
- (3) What were the different negotiating positions of the member state governments and what factors shaped those positions?
- (4) How and why was the principle of flexibility institutionalised in the new treaty?

These four basic questions can be divided into a multitude of sub-questions which will be addressed throughout the thesis:

- (a) What was the negotiating *environment* and *process* of the 1996-97 IGC and what were the different negotiating *styles* of the participants?
- (b) When does flexibility emerge as an issue in the EU debate?
- (c) What are the key definitions and examples of flexibility and how can they be categorised?

- (d) What was the political context of the flexibility debate before and during the 1996-97 IGC?
- (e) Why did flexibility emerge on the IGC agenda and what were the underlying issues?
- (f) Who were the main actors influencing the flexibility debate?

To answer these questions the thesis is divided into two parts, with three chapters each. The *first part* deals mainly with the *substance* of flexibility and also provides some tools of analysis for the actual negotiations. The *second part* deals with the *process* of the 1996-97 IGC negotiations on flexibility.

Chapter 1 provides a roadmap for the analysis of the 1996-97 IGC negotiations on flexible integration. The chapter is concerned with describing the *environment*, *process* and *styles* of negotiation in the IGC. The chapter captures the basic line of argumentation for the thesis and outlines a series of tools from both negotiation and integration theory which can be used in describing and analysing the 1996-97 IGC.

Chapter 2 aims to give an overview of the existing literature on flexibility and provide definitions, categories and examples of flexible integration. It is important to address these points because they provide the background for a better understanding of the issues relating to flexibility and the forms of flexibility which were negotiated in the 1996-97 IGC. The overview provides an essential background to arguments that will be dealt with in the chapters that follow.

Chapter 3 examines the outcome of the flexibility provisions in the Amsterdam Treaty. It deals with the *substance* of flexibility. This "reverse" approach - i.e. looking at the end result before analysing the process - is adopted in order to be able better to discuss how and why the Amsterdam Treaty ended up with the new flexibility provisions. The objective of the chapter is to clarify the complex web of rules and issues relating to the different forms of flexibility in the new treaty.

Chapter 4 examines the evolution of the flexibility debate during the *agenda-setting* stage of the 1996-97 IGC and tries to answer how and why flexibility emerged on the agenda. The agenda-setting phase starts with the European Council of Corfu in June 1994 and ends with the beginning of the IGC during the Italian Presidency in Turin on 29 March 1996. The main focus is on the internal dynamics of the flexibility

debate. Nevertheless, the debate is put in context through an examination of domestic events in respective member states.

Chapter 5 examines the evolution of the flexibility debate during the *decision-shaping* stage of the 1996-97 IGC. This phase starts with the beginning of the IGC in Turin on 29 March 1996 and ends with the Irish draft treaty in the European Council of Dublin on 13-14 December 1996. During this period the flexibility debate focused on some of the political implications of differentiation and member states began grappling with how to institutionalise the principle of flexibility.

Chapter 6 examines the evolution of the flexibility debate during the *decision-taking* stage of the 1996-97 IGC. This phase starts with the beginning of the Dutch Presidency on 1 January 1997, runs through the official end of the IGC at the European Council of Amsterdam at 3.35 a.m. on 18 June 1997 and concludes with the signing of the Amsterdam Treaty on 2 October 1997. During this period the flexibility debate became more focused on legal detail than it had been during the first two phases of the negotiations.

The Conclusion summarises the argument of the thesis and assesses the process of the 1996-97 IGC, the substance of flexible integration and the implications that the new flexibility clauses may have on the integration process. The aim is to draw lessons from the IGC process, determine the "good" and "bad" news resulting from the new provisions and outline areas in which flexibility may be used in the future.

ARGUMENT

The thesis has three basic lines of argumentation. The first relates to the *process* taking place in the negotiations, the argument being that the 1996-97 IGC negotiations on flexibility were an incremental learning process in which the basic positions of the member states illustrated a certain amount of continuity, but the specific positions of the negotiators fluctuated as they tried to grasp the nuances of a difficult concept. IGC negotiations are not as exciting as many observers may suggest. On the contrary, an IGC is a long and often boring problem-solving process in which government positions are repeated and re-thought throughout the Conference. The account of the negotiations will try to show that the evolution of

flexibility was typical of any new concept developed in an IGC. First, the idea is launched. Second, the concept is defined. Third, a draft article is provided. And finally, the draft article becomes subject to interpretation and negotiation. The member states' approaches to flexible integration varied according to their general integration preferences, and assumptions of inclusion or exclusion from the proposed cooperation. The willing and able governments supported the institutionalisation of flexibility in a general sense, whereas the unwilling or unable governments wanted to secure tight rules and conditions for flexibility. The reasons behind these positions were a blend of domestic pressures and constraints, and the personal preferences of the officials and politicians who were involved in the negotiations.

The second line of argumentation relates to the *substance* of flexibility. One of the main difficulties with the flexibility negotiations was that flexibility meant different things to different people. Member state governments did not necessarily agree about its purpose. Some saw it as an instrument for enlargement, for others flexibility was a way in which to bypass awkward member states or to opt out from certain policy areas. These different perceptions led to a rather fragmented flexibility debate particularly in the early stages of the IGC. It was by no means clear what kind of flexibility the delegations were talking about and what they were after. In addition it is important to point out that one of the main problems with the flexibility debate in the 1996-97 IGC was that France and Germany, who instigated the debate, seemed to have grand visions about flexible integration, but little understanding of how it would be incorporated into the new treaties in practice.

The final strand of argumentation relates to the key players in the flexibility debate. The outcome of the flexibility negotiations was affected by the institutional set up of the IGC. Although all member states, large and small, played an important role in the IGC process, the most influential actors in the 1996-97 IGC were the civil servants of the respective Presidencies and the Council Secretariat. In this sense IGCs should be seen as a team effort by respective governments, with the Presidency and the Council Secretariat clinging on to the managerial positions and making the calls. In addition it is important to point out that IGCs are not run by the highest ranking players: over 95 percent of the flexibility debate, for instance, was solved at the representatives' level. Only the most politically sensitive issues were dealt with at the highest level, i.e. Heads of State or Government in the final stages

of the IGC. Moreover the thesis argues that the frequency of the negotiations and the camaraderie between the participants increased the potential and propensity for reaching agreement. It was more important for the delegations to achieve an agreement on flexible integration - no matter what kind - than to come out of the negotiations without any kind of result. The time limit on the negotiations and delegations' preference to reach some kind of an agreement, meant that it was in everyone's interest to make sure that the bottom line position of each and every member state was achieved.

SOURCES

Before launching into the details of the thesis it is important to say a few words about my research sources. There are five basic sources from which the research has been drawn: (1) publicly available Conference documentation and government reports, (2) academic books, articles, papers and reports, (3) news material, (4) interviews with participants in the negotiations, and (5) my own experiences around the 1996-97 IGC negotiating table (participant observation).

(1) One of the major differences between the Maastricht and Amsterdam negotiations related to the availability of Conference documentation. Both negotiations were based on Presidency background papers, draft articles and non-papers. During the Maastricht negotiations these documents were classified as confidential. In the Amsterdam negotiations it was decided that each member state could choose whether to make the documentation publicly available or keep it within the administration. As a consequence the Finnish, Swedish and Danish governments, for instance, decided to make most background documentation publicly available. It is this documentation that forms the basis of the primary sources of the thesis. I have also been able to use a great number of IGC-reports published by governments, national parliaments and the institutions of the Union. This thesis would have been much poorer without this information.

(2) The secondary literature that has been used for the research is of both a theoretical and empirical nature. The aim has been to give an overview of the literature available on flexible integration and negotiating and integration theory over the past 50 years.

(3) This has been supplemented by material from the media. *Europe Documents*, *Reuters European Community Report*, *Agence Europe*, *European Voice*, *Le Monde*, *Frankfurter Allgemeine*, *Helsingin Sanomat*, *Financial Times* and *Svenska Dagbladet*, among others, have been a rich source of information.

(4) The primary and secondary documentation has been supplemented by over 30 interviews with participants from the negotiations (listed in annex 1). It was during these interviews that I was able to confirm some of the detailed analysis of the negotiations. All of the interviews were conducted on condition of anonymity, so none of the detailed comments from the interviews have been attributed to a specific source. Interviews are always a problematic source of material and thus I have tried to validate the information through cross-references with other officials involved in the negotiations or preparations for them. In addition the thesis has benefited from my participation in 6 expert group hearings on flexibility in The Hague, Bonn, Madrid, Copenhagen, Warsaw and Brussels (the Commission). The expert group, led by Christian Deubner, was composed of a group of academics and policy makers interested in flexible integration. During these hearings the group was able to have round-table discussions with over 60 government officials (listed in annex 2) about the implications of the institutionalisation of flexibility.

(5) This is not a "kiss and tell" thesis. There are obviously clear rules about primary material. National reports from the negotiations remain officially classified and unavailable to the public under the thirty year rule and I therefore make no direct reference to negotiating briefs or government reports. This does not, however, mean that I have not been influenced by them. The fact that I worked on flexibility in the Finnish negotiating team and participated in the flexibility negotiations during the Conference has inevitably left a mark on the analysis of the thesis. In an attempt to avoid any misunderstandings I was fortunate enough to receive a number of comments on the first draft of the thesis from negotiators from virtually all member states. Not one felt that the thesis crossed the line of confidentiality.

PART 1

THE SUBSTANCE

Chapter 1

A FRAMEWORK ANALYSIS FOR THE 1996-97 IGC NEGOTIATIONS ON FLEXIBLE INTEGRATION

INTRODUCTION

This thesis is concerned with the *process* of negotiation in a European Union Intergovernmental Conference and the *substance* of one of the most important principles relating to the development of the EU, flexible integration. The primary task is to analyse and describe the 1996-97 IGC negotiations on flexible integration (chapters 4, 5 and 6). The secondary task is to examine the evolution of the notion of flexible integration from a fairly abstract concept in the early 1970s to its institutionalisation in the Amsterdam Treaty in 1997 (chapters 2 and 3). Instead of trying to fit a theory or create a new theory to the empirical evidence, this chapter outlines a number of tools from negotiation and integration literature which are useful in describing and analysing IGC negotiations. The aim is to highlight key issues and characteristics of the negotiating process of an IGC and thus provide a roadmap for analysing the events leading to the institutionalisation of flexibility in the Amsterdam Treaty. The thesis explains how things change in an IGC and outlines an array of ideas, interests and issues at stake for the actors in the 1996-97 IGC negotiations on flexibility.

This thesis uses the term “negotiation” instead of “decision-making” to describe the actual process of interaction in an IGC. The choice of the term is derived from the assumption that the IGC process is different from the regular decision-making process of the European Union. Peterson (1995), for example, argues that it is important to determine the level of analysis when examining a multi-tiered system of government such as the EU. He offers a framework of analysis on three levels: “super-systemic”,

"systemic" and "sub-systemic"¹. This thesis is concerned with the negotiation that takes place on the "super-systemic" level, not the regular EU decision-making which is the subject of analysis on the "systemic" and "sub-systemic" levels². In addition it should be pointed out that EU practitioners involved with IGCs use the term "negotiation" to describe their activity. Although this thesis takes distance from the idea that IGCs are purely "intergovernmental" exercises, the use of the term negotiation is symbolically significant (Moravcsik 1991, 1993, 1998). It indicates that EU practitioners themselves still see IGCs in the context of traditional diplomatic negotiations. The context has obviously changed through the evolution of the Community institutions and processes, previous IGCs and the development of the *acquis communautaire*, but the terminology used for describing the most significant changes of the integration process has not changed.

Before looking at different angles of negotiation in more detail it is important to articulate what is meant by negotiations in the context of the 1996-97 IGC. A plethora of definitions of negotiations exists. Bartos (quoted in Rojot 1991, p.19) sees negotiations as "a process through which two teams try to resolve their differences and arrive at agreement". Rubin and Brown (1975, p.2) define negotiations as "the process whereby two or more parties attempt to settle what each shall give and take, or perform and receive, in a transaction between them". McGrath (1966, p.2) sees negotiations as "a process in which representatives of two or more parties come together explicitly in search of an agreement on an issue about which they are divided". Iklé (1964, pp.3-4) sees negotiation as "a process in which explicit proposals are put forward ostensibly for

¹ Firstly, he argues that the "history-making" decisions are made on the "super-systemic" level. The dominant actors on this highest level are the European Council, national governments in IGCs and the European Court of Justice (ECJ). The rationality of the decisions is political and legalistic. Secondly, he claims that the "policy-setting" is made on the "systemic" level. The dominant actors on this second level are the Council and Coreper. The rationality of the decisions is political, technocratic and administrative. Finally policy-shaping decisions are crafted on the lowest, "sub-systemic" or meso-level. The dominant actors include the Commission, committees and Council groups and the nature of the decisions is technocratic, consensual and administrative. This thesis focuses on the "super-systemic" level where history is made, but contrary to Peterson, the argument is that the Permanent Representatives (i.e. Coreper) are essential not only on the "systemic" level, but also on the highest, "super-systemic" level.

² In the 1990s a new genre of literature drawing on policy network models emerged to challenge traditional integration theory. This school of thought has its roots in public policy literature and is focused mostly on ideas, knowledge and expertise, rather than pure state interest (Richardson 1996). In a sense it is closely related to multi-level-governance and historical institutionalism in that it examines the EU as a system of governance (Sbragia 1992, Bulmer 1994, G. Peters 1992, B. Peters 1994, Majone 1993, Pierson 1996, Peterson 1995).

the purpose of reaching agreement on an exchange or on the realisation of a common interest where conflicting interests are present". Hayes-Renshaw and H. Wallace (1997, p.245) argue that negotiations "take place when actors with different goals, the advancement of which depends on a change in the behaviour of others, use a common framework to establish a joint outcome".

From the above definitions this thesis describes IGC negotiations as follows. IGC negotiations are multilateral, i.e. they take place among a large number of players, making moves and counter moves between visible and invisible players. IGC negotiations should be seen as an incremental learning process which is dynamic and on-going, as opposed to static. IGC negotiations are a complex web of events with a multitude of levels of negotiation ranging from Heads of State or Government to the lowest civil servant. There is often issue linkage from both inside and outside the actual negotiations and the big issues are often hidden in the smaller issues (Tsebelis 1991). IGC negotiations are a reoccurring win-win game, as opposed to win-lose, where the decisions have long-term implications and the negotiators are engaged in an ongoing assembly line of decision-making. The bottom line in IGC negotiations is that both institutions and individuals within those institutions matter. It should also be highlighted that EU negotiators are not adversaries, rather they are interlocutors trying to find common solutions to common problems. Negotiations are about "how to achieve a better process for dealing with your differences" (Fisher, Ury and Patton 1991, p.154) and as such they are as much about problems as they are about actors (Zartman and Berman 1982). The best negotiator is the one who can "separate the people from the problem" (Fisher, Ury and Patton 1991, p.17).

The chapter is divided into three parts which examine in detail different factors influencing a set of IGC negotiations. The tools provided relate to the negotiating *environment*, the negotiating *process* and the negotiating *styles* of the participants (Rojot 1991). When looking at the negotiating *environment*, the different levels of negotiation, the number of actors involved, the repetition of the negotiation pattern, the relationship between the negotiators, and the need to achieve agreement and ratification will be examined. In describing the negotiation *process*, close attention is paid to the scope, layers and issue-linkage of the negotiations, the pursuit of

compromise, consensus and coalitions, the reality of side-payments and time constraints. Finally an examination of different negotiating *styles* (soft, hard and principled) will be provided. Here the notion of bounded rationality is also introduced.

The basic starting point is that IGC negotiations can be conceptualised at these three levels which move from the more general towards the more specific. The negotiations occur in a given *environment* where there is usually a pre-established structure. IGC negotiations are a *process* which pits opposites against each other. Negotiations are also an interaction between people with different negotiating *styles*. The move down the ladder from the negotiating environment to the process and finally to the negotiating styles, is a move from knowledge to know-how. At the first level it is essential to understand the negotiating environment and the structure of the actual negotiations (Rojot 1991). At the second level one must be able to dissect the different processes that influence the negotiations. And at the final level one should be able to assess the effect of different negotiation styles on the final result. The analytical question should be *what characterises the negotiating process, not whether it exists* (H. Wallace 1996). To this end it is useful to get into the substance of the issues that are being negotiated (chapters 3, 4, 5 and 6), the negotiating environment, factors which influence the process, and the different negotiation styles of the participants. This will give a better understanding of the internal and external dynamics of the 1996-97 IGC negotiations on flexible integration.

1. THE NEGOTIATING ENVIRONMENT

This section looks at the negotiating environment in the 1996-97 IGC. In order to be able to dissect the negotiating environment it is useful to look at four things: the level of negotiation, the number of actors involved, the repetition of the negotiation pattern and the need to achieve agreement. The aim is to explain the actual structure of the negotiations.

1.1. Multi-level negotiation

The IGC negotiations on flexibility were conducted on three levels. The quarterly meetings of the Heads of State or Government, culminating in the end game of the European Council of Amsterdam in June 1997, constituted the top level. This was the level where the final bargain was struck – in a sense it was the final stone in the pyramid - and was the highest political level of the negotiations. The atmosphere in the European Councils was often fairly chaotic. Prime Ministers, Foreign Ministers and Presidents sat around a large table discussing a multitude of often very detailed issues. Most of the parties were well briefed, but this did not necessarily mean that they had a detailed understanding of the issues at hand, particularly given the fifteen months of evolution that most of the issues in the 1996-97 IGC had undergone. This was not surprising, taking into account the immense workload and variety of issues that have to be managed by Heads of State or Government. But it tended to lead to somewhat confusing debates at which parties often read out their specific positions.

The chaos of the European Councils was exacerbated by the fact that the debate was conducted in eleven languages – each participant speaking his or her own language. In practice this meant that information transmitted to the Heads of State or Government was usually second hand and information reaching civil servants of the member states, who were not present in the meeting room, was usually third hand. If, for example, the Greek Prime Minister spoke, firstly, the intervention was simultaneously translated into English. Secondly, the Presidency *anticis* took notes and went to another room to tell the other *anticis* what had been said³. Thirdly, the national *anticis* faxed their notes to their own delegations, who read the hand-written scribbles in yet another room. Given this archaic method of transmitting information, it was no wonder the information was not always accurate. This should, however, not undermine the importance of the European Councils. Even though Heads of State or Government only dealt with the final stages of an IGC they were the only ones who could wrap up the Conference. They provided the final political push.

³ The *anticis* group is composed of middle rank civil servants (usually counsellors) from respective member states. They usually function as the notetakers (right hand men/women) of the Permanent Representatives in Coreper II. During European Councils they are the principal notetakers for the national delegations.

The middle negotiating level in the IGC was the monthly meetings of the Foreign Ministers. The atmosphere was a little less chaotic than at the highest level mainly because the Foreign Ministers dealt with the issues more frequently. These meetings usually took place in connection with the General Affairs Council (GAC) meetings. Nevertheless, the same language problems were always present, the difference being that the civil servants were in the negotiating room and no *antic* reporting was necessary. The Foreign Ministers were also well accustomed to each other as they meet around the world in different fora. The key role of this level was to provide a link between the lowest and the highest levels of negotiation. The function of this level was to launch political initiatives, solve issues with political input and pave the way for final decisions which were to be made on the highest political level. The Foreign Ministers met in both a formal and an informal setting. In the formal setting they were usually assisted by three government officials and in the informal setting, the so called *conclaves*, the Foreign Ministers were accompanied by their personal representatives only.

The lowest level of negotiation in the 1996-97 IGC was that of the personal representatives of the Foreign Ministers (high ranking civil servants or politicians, see below). The representatives met once a week in two-day negotiations. Most of the detail was ironed out in these meetings. The main function of the representatives was to identify all legal problems and areas of agreement. They negotiated the draft articles and did over 95 percent of the work in the IGC. The formal representatives meetings were composed of the representatives and three or more government officials. In the informal meetings and "confessionals" the representatives were accompanied by only one assistant. In addition there was a "friends of the Presidency" group, composed of low level civil servants, which met only a handful of times in the final stages of the negotiations. The function of this group was to deal with legal technicalities. Of course the civil servants who prepared the briefs for the representatives also prepared briefs for both the higher levels. The atmosphere in the representatives' negotiations was very casual and the representatives addressed each other on a first name basis. There was not usually a language problem because as an unwritten rule the representatives debated only in English, French and German. The nature of the debate was coherent

and structured because the representatives knew the subject extremely well. Table 1 illustrates the different responsibilities of the actors in the 1996-97 IGC⁴.

Table 1 – Responsibilities of the actors in the 1996-97 IGC

Level	Participants	Function	Format	Meeting
Official (low)	Personal Representatives of the Foreign Ministers. (Mostly government officials; a few politicians.)	Identify all legal problems and areas of agreement. Carry out over 95 percent of the work. Negotiate draft articles.	Formal (1+3) Informal (1+1) Confessional (1+1) Friends of the Presidency (0+2)	Weekly
Political (medium)	Foreign Ministers	Launch political initiatives. Solve issues with political input. Pave the way for final decisions.	Formal (1+3) Informal (1+1)	Monthly
Political (high)	Heads of State or Government	Establish package deals. Make final decisions.	Formal (2+0) Informal (2+0)	Quarterly

The point to emphasise here is that most of the work of the IGC was carried out by the representatives at their weekly meetings. The Foreign Ministers verified the work of the representatives at their monthly meetings. The Heads of State or Government followed the IGC process in their summit meetings and provided the key input in the final stages of the negotiations. Against this background it is important to examine the negotiations

⁴ A similar schematic illustration has been provided by Forster (1999).

at all levels but to focus primarily on the representatives' meetings where the early decisions and articles were crafted.

1.2. Multilateral negotiation

When it comes to numbers, Ruggie (1993) has drawn a distinction between bilateral, restricted multilateral and extended multilateral negotiations. Bilateral negotiations involve two parties and are less complex than multilateral fora. Much of game theory has its origins in bilateral negotiations. Multilateralism "refers to co-ordinating relations among three or more states in accordance with certain principles" (Ruggie 1993, p.8). Restricted multilateral negotiations are conducted among a limited number of participants. Essential to this form of negotiation is the degree of intimacy and mutual familiarity. Extended multilateralism, on the other hand, refers to an even larger ensemble of states which decide to adapt common rules. EU negotiations in general fit into the second category, i.e. restricted multilateralism, because the EU is an intimate club of like-minded liberal democracies which have decided to pool sovereignty with an aim of negotiating common solutions to common problems (Haas 1957 and 1964, Lindberg 1963). In IGC negotiations there are obviously more than two parties involved. In the 1996-97 IGC the main actors were the fifteen member states, the Commission and the Council Secretariat. The European Parliament made occasional guest appearances, but their input in the actual IGC was very limited⁵.

In addition it should be pointed out that the parties in IGC-type negotiations are not monolithic, unitary actors. It has been shown that the participants are often involved in two-level games where the domestic constituency must accept the negotiated agreement (Putnam 1988, Scharpf 1988, Moravcsik 1993 and 1993, Ziller 1993). The signed agreement must be ratified by the member states. In addition negotiators are often constrained by national administrations. The flexibility negotiations in the 1996-97

⁵ Some observers have argued that the European Parliament influenced the outcome of the 1996-97 IGC. From personal experience, I disagree. It was noticeable that every time a representative of the European Parliament was allowed into the negotiating room to express his or her view, most, if not all, notetakers laid down their pens. Very few delegations took any note of the positions of the EP during the actual Conference. However, the opposite was true during the agenda-setting stage. There the European Parliament's representatives, Elisabeth Guigou and Elmar Brok, were very influential in the Reflection Group. Many of Guigou's ideas, for example, can be found in the group's report.

IGC, however, were somewhat different from regular policy oriented negotiations. The principle of flexibility was such a complex and abstract issue to negotiate that most ministries paid little or no attention to the subject. However, as negotiations proceeded, the Finance, Interior and Justice Ministries in respective member states showed increased interest in flexibility⁶.

An additional factor to bear in mind is that, as part of the national ratification procedure, the Amsterdam Treaty was the subject of referenda in Ireland and Denmark. This was also an important consideration for the negotiators who had to be aware of how the negotiated agreement would be perceived in the capitals (Scharpf 1988, Putnam 1988). In addition it should be pointed out that all of the IGC negotiators were involved in intraparty negotiations (Bulmer 1983, 1985 and 1993, Marks, Hooghe and Blank 1996, Sbragia 1992, Sandholtz 1993). The negotiators were bound by a network of constraints relating mainly to the ministries and parliaments in respective capitals. Each delegation represented a set of diverse, divergent and even contradictory interests. Hence the negotiators were somewhat constrained by their constituents. It then followed that the power to negotiate was with the negotiators, but the real and final power rested with the constituents (Bulmer 1983, H. Wallace, W. Wallace and Webb 1977 and 1983, Putnam 1988, Scharpf 1988, Moravcsik 1991 and 1993). Consequently there was often a separate process of bargaining which took place within each delegation.

Against this background negotiation patterns of the 1996-97 IGC can be broken down into two categories. Firstly there was the "EU-game" which took place among the member states' delegations (Heads of State or Government, Foreign Ministers and representatives), the Commission and the Council Secretariat. And secondly there was the "domestic game" which involved the government ministers (from different parties), national parliaments, the Permanent Representation in Brussels, the different ministries and even the different departments within the ministries. In order to be able to establish the way in which positions are crafted in an IGC, this thesis will look at all of these levels throughout the chapters.

⁶ These three ministries were the most frequently cited in interviews conducted for this PhD. From my personal experience in coordinating Finland's IGC positions, based at the Ministry for Foreign Affairs, it was

1.3. The repetition of the negotiating pattern and the relationship between negotiators

It is important to distinguish between one-off negotiations and recurring negotiations. In a single negotiation, such as buying a car, there is scope for dishonest or manipulative behaviour, because the participants are unlikely to meet again. When meetings between negotiators take place on a recurring basis, the incentive to behave constructively increases and it becomes more important for the negotiations to follow a set code of conduct.

Negotiations in general take place within very different types of settings and relationships. Much depends on the permanence of the relationship between the interlocutors. IGC negotiations are part of a symbiotic set of negotiations in the EU. As has been noted the Heads of State or Government meet two to four times per year in European Councils. In addition they meet in other EU fora such as enlargement meetings within the framework of Europe agreements. On top of the EU meetings there are other fora, such as the G-7, OECD, NATO, WEU, UN and G-24 where they meet either in a bilateral or multilateral setting. Equally the Foreign Ministers are in a state of permanent negotiation in that they meet every month in the General Affairs Council, in addition to many other informal and formal multilateral and bilateral fora. The most permanent level of negotiation in the IGC was the group of representatives. As has been noted above, they met once a week throughout the Conference. Six of the representatives were also the Permanent Representatives of their member state in Brussels. This meant that they also met at least once a week in Coreper II. The fact that negotiators in the 1996-97 IGC met repeatedly in a number of different fora inevitably influenced their negotiating styles.

The second feature relating to the relationship between the parties is the attitude they have towards each other. It is interesting to note that though the negotiations should be about dealing with specific problems, they often have a tendency to mirror the broader beliefs of a particular negotiator. Therefore the negotiators often focus on the principle

also clear that these three ministries were the most active in flexibility discussions.

rather than the issue or interest at stake (Fisher, Ury and Patton 1991). In the IGC negotiations on flexibility, for example, it was often clear that those member states usually perceived as having a favourable attitude towards deeper integration, favoured flexibility. Those member states considered sceptical towards deeper integration had a less favourable view of flexibility. The tendency of negotiators to focus on the principle rather than the issue was problematic in the early stages of the debate in particular when flexibility was still a rather abstract venture.

1.4. The need to achieve agreement

In negotiations there are usually three options: to agree, to disagree while continuing to try to find a solution or to break off the negotiations. In IGC negotiations the last option is rarely, if ever, considered because of the cumbersome nature of an IGC and its enormous political implications for each member state. In the 1996-97 IGC the flexibility negotiations were a good example of an issue which had such political backing that even if the Dutch Presidency had considered abandoning the whole dossier in April 1997 (interview), it would have been practically impossible to do so. By that stage too much political effort had been put into institutionalising flexibility for it to be dropped at the final hurdle. The idea had taken root and it would have been more politically difficult to neglect it than to nurture it.

In addition, in IGC-type negotiations, it is more important for delegations to achieve agreement - no matter what kind - than to come out of the negotiations without any tangible result. Because of this, and the fact that there is a time limit on the negotiations (see 2.3.), it is in everyone's interest to make sure that the basic positions of each and every member state are achieved. This means that in the early stages of negotiations, much time is devoted to sketching out delegations' basic positions and no government is willing to make concessions. There is an incentive for all the governments to have a position, no matter how vague, on each issue in the negotiations and to have a clear understanding of what the other delegations are after. When all the bottom line positions have been established the delegations start moving from their basic positions, or alternatively agree that no agreement will be achieved. If and when the minimum degree of consensus has been sketched out the delegations can again move their basic

trade-off positions towards a compromise (see 2.2.). This step-by-step game ensures that when the negotiations run out of time, each member state will at least have achieved its basic aims.

2. THE NEGOTIATING PROCESS

The second angle of analysis focuses on the actual process of the negotiations⁷. Three sets of general characteristics of an IGC as a negotiating process will be examined – scope, layers and issue-linkage; compromise and coalition building; and side-payments and time constraints. The aim is to dissect the different processes that influence IGC negotiations.

2.1. Scope, layers and issue-linkage

EU negotiations in general cover an extremely broad range of issues from the very specific, such as illumination in hen-houses, to the all-encompassing, such as EMU. In IGC negotiations the scope is marginally more limited, but still very wide. In the 1996-97 IGC the issues ranged from a declaration on sport to the institutionalisation of flexible integration. Each negotiated issue in an IGC has both a political and a legal dimension. Flexible integration, for instance, was a political time-bomb because of the implications it was thought to have on the general development of the Union and the relationship between the member states (see chapter 2). Legally, flexibility was also a difficult issue to negotiate because it was such a loosely defined principle (see chapter 3)⁸.

⁷ The negotiating process can also be looked at from angles other than those proposed here. Rojot (1991) suggests that when one looks at the process the focus should be mainly on strategy and tactics. His argument is that the process is best understood by looking at four determining elements: (1) the level and balance of bargaining power, (2) the consequence of the relationship between the parties, (3) the objectives of the party and (4) the items to be negotiated. Rojot (1991) also points out that it is always important to establish a list of negotiating items. In EU negotiations which are often multi-issue, there are a number of categories of items which provide useful distinctions between: (1) monetary versus non-monetary issues, (2) short-term versus long-term, (3) contingent versus matter of principle, (4) high versus low cost items, (5) items which have foreseeable results versus those with unforeseeable results. Another important distinction is provided by Walton and McKersie (1965) who argue that one should distinguish between distributive and integrative items. Distributive items lend themselves better to conflict, whereas integrative items can be characterised by a more co-operative mode (Walton and McKersie 1965). In Zartman (1977) Cross, Spector and Zartman look at negotiations as a process from three angles. They see negotiations as (1) a learning process, (2) a psychological process and (3) a joint-decision-making process.

⁸ Subsidiarity, negotiated at Maastricht, was perhaps an issue which was equally difficult to negotiate.

The dual nature of IGC negotiations, political and legal, has implications for the layers of negotiation. The principle of a policy becomes subject to debate on the higher political level, whereas the technical detail is negotiated on the lower, civil servant level. However, this division should not be seen as absolute since it is often difficult to identify exactly where the politics ends and the legal detail begins. In addition it should be reiterated (see 1.2.) that the layers of negotiation extend beyond the formal level of the negotiations. Indeed “negotiating fora may engage a layer or a smaller number of layers of political decision, or plurality of players, beyond the formal representatives in the negotiations” (Hayes-Renshaw and H. Wallace 1997, p.250). This strengthens the point made earlier that the EU game is usually closely linked to the game that goes on in respective national capitals.

IGC negotiations are often heavily linked to other issues on the EU agenda. There are both implicit and explicit links within the negotiation agenda and outside of it. This thesis will show that the flexibility negotiations were closely linked to the issue of how to deal with sceptical member states, as well as CFSP and JHA within the IGC process itself. Outside considerations included EMU and enlargement (see chapter 2). In this sense the issue-linkage resembles the “nested games” approach of Tsebelis (1991). However, the notion of issue-linkage is often more apparent than real. Or indeed it could be argued that analysts often force issue linkage in examining a particular set of negotiations retrospectively. It is always easy to be “aftersmart”. In other words, the observer assumes that a set of issues were linked throughout the negotiations. Some issues might be implicitly linked, but explicit linkage in IGC negotiations is less common. A clear example of this is the common observation that throughout the Conference the big institutional compromise formed a triangular tension between an increase in qualified majority voting, the reweighting of votes and the number of Commissioners. This might have been true for the latter half of the IGC, but as a matter of fact these issues were only explicitly linked for the first time in the negotiations by Noel Dorr (IRL) in November 1996 during an informal dinner during the Irish Presidency (interview).

The 1996-97 IGC negotiations were composed of hundreds of issues ranging from the general to the very detailed. For those who did not follow the negotiations closely or actually participate in the negotiations it was very difficult to comprehend how many

cross-cutting, detailed issues needed to be resolved during the IGC. For civil servants, in particular, who only dealt with one particular dossier of the IGC, it was not at all easy to see the wood for the trees. Integration literature, especially that of a rationalist kind (Moravcsik 1991, 1993), has a tendency to focus on the final stages of a particular set of negotiations, without taking into account of the fact that often over 95 percent of the issues have been resolved in advance, and most often on the representatives' level. In IGCs, negotiations often involve over twenty major issues, divided into another twenty subcategories, each with hundreds of issues upon which the member states must act, or react as the case may be⁹. Flexibility is a classic example of this form of multi-issue negotiation. Much of the empirical evidence of this thesis revolves around detailed technicalities of the flexibility negotiations – they were the building blocks upon which the final decisions were based.

2.2. Compromise and coalition building

There are further considerations which relate to the negotiating process: compromise and coalition building. Compromise is essential to any negotiation and it cannot be achieved if there is not an agreement among the participants that the agreement is binding. In IGCs it is often the Presidency, aided by the legal expertise of the Council Secretariat, which hammers out a compromise among the member states. In the final stages of IGC negotiations on flexibility the big compromise was about second pillar flexibility, the role of the Commission and the triggering mechanism for closer cooperation (see chapters 3 and 6).

Multilateral negotiations usually have a degree of coalition building. Coalitions can be ad hoc, strategic or tactical, issue-specific or widely based (Hayes-Renshaw and H.

⁹ The 1996-97 IGC had six main themes - 1. Freedom, Security and Justice, 2. The Union and its Citizens, 3. External Relations, 4. The Institutions, 5. Flexibility and 6. Simplification of the treaties. These six main themes were divided into nineteen subcategories - 1. Fundamental rights and non-discrimination, 2. Free movement of persons, asylum and immigration, 3. Security and safety of persons, 4. Employment, 5. Social policy, 6. Environment, 7. Consumer policy, 8. Transparency, 9. Subsidiarity, 10. Quality of Community legislation 11. Other Community policies, 12. CFSP, 13. External economic relations, 14. Legal personality, 15. European Parliament, 16. Council, 17. European Commission, 18. European Court of Justice, 19. Other institutions. These sub-categories were divided into another twenty subcategories relating to other Community policies and the institutions. All of these issues were first discussed many times and then they were put into article format. The discussions and the articles forced the member states to take positions on the smallest of details. Flexibility alone had over twenty sub-issues related to it.

Wallace 1997), predictable or unpredictable. These patterns will be examined in chapters 4, 5 and 6 of the thesis. The coalition patterns generally depend on how repetitive the negotiations are, that is to say, how often the participants negotiate together about similar issues. Consequently, much of the analysis will depend on how consistent the behaviour of individual participants is.

2.3. Side-payments and time constraints

The third consideration of the negotiation process relates to side-payments and time constraints. Side-payments may not relate at all to the actual issue being negotiated. One of the tasks of this thesis is to establish whether there were any direct side-payments to the member states that were not favourable to flexibility in the IGC negotiations on flexibility. IGC negotiations are often, if not always, win-win negotiations. This relates closely to the notion of reciprocity – that is to say the possibility for negotiators to extract comparable gains and costs (Axelrod and Keohane 1985, Keohane 1986). The bottom line is that the more narrowly defined the negotiations are, the more often reciprocity will be specific; or conversely the broader the negotiations the more diffuse the reciprocity (Hayes-Renshaw and H. Wallace 1997).

In EU negotiations there is a mutual understanding that the negotiators follow the path of integrity. Member states work together in many negotiating situations on thousands of issues. No EU negotiator can afford to be branded a cheat or thought to be underhand, as such a stamp on a particular member state would seriously weaken its negotiating position across the board. Threats are of course possible in all negotiating situations. Coercion can take the form of a threat to walk away from the negotiations or a refusal to sign an agreement. However, threats are very rarely used in EU negotiations. Exceptions to the rule have perhaps been Spain's threats over cohesion funds, Greece's attitude towards Turkey, the former government of the United Kingdom on a number of issues including the "mad-cow" disease, and more recently France's stance in relation to the nomination of the President of the ECB. The IGC negotiations on flexibility, however, did not arouse enough passion to cause any particular member state to threaten to block the negotiations.

In IGC negotiations time constraints usually relate to externalities. In the 1996-97 IGC the clearest external factor was the British general election which was finally held on 1 May 1997. Throughout the IGC there was a feeling that very little could be resolved before the British election. The Conservative government would not be able to give any concessions relating to the end game before the general election. To a certain extent this was counterproductive in the IGC. The actual IGC, starting with the European Council of Turin in March 1996 and ending with the European Council of Amsterdam in June 1997, took 15 months, which is exceptionally long. The Maastricht negotiations lasted twelve months and the negotiations leading to the SEA lasted only four months. Retrospectively it is clear that the 1996-97 IGC was too long. It would be beneficial to impose legally binding time limits on any future IGC – a maximum of six months, for example. But then again an issue such as flexibility would have been difficult to deal with in any less time. It was a complex issue which had to be tackled carefully. This, combined with the British election, stretched the time-span of the IGC to a maximum.

3. THE NEGOTIATING STYLES

The third and final angle of analysis is that of negotiating styles and bounded rationality. This is an important angle of analysis because it will help us understand, in greater depth, the actions of different negotiators in the IGC.

3.1. Negotiating styles

This thesis examines negotiating styles using the three Fisher, Ury and Patton (1991) categories of negotiating styles¹⁰:

- the hard negotiator
- the soft negotiator

¹⁰ Other scholars have also looked at negotiating styles. Sparks (1982) for instance talks about four negotiating styles: (1) confrontative, (2) restrictive, (3) elusive and (4) friendly. Rojot (1991) suggests that there are four negotiating styles: (1) tough, (2) warm, (3) number oriented and (4) dealer. Others, such as Mastenbroek (1984), categorise the negotiating styles as: (1) analytical aggressive, (2) flexible aggressive, (3) ethical persuasive and (4) flexible compromising. Williams (in Hall 1993) points out that there are

- the principled negotiator.

The hard negotiator sees a given situation as a “contest of will in which the side that takes the more extreme position and holds out longer fairs better” (Fisher, Ury and Patton 1991, p.xiv). The hard negotiator wants to win at all cost. He often ends up exhausting himself and his resources, the end result being that he harms his relationship with the other side. The soft negotiator avoids personal conflict and makes concessions readily in order to reach agreement. He wants an amicable resolution, but often ends up feeling bitter and exploited. The third way to negotiate is neither hard nor soft, but rather both hard and soft. The negotiator is a “principled” negotiator whose aim is to look for mutual gains wherever possible. When interests conflict his aim is to insist on fair standards independent of the will of the other negotiator. In essence “the method of the principled negotiator is hard on the merits, soft on the people” (Fisher, Ury and Patton 1991, p.xiv).

This thesis looks at the negotiating styles of the different participants in the IGC and establishes which of the three styles outlined above is most fruitful. The basic argument is that all EU negotiators are usually principled negotiators. Negotiations should be based on merits and consequently this thesis follows Fisher, Ury and Patton (1991, p.11) in arguing that:

- people should be separated from the problem
- the focus should be on interests, not the position
- one should generate a variety of possibilities before deciding what to do
- one should insist that the result be based on some objective standard.

All of these four claims pertain to the 1996-97 IGC. The first point refers to the fact that humans are not computers. “We are creatures of strong emotions who often have difficulty in communicating clearly” (Fisher, Ury and Patton 1991, p.11). The IGC debate on flexibility illustrated this notion of human nature clearly. For much of the debate

flexibility was interpreted in a number of different ways and at times the negotiators found it difficult to make their views understood by the other interlocutors.

The second point illustrates a weakness of the negotiations. A majority of the governments focused on the positions, not the interests of the other negotiators. On occasion this created a wedge between the positions. As the negotiations proceeded, however, the focus was more on the specific interests of the member states. An illustration of this was the way in which the special interests of the United Kingdom, Ireland and Denmark relating to justice and home affairs in a broad sense were taken care of in the final stages of the negotiations (see chapter 6). Throughout the Conference there was a permissive consensus that the interests of these countries had to be solved if any progress was to be made in justice and home affairs. Spain was the only member state which seemed to have a problem with the special arrangement. It is evident that the negotiating position often obscures what the parties are really looking for.

The third point alludes to the difficulty of designing optimal solutions while under pressure. The IGC negotiations solved this problem by having flexibility very frequently on the negotiating agenda. The negotiators were able to think up a wide range of options and possible solutions. This is illustrated not least by the wide range of models and mechanisms that were considered under the topic of flexibility. The fourth and final point, relating to objective criteria was also relevant to the negotiations on flexibility. In principle it was agreed that flexibility would be institutionalised in the treaty one way or another. In order to accommodate the more reluctant member states it was agreed that stringent conditions would be established to manage flexibility. A set of objective criteria, to which all could agree, was established.

3.2. Bounded rationality

The final issue relating to negotiating styles is called bounded rationality. There are two basic schools of thought relating to the rationality of negotiators. The first school claims that actors are rational and the second school advocates bounded rationality. This thesis follows the second avenue arguing that negotiators do not behave rationally or

irrationally, instead they are constrained by the notion of bounded rationality. In other words, the negotiators are quasi-rational actors acknowledging the broad guidelines of their positions, but more often than not reacting to the flow of the negotiations. This would seem to be an inevitable consequence of the fact that the IGCs are a complex learning process.

The rationalists claim that actors make well calculated decisions independent of their counterparts (Hoffmann 1966, Morgenthau 1967, Milward 1984, 1994, Moravcsik 1991, 1993). People keep a degree of freedom in the way in which they react to a particular situation. The fact that they have a degree of freedom and choice allows them to seek the best course of action (Rojot 1991). The rational choice scholars are often interested in game theory. Game theorists – mostly applied mathematicians and mathematical economists – “examine what ultrasmart, impeccably rational, superpeople *should* do in competitive, interactive situations” (Raiffa 1982, p.21). Game theorists “are not interested in the way erring folks like you and me actually behave, but in how we should behave if we were smarter, thought harder, were more consistent, were all-knowing” (Raiffa 1982, p.21). This form of thinking is also called symmetrically prescriptive (Raiffa 1982). The prescribers are interested in how the actors should or ought to behave, rather than how they actually behave. The rationalists see the negotiator as trying to maximise his own pay-off (Bartos 1977) and thus the individual negotiator is seen as inherently competitive. Game theory sees every negotiating situation as a game. It follows economic models of rational agents which, the rationalists claim, serve prescriptions in a rational world (Bazerman and Neale 1991). The argument is that with full information, in a perfect world, and if there is a zone where agreement can be reached, agreement will be reached. With incomplete information rational actors may fail to reach an agreement (Myerson and Satterwaite 1983).

The second school of thought is called bounded rationality. The notion of bounded rationality was introduced by March and Simon (1958), developed by Simon (1965), and further elaborated by Crozier and Friedberg (1977) and Rojot (1991). The idea behind bounded rationality is that “individuals cannot be expected to be perfectly and totally rational and behave accordingly” (Rojot 1991, p.24). Rationality itself “is concerned with the selection of preferred behaviour alternatives in terms of some

system of values whereby the consequences of behaviour can be evaluated" (Simon 1965, p.25). The argument here is that the IGC negotiations, especially as they related to flexibility, were simply too complex to be predictable. Too many alternatives were open and constantly changing. Trying to figure out the consequences was a fragmented guessing game. "The limits of rationality derive from the inability of the human mind to bring upon a single decision all the aspects of value, knowledge, and behaviour that would be relevant" (Simon 1965, p.108).

The basic argument is that individuals are not perfect, objective or rational. This does not, however, mean that in the IGC negotiations they were always imperfect, subjective and irrational. As the empirical evidence from the negotiations on flexibility will demonstrate, individuals can act within the boundaries of their limited knowledge, capacities and ways of action and hence select a preferred alternative. It has been pointed out that the framework is bounded by two dimensions: "perfect rationality would drive us to assume a synoptic and maximising attitude" (Rojot 1991, p.25). It is synoptic in that the individual will consider all possible courses of action, and maximising in the sense that out of the possible consequences, only one will be ultimately chosen. Nevertheless it should be borne in mind that we do not live in a perfect world. The individual or the negotiating team will not be able to cipher all the information and then analyse it in a short time. "Thus instead of being synoptic, the consideration of alternatives is sequential, and instead of maximising, the selection of one is only satisfying" (Rojot 1995, p.25). This fits well with the idea that any set of IGC negotiations is a learning process. While trying to achieve the best possible perceived result the delegations are constantly forced to learn more about the issue that is being negotiated. The final solution is the one which appears to be most satisfactory at the point at which agreement must be reached, but with hindsight it may not be the perfect solution.

Lindberg (1994, pp.83-84) puts this eloquently in a critique of Moravcsik (1993):

"All of these approaches of a rationalist kind tend to reason backwards: the outcome is obvious once you understand the underlying distribution of preferences, or of preference ordering. I really do not think this is the case. I think that governments perhaps do not really know what their preferences are. Even if they do, it is not clear that they can find an area of

agreement. We know that preferences are not stable. We know that in certain cases a proposal, a well-chosen proposal from the Commission, can change the whole nature of bargains and bring in new issues".

Lindberg's suggestion makes sense: governments and their negotiators do not always know what they want and the situation changes unpredictably with the dynamics of the negotiations where written and oral proposals are floated around the table by all the participants at frequent intervals.

Two additional points related to bounded rationality should be highlighted. Firstly, the aims and objectives of the delegations are often broadly, rather than precisely, defined. The delegations more or less know what they want. The Finnish delegation, for example, defined a set of objectives in a few policy documents. In internal meetings broad aims were often set out, but in the early stages of the flexibility debate, in particular, the Finnish objectives were not always totally clear nor precisely formulated. The Finnish delegation, like those of other member states, was simply involved in an incremental learning process. As will be shown below, initial positions changed with time as new ideas and approaches were floated. Member states have to prepare new positions, and in the process the old positions change to accommodate the new ones. Governments' positions and the changes in position are often diffuse and plural, and indeed sometimes they are contradictory to earlier positions. In a pre-IGC policy document Finland, for instance, argued that flexibility should be temporary (Finland 1996). During the actual negotiations the position changed and Finland began advocating the enabling clause model, which is by no means temporary in nature (see chapter 2).

Secondly, governments are often involved in tactical negotiations in a broad sense. In the early stages of negotiations the delegations are often reluctant to "come out of the closet" and reveal their detailed positions. The "rationale" behind this quasi-strategic approach is that governments are under the assumption that they can hold the specific position as a bargaining chip at a later stage in the negotiations. Usually, however, the story is quite different. Governments are often hesitant to reveal their positions because they have not thought them through carefully enough. Indeed it is quite common to hear a delegation say that "at this stage we have no position on the matter" or "we are

looking into the subject" or "we are in the process of examining the various options" or "at this stage we are open to the question at hand".

There are two specific consequences of bounded rationality. Firstly, "it helps us to realise that everybody behaves rationally in their own eyes, according to their own set of objectives, however more or less well-defined they are, within their framework of bounded rationality" (Rojot 1991, p.27). Interlocutors in negotiations may sometimes appear not to be making sense to the others. This does not necessarily mean that they are irrational and stupid; instead it means that we do not always know the boundaries of their rationality and hence we need more information. The second consequence of bounded rationality is that the negotiators should not assume that the given situation is seen by all participants in the same way. This point is especially relevant to the IGC negotiations on flexibility. During the course of the debate it was clear that each delegation had a very different understanding of the concept of flexibility. This was true during the agenda-setting stage, in particular. The French and the Germans, for instance, saw flexibility as a way in which to deepen the integration process (see chapters 2, 4, 5 and 6). However, their thinking behind flexibility was not necessarily alike: the French saw flexibility as a way to create a closed hard core; the Germans saw it as a way in which to pull the hesitant member states along. The British, on the other hand, saw flexibility as a way in which to opt out from a specific area of cooperation. The basic point is that the negotiators see things differently and hence much time during the actual agenda-setting, decision-shaping and decision-taking stages is devoted to defining and clarifying the issues that are being dealt with.

In sum, the introduction of bounded rationality has implications for all aspects of negotiation dealt with in this thesis. In essence, the notion of bounded rationality will run as a *leitmotif* throughout the analysis. Bounded rationality will explain why the negotiators held specific positions in the agenda-setting, decision-shaping and decision-taking stages. It will also be shown that bounded rationality has direct consequences on the analysis of the negotiating environment, process and styles.

CONCLUSION

The aim of this chapter has been to highlight some of the issues relating to the *environment, process and styles* of negotiating the 1996-97 IGC. It has suggested that the sequence of events leading to the institutionalisation of flexibility in the Amsterdam Treaty can be described and explained through a framework analysis which provides tools from both negotiation and integration theory. By looking at the negotiating *environment* we learn how the level of negotiation, the number of parties involved, the repetition of the negotiating pattern, the relationship between the parties, the need for agreement and the need for ratification of the end treaty and the roles of the different players affect the negotiations. By examining the *process* we are able to highlight the scope of the negotiations, the different layers of negotiation, issue-linkage, the strive for compromise, coalition building, and side-payments and possible time constraints. The different *styles* reveal whether the negotiators are hard, soft or principled and more importantly tell us which approach is most fruitful during the different stages. The various styles also tell us about the notion of bounded rationality. If we want to understand the process of European integration we must be able to dissect the motivations, strategies and goals of the main actors.

This chapter has been important in that it has laid out the roadmap for the rest of the thesis. The remaining chapters provide the empirical evidence through which we can assess what we can learn from looking at the negotiating *environment, process and styles* in an IGC. The central argument of the thesis - namely that the flexibility negotiations in the 1996-97 IGC were an incremental learning process with a high degree of fluctuation in the positions of the member states – will be revisited in the conclusion of the thesis, after an examination of the empirical evidence. The conclusion of the thesis will consider the added value of looking at IGC negotiations through these three angles. But before the conclusion and before examining the IGC negotiations (chapters 4, 5 and 6) we must look at the *subject* of the thesis, i.e. the evolution of the concept of flexibility from 1974 onwards (chapter 2) and the outcome of the flexibility clauses in the 1997 Amsterdam Treaty (chapter 3).

Chapter 2

TOWARDS CLARITY IN THE FLEXIBILITY DEBATE: DEFINITIONS, CATEGORIES AND EXAMPLES

INTRODUCTION

The aim of this chapter is to give a historical overview of the debate and issues relating to flexible integration over the past 25 years. One of the main problems of the IGC debate was the lack of clarity about the subject being negotiated and even the terminology the negotiators used. Hence this chapter defines, categorises and gives examples of flexible integration. Before examining the IGC negotiations on differentiation and the related provisions in the Amsterdam Treaty, it is important to clarify the complex and often opaque examples and terminology of flexible integration. Clarification is essential for a better understanding of the arguments which will be elaborated in the chapters that follow.

In order to meet its aim, the chapter attempts to answer two questions:

- (1) How has the theoretical and political debate on flexibility evolved from 1974 to 1998?
- (2) What are the key academic and practical definitions and examples of flexibility and how can they be categorised?

The first question is answered through an overview of the existing literature on flexibility. The sources are primarily writings in German, French and English. Finnish, Swedish, Norwegian, Danish and Dutch texts are also explored. An examination of the context in which the literature was published demonstrates that a debate about flexible integration emerges when one or more of five issues is on the European agenda: (1) economic and monetary union, (2) common foreign and security policy, (3) justice and home affairs, (4) enlargement and (5) bypassing

recalcitrant member states. Furthermore, an overview of the literature reveals that the flexibility debate was highly fragmented between 1974 and 1996. Scholars and policy-makers looked at flexibility through the lenses of their particular specialisation, be it political, legal or economic, and thus failed to address the overall implications of differentiation in the EU. However, the literary overview does show that the debate reached a level of clarity in the immediate pre-IGC era. Unfortunately that clarity did not spill over to the early IGC negotiations.

Drawing on the literary overview, the second question is answered by providing a set of definitions, categorisations and examples of flexibility which elaborates current work on the semantics of flexibility (Stubb 1996b, 1997, 1998, Giering 1997). In essence it takes the current debate one step further, reformulates what has been said about flexibility and suggests a categorical framework against which to examine flexible integration. A distinction is made between the pre-IGC theoretical terminology and the post-Amsterdam terminology of practice. However, the division between theoretical and practical terminology is not clear cut or absolute. For instance, much of the early theoretical flexibility debate in the 1970s was clearly policy oriented; ideas floated by practitioners (Brandt 1974, Dahrendorf 1979), or papers written by think-tanks, were intended to influence the practical debate. Academics, politicians, economists, lawyers and other policy experts have tried to conceptualise and interpret flexibility. The result is that flexibility has taken on its own language which is partly theoretical and partly practical. The subcategories of the theoretical discourse are (1) multi-speed, (2) variable geometry and (3) à la carte. The practical terminology, which can be partially found in the Amsterdam Treaty, includes (1) transitional clauses, (2) enabling clauses, (3) case-by-case flexibility and predetermined flexibility. The practical can be pegged to the theoretical as follows: (1) transitional clauses correspond to multi-speed; (2) enabling clauses to variable geometry and (3) case-by-case flexibility and predetermined flexibility correspond to à la carte. This clarification is essential because it makes it easier for the reader to comprehend the various issues involved in the Amsterdam Treaty provisions in particular (chapter 3) and the flexibility negotiations in general (chapters 4, 5 and 6). The categorisation and definitions which are elaborated in the chapter are illustrated in table 2. The reason for first separating and then connecting the theoretical and practical debate is to show that even though the rhetoric is different, the issues and underlying themes dealt with were and are the same.

Table 2 - Definitions, categories and examples of flexible integration

THEORETICAL FLEXIBILITY & VARIABLES	DEFINITION	PRACTICAL FLEXIBILITY & VARIABLES	DEFINITION	EXAMPLES
(1) Multi-speed Time When 1-15 MS IGC decision - unanimity EC budget Acquis preserved Common objectives	Mode of flexible integration according to which the pursuit of common objectives is driven by a group of member states which are both able and willing to go further, the underlying assumption being that the others will follow later.	(1) Transitional flexibility Time When 1-15 MS IGC decision - unanimity EC budget Acquis preserved Common objectives	Mode of flexible integration which is characterised by two-way transitional periods which allow either the new member state or the old member states to adapt to a particular policy area, the underlying assumption being that the adaptation period is temporal.	EMU Directives Transition periods Articles: 15 (7c) 134 (115)
(2) Variable geometry Space Who ½ MS if inside no IGC decision - QMV + emerg. brake Special budget Beyond acquis Different objectives	Mode of flexible integration which admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between a hard core and lesser developed integrative units.	(2) Enabling clauses Space Who ½ MS if inside no IGC decision - QMV + emerg. brake Special budget Beyond acquis Different objectives	Mode of flexible integration which enables the willing and able member states to pursue further integration - subject to certain conditions set out in the treaties - in a number of policy and programme areas within and outside the institutional framework of the Union.	Old Schengen Airbus Ariane Esa Jet Eureka WEU Eurocorps Eurofor Euromarfor Articles: 11 (5a), 14 (J.3), 17 (J.4), 40 (K.12), 43 (K.15), 44 (K.16), 45 (K.17), 168 (130k) 306 (233)
(3) A la carte Matter Who 1-3 MS IGC decision - unanimity Special budget Acquis undermined Different objectives	Mode of flexible integration whereby respective member states are able to pick-and-choose, as from a menu, in which policy area they would like to participate, whilst at the same time holding only to a minimum number of common objectives	(3) Case-by-case flexibility (4) Pre-defined flexibility Matter Who 1-3 MS IGC decision - Unanimity or constructive abstention during regular EU work Special budget Acquis undermined Different objectives	(3) Mode of flexible integration which allows a member state the possibility of abstaining from voting on a decision and formally declaring that it will not apply the decision in question whilst at the same time accepting that the decision commits the Union. (4) Mode of flexible integration which covers a specific field, is pre-defined in all its elements, including its objectives and scope, and is applicable as soon as the treaty enters into force.	UK and Social Charter UK and EMU DK and EMU DK and defence DK and III pillar DK and Title IV UK and Title IV IRL and Title IV UK and Schengen IRL and Schengen DK and Schengen Article 23 (J.13)

1. THE EVOLUTION OF THE THEORETICAL AND POLITICAL DEBATE ON FLEXIBILITY

1.1. The first wave of the flexibility debate: 1974-1978

The debate on flexibility in matters relating to European integration is not new. How has the theoretical and political debate on flexible integration in the European Communities evolved? The roots of the current flexibility debate can be traced back to the early 1970s. Though flexibility has been prevalent in Community business since its founding, the early debates on flexibility remained elusive. There were, however, two springboards to the debate on flexible integration which emerged in the mid-1970s. The first was a speech by Chancellor Willy Brandt to the European Movement in Paris in November 1974. Brandt claimed that the Community needed what he called graduated integration (*Abstufung der Integration*)¹. The underlying argument was that economic diversity was not necessarily compatible with the equal treatment of all nine member states. If all the countries were treated equally the danger was that the cohesion among them would be undermined. Against this background Brandt suggested that the Community would be strengthened if the objectively stronger countries were to be more closely integrated first and the others followed at a later stage. A central element of his argument was that there should be no permanent dissociation (*Abkopplung*) between the stronger and the weaker member states. In other words, Brandt believed that any form of flexibility would have a centripetal effect which would drive the process forward and pull the weaker countries along into the core group.

The second springboard for the flexibility debate was the Tindemans Report of December 1975. Elaborating ideas put forth by Brandt, Leo Tindemans (1975, p.27) argued that it was not "absolutely necessary that in every case all stages of integration should be reached by all the States at the same time". He pointed to the divergence of the economic and financial situations of the member states and suggested that (1) those states which were able to progress had a duty to forge ahead, and (2) those states which had reasons for not progressing should allow the

¹ The exact wording was "Die Gemeinschaft braucht eine Politik der Abstufung der Integration".

others to forge ahead. Tindemans objected to the idea of a Europe à la carte. Instead, his view was that each country should be bound by a final common objective which would be reached by all in due course.

As argued above, debate about flexibility usually emerges when one or more of five issues is on the European agenda: (1) economic and monetary union, (2) CFSP, (3) JHA, (4) enlargement and (5) recalcitrance. In this respect it is important to note that Brandt's speech and the Tindemans Report coincided with the early years of the adoption of the Werner plan for Economic and Monetary Union which was launched in 1970 with a target date for full implementation in 1980. The plan was barely off the ground when the Community's currencies began to slither in and out of the currency "snake". The mood was against monetary union and by 1975 the plan was effectively grounded. This was the main reason why Tindemans suggested that some member states should be able to forge ahead. It is also important to point out that Brandt's speech and the Tindemans Report coincided with Britain's renegotiations of some aspects of membership in 1975. Even though the renegotiation was largely a cosmetic exercise to appease the British public and keep the Labour Party together, the extension of transitional periods and other special arrangements ignited discussions about differentiation. In addition it should be pointed out that the flexibility debate also coincided with a debate about the revival of the WEU which would have left Ireland and Denmark on the outside of the organisation.

Much like reactions to the Schäuble and Lamers paper of 1994, the original reactions to the Brandt and Tindemans proposals were negative. Most EU capitals immediately rejected any form of differentiation. *Frankfurter Allgemeine Zeitung*, among others, went as far as to claim that the reactions of the other member states meant that Brandt's proposal was "born as a dead child" (FA 22.11.1974). Reactions to the Tindemans Report followed a similar vein. Smaller member states in particular feared that any differentiation would lead to different classes of membership and possible exclusion.

There was only a minor outburst of literature on flexibility after Brandt's speech and the Tindemans report. Most of the immediate post-Brandt-Tindemans academic and

policy debate took place in Germany². Observers such as Scheuner (1976), Weinstock (1976), Scharrer (1977), Wessels (1976), Vandamme (1978)³, Schneider and Wessels (1977a), and together with Heinrich (1977b), made important contributions to the debate⁴. A few other commentators/politicians, such as Thorn (1977) and Spierenburg (1977), also gave their input to the debate. Nevertheless, the debate was mostly focused on general commentary on the Tindemans Report⁵. None of the studies outlined various forms of flexibility. Nor did they seek to define, categorise or give examples of flexibility. It was to take two years before another concrete and politically significant vision of differentiated integration was launched by Ralf Dahrendorf in 1979.

1.2. The second wave of the flexibility debate - 1979-1991

Ralf Dahrendorf's Jean Monnet lecture of November 1979 marks the beginning of the second wave of reflections upon the concept of flexibility. He claimed that "European union has been a remarkable political success, but an equally remarkable institutional failure" (Dahrendorf 1979, p.8). Dahrendorf argued that the rigidity of Community policy-making was an obstacle to further European integration. The solution was to agree on a short list of common and genuinely political decisions such as a common budget and a customs union, while allowing more freedom to choose areas of cooperation in others⁶. Dahrendorf (1979, pp.20-21) called his vision "Europe à la carte", which he defined as "common policies where there are common interests without any constraint on those who cannot, at a given point of time, join them".

² For an overview of reactions to both the Brandt proposal and the Tindemans Report please see a collection of material on flexible integration provided by *Stiftung Wissenschaft und Politik* (1984).

³ Vandamme was very much a part of the policy debate because he had been secretary to the Tindemans group.

⁴ Later writings on the Tindemans Report include Tindemans (1995) and Wessels (1998).

⁵ Even the German Government (1975) gave a position on the Tindemans Report.

⁶ Dahrendorf's ideas have been widely misconstrued and distorted. Most observers interpreted his à la carte approach to mean that European integration is anarchically optional. Indeed, when observing the discourse of flexible integration in the early 1990s, the assumption of academics and politicians was that à la carte implies a high degree of voluntarism without structure or discipline. This, however, is a false assumption. Dahrendorf (1979, p.20) actually argues that "more often than not [à la carte] will in the end lead to common policies". H. Wallace (1985) points out that it is an approach to the division of powers between the EC and other levels of government which is based on federalist ideas as the only logical political framework for dealing with diversity. This interpretation of Dahrendorf is correct. The problem, however, is that the current literature on flexible integration, including this thesis, has a tendency to draw parallels between à la carte and pick-and-choose. In this sense we are no longer dealing with Dahrendorf's definition of à la carte, but nevertheless he did coin the phrase.

Dahrendorf's speech has to be put in context. It coincided with two important events: the second enlargement and the launching of the European Monetary System (EMS). The debate about Greek membership was in motion in 1979. In 1976 the Commission advised against Greek membership in its *avis* to the Council. The Council, however, defied the Commission and Greece negotiated its membership agreement which was signed in 1979. In 1981 Greece became the tenth member of the European Community. Spain and Portugal filed their membership applications shortly after Greece. There was serious concern about the economic implications of such an enlargement and France in particular, feared competition from larger southern agricultural markets. Alongside these fears emerged a debate about the necessity of institutional change. Commission President Roy Jenkins, and two years later French President François Mitterrand together with German Chancellor Helmut Kohl, began calling for institutional change, including the possibility of seeking flexible solutions (Jenkins 1989).

The second important event which coincided with Dahrendorf's speech was the 1979 establishment of EMS, an initiative to create a zone of relative monetary stability in a world of fluctuating exchange rates. The EMS became an odd form of flexibility. As some observers noted it was a hybrid - not entirely Community, nor entirely outside it (Nicoll and Salmon 1994). Only EC member states were allowed to participate in the EMS, although none was obliged to do so. And indeed Britain did not join the system. The EMS was not based on the EC treaty, nor did it emerge from a Commission proposal. Nevertheless, the first concrete seeds for a differentiated monetary system had been planted.

It was against this background that an avalanche of new literature on flexibility descended. Most of the debate still took place in Germany. Authors such as Scharrer (1981), Ulrich (1981a, 1981b, 1983), Hellmann (1983), Franzmayer (1983, 1984), Grabitz (1983), Langeheine (1983), Langeheine and Weinstock (1984), May (1983), and Stadtmann (1984), began analysing the conundrums of flexibility. Some analysis, however, also emerged in English. Among the main contributors were Grabitz and Langeheine (1981), Kaiser and W. Wallace *et al.* (1983), Langeheine and Weinstock (1985), H. Wallace (1985), W. Wallace (1985) and Tugendhat (1985).

Official papers on flexibility were also launched. The French *Commissariat Général du Plan* (1980), for example, argued for a Community of variable geometry. A report by the "Three Wise Men" also dealt with flexibility (Commission 1979). Although they rejected the concept in general, they considered certain flexibility within a policy area as useful. In May 1984, François Mitterrand, speaking before the European Parliament, said that a multi-speed or a variable geometry Europe was a virtual necessity (Gibert 1994). In preparing the Single European Act (SEA), the Dooge Committee (1985) estimated that differentiation as a means by which to achieve the objectives of a single market would facilitate both the decision-making and negotiation of the Single Act. In addition, the rhetoric of flexibility was used in the Draft Treaty on the European Union (1984), which envisioned the implementation of action by a hard core comprising two-thirds of the population of the Union. Even the Commission examined flexible decision-making in a report in the first and second so-called *Fresco* papers in 1978 and 1982 respectively (Commission 1978, 1982).

At this stage the debate began to take focus. Some scholars examined the various concepts relating to flexibility (Scharrer 1981a), or the role of a particular member state in relation to flexibility (Ulrich 1981). Scharrer (1981b, 1983) and Hellmann (1983) began looking at the implications of flexibility on specific policy areas. Others, such as Kaiser (1983), even made policy suggestions or saw flexibility as a means to revitalise of the integration process - May (1984), Stadlmann (1984), Langeheine and Weinstock (1985) and Tugendhat (1985). And yet others carried out a more detailed legal analysis, including a catalogue of examples on flexibility - Grabitz and Langeheine (1981)⁷. It was at this stage that a distinction between macropolitical analysis (visions and strategies) and more micro-oriented (legal implications) policy analysis of flexibility began to emerge. Tindemans, Brandt and Dahrendorf had laid the visionary foundations for the debate. Now the observers began to make sense of the debate by defining the related terminology and examining various concrete policy areas which exemplified flexible integration.

There were three particular studies which can be considered to be the most important contributions to the debate in the mid-1980s: Ehlermann (1984), Grabitz

⁷ Grabitz and Langeheine (1981) was helpful in that it examined admissibility of flexibility. They concluded that "it can be conceived that the more explicitly and intricately a certain field of policy is

(1984) and H. Wallace (1985). Each of these studies dealt with a different aspect of flexibility. Ehlermann examined the legal implications and limits of flexibility. Grabitz dealt with policy implications and H. Wallace with the politics of flexibility. All three, in their own right, are still considered to be "classic" studies on flexibility. For this reason it is worth providing a short description of each of them.

Ehlermann (1984) demonstrated that the scope for flexibility in Community law is considerable. He pointed extensively to over one hundred examples of flexibility in primary and secondary Community law and decisions of the European Court of Justice. The central argument of his article was that since existing Community law leaves considerable room for differentiation, there is no pressing need for a treaty amendment to legalise the concept. The natural conclusion was that flexibility "will never become subject matter of a formal Treaty amendment" (Ehlermann 1984, p.1293). This predictive shortcoming of the article does not reduce its value as the most substantial legal assessment of flexibility. Fifteen years later no one has been able to examine flexibility in Community law with such depth and precision⁸.

Grabitz's (1984) edited volume was based on detailed policy research over four years. The individual chapters dealt with a plethora of policy sectors: transport, trade, exchange rates, taxation, energy and environment. The research concluded that on a combination of legal, functional and economic criteria, there is scope for developing the application of flexible or, in Grabitz's terms, graduated integration. Although the volume is the most detailed and thorough study of diversity within the Community, and lays down basic definitions of concepts related to differentiated integration, its authors did not confront the question of how far flexible integration implies a reformulation of the long-term objectives of the Community.

For a further answer to the reformulation of objectives within the Community, we must turn to H. Wallace's (1985) study of the challenge of diversity in Europe. In this study, H. Wallace examined and defined the strategies and concepts related to a Community which exhibits a plethora of political, economic, and social cultures. Her

regulated by the Treaty, the less acceptable differentiation between Member States [which is not expressly provided for in the Treaty] seems to be" (Grabitz and Langeheine 1981, p.48).

⁸ This thesis will not provide an exhaustive overview of examples of flexibility since 1984. Some modest suggestions, however, will be provided below. Nevertheless, it is suggested that a clear lacuna now exists in the legal analysis of flexibility. There is a need for a close Ehlermann-like legal scrutiny of flexibility provisions in the post 1984-era.

claim was that "experience suggests that much depends on how far the framework of negotiation can accommodate a diverse range of special interests while retaining a central core of common commitments" (H. Wallace 1985, p.89). Though written over a decade ago, H. Wallace's study illustrated a number of general characteristics which still colour the current debate about differentiated integration. The positively provocative title of the book, *Europe: The Challenge of Diversity*, alluded to the difficult question which faced the Community then and now: how to reconcile diversity and difference in the current Community in particular, and an enlarged Community in general? Though her definitions of the concepts may appear slightly outdated in the current debate about future strategies for Europe, H. Wallace was able to predict the importance of clear visions, such as the CDU/CSU document (see below), as the locomotives of progressive change in the Community. Indeed, she concluded by remarking that: "The Community is not likely to find a durable and satisfactory response to the challenge of diversity unless its members can also make some headway in clarifying their common economic and political objectives" (H. Wallace 1985, p.90).

After these three seminal pieces, from 1985 to 1991 there was a remarkable lacuna in the flexibility literature. Though a few exceptions such as Mertes and Prill (1989), Body (1990), Leborgne and Lipietz (1990) and De Michelis (1990) emerged, virtually nothing was written on the subject. This was all the more surprising since the solving of the British budgetary question at the Fontainebleau summit in 1984 had finally moved the debate on the Community's future "to the centre of the stage" (H. Wallace 1985, p.3). The threat of differentiated membership had become a prominent feature in the discussions about constitutional reform before the SEA. Kohl and Mitterrand in particular seemed to hammer the point to the British that if no constitutional progress could be made, the Community would have to seek flexible formulae. It seemed that only the politicians were engaged in debates about flexibility.

Three other issues should have prompted a debate on flexibility. Firstly, the signing of the Schengen Agreement in 1985 by France, Germany and the Benelux countries was a flexible arrangement outside the treaty framework, with only half of the member states participating. Secondly, until the mid-1980s, membership of the Western European Union (WEU) was confined to France, Germany, Italy, the United Kingdom and the Benelux countries. The underlying idea behind this

arrangement was that the WEU countries were the core member states that were seriously committed to a European defence. Not even the Spanish and Portuguese accessions to the EC in 1986 prompted a debate about flexibility. This is somewhat surprising since both countries established lengthy transitional periods.

The reasons for the lack of flexibility literature in the late 1980s and early 1990s are many. Firstly, the revitalisation of the integration process through the signing of the SEA in 1986 and the establishment of the 1992 Internal Market Programme seemed to be driving the Community forward. Britain had boarded the boat and the threat of a two-track Community had been removed after the signing of the SEA. Secondly, the next round of enlargement was nowhere in sight. It seemed that Community membership would be fixed at 12. This was echoed by some prominent scholars (Langeheine and Weinstock 1985, p.185) who began an article on flexibility in 1985 with the words "Before the next and *final* enlargement", and even policy-makers such as Tugendhat (1985, p.421) who noted that "it is hard to see any other applicants on the horizon at present". Thirdly, the establishment of the Single Market had postponed the debate on monetary union. Little did the member states know that the debate about monetary union was just around the corner⁹. The shift in the debate was to come with the signing of the Maastricht Treaty and the institutionalisation of functional flexibility in the form of EMU and the Social Chapter.

1.3. The third wave of the flexibility debate - 1992-97

Much of the credit for the resurgence of flexibility literature can be given to the differentiated arrangements established in the Maastricht Treaty. The earlier debates clearly had an influence on the emergence of the new flexibility debate. As H. and W. Wallace (1995) pointed out, the negotiations on EMU, CFSP and JHA should not be separated from the earlier debates about EMS, WEU and the Schengen agreements. Inevitably each of these three issues "raised the question of which member states were willing and able to take part and of what precise institutional formula should be adopted for their management" (H. and W. Wallace 1995, p.75). The TEU introduced an array of functional flexibility in areas such as

⁹ The Hanover European Council of 1988 established a working group, chaired by Jacques Delors, to examine the prospects of EMU.

EMU, Social Policy, CFSP and JHA. The Maastricht Treaty thus stepped up the debate by introducing flexibility into major policy areas.

The early post-Maastricht literature was largely focused on two policy areas which had become the symbols of flexible integration: the British opt-out from the Social Agreement and the establishment of EMU. Observers such as Bercusson (1994), Deakin and Wilkinson (1994), Curtin (1993), Towers (1993), Lange (1993), Shaw (1992, 1994), Szyszczak (1994) and Whiteford (1993) began examining social policy in general and the flexibility of the Social Chapter in particular. Meanwhile economists such as Caesar and Sharrer (1994), Tietmeyer (1994) and Thygesen (1994) examined the flexibility clauses of EMU. Despite the focus on the Social Chapter and EMU some observers also examined flexibility in more specific fields such as environmental policy - Epiney and Furrer (1992). Yet others linked flexibility to enlargement - Michalski and H. Wallace (1992) and Deubner, Kramer and Thiel (1993). Only two observers – Maclay (1992) and Harmsen (1994) – tried to make sense of the overall legal and political debate of flexibility.

At this stage even textbooks on the European Union - Laursen and Vanhoonacker (1992), Cloos, Reinesch, Vignes and Weyland (1994), Monar, Ungerer and Wessels (1993), Nugent (1994), Duff, Pinder and Pryce (1994), Bainbridge and Teasdale (1995), Dinan (1994), Lodge (1993), Church and Phinnemore (1994), Baun (1996), George (1996), and Dedman (1996) - began taking note of various forms of existing flexibility in the treaties. The analysis was not in-depth, nor was it meant to be, but nevertheless flexibility and its examples began finding their way to the general texts and commentary on European integration and the Maastricht Treaty. Flexibility, which had been ignored by mainstream integration literature for so long, had become a feature on the academic agenda.

Two decades after Brandt and Tindemans, there were to be three documents which triggered the debate on flexible integration in relation to the 1996-97 IGC. The first of these was written by two prominent German politicians, Wolfgang Schäuble and Karl Lamers (1994) of the CDU-CSU coalition party. The second was written by then Prime Minister of the United Kingdom, John Major (1994b), and the third by the then Prime Minister of France, Edouard Balladur (1994). Each of them illustrated various forms of flexibility, the political implications and context of which will be

assessed in more detail in chapter 4, which looks at the agenda setting stage of the 1996-97 IGC.

The Schäuble and Lamers, Major and Balladur documents set off a wave of published studies explaining the conundrums of flexibility. The pre-Amsterdam studies on flexibility were helpful in many ways. Some tried to clarify the debate on flexibility in the pre-IGC era - Chaltiel (1994), Fastenrath (1994), Dashwood (1996), Stubb (1995b), Quermonne (1995), Gibert (1994), Maillet and Velo (1994), Maillet (1994), Wimmer (1995), Antola and Ojanperä (1996), Duff (1996, 1997), Giraud (1996), Sæter (1997), Wulff (1997) and the CEPR (1996). Others, such as Stubb (1996b) and Giering (1997a, 1997b), focused on categorising the terminology. Yet others suggested ways in which to approach the legal aspects of flexibility - Justus Lipsius (1995), Charlemagne (1994), Ehlermann (1995a, 1995b), Mikaelson (1995) and Curtin (1995). The broadest examination of the terminology and dividing lines of flexibility was provided by H. and W. Wallace (1995).

Some studies such as H. and W. Wallace (1995), the CEPR (1996) and Vibert (1996) showed which policy areas are amenable to flexible integration. Others, such as Ehlermann (1995a, 1995b), Justus Lipsius (1995), Charlemagne (1994) and Vibert (1996) pointed to certain conditions necessary to control flexibility. Yet others provided definitions and examples of flexible solutions - Quermonne (1995), Justus Lipsius (1995), Charlemagne (1994), H. and W. Wallace (1995), Chaltiel (1994), Dashwood (1996), Giraud (1996), U. and H. Bernitz (1996) and Stubb (1995b, 1996b, 1997b). Some also dealt more specifically with flexibility and enlargement - van Ham (1997), Kux (1996), Dauderstädt and Lippert (1995), Jesien (1996) and DUP (1997). Some even focused on statistical aspects of flexibility - Jacquemin and Sapir (1996). Bal and Rood (1994), Deubner (1995), Wallace (1997), Toulemon (1995) and Sæter (1995) examined the concept of a core Europe. Maillet, Hitris and Holdt (1996), Martin and Ottaviano (1995), Maillet (1996) and Hargreaves (1997) looked at the economic and social aspects of flexibility. There were also studies on flexibility as a general integration strategy - Janning (1994), David (1995), Janning and Weidenfeld (1996a, 1996b), Biering (1996), Jopp (1997), Metcalfe (1997a), le

Gloannec (1997) and Shaw (1997) - and others on the consequences of flexibility for a particular region - Bingen and Melchior (1997) and Sæter (1996)¹⁰.

1.4. Lessons from the flexibility debate since 1974

Many of the specific suggestions of the observers and politicians (especially Schäuble and Lamers, Major and Balladur) will be dealt with in more detail in chapter 4 which analyses the agenda-setting stage of the 1996-97 IGC. At this stage, however, we can draw two preliminary observations about the flexibility debate both before and during the IGC.

Firstly, it is now clear that flexible integration has become a feature on the academic agenda and a part of the language of policy-makers. In gradual steps from the 1970s onwards flexibility has been tackled from a plethora of political, economic and legal angles. It seems, however, that commentators have taken a very narrow approach to their respective avenues of analysis. Lawyers have examined the legal aspects of flexibility. Economists have looked at the costs involved with flexibility. And political scientists have looked either at the semantics of flexibility or the implications for specific policy areas. Some studies have been particularly helpful in clarifying the otherwise fragmented pre-IGC debate. Authors such as Quermonne (1994), Gibert (1994), Chaltiel (1995), Justus Lipsius (1995), Charlemagne (1994), H. and W. Wallace, and Stubb (1995b, 1996b, 1997b) narrowed down the various terms and strategies to three viable options for the IGC: multi-speed, variable geometry and à la carte. The timing of the pre-IGC debate was an indication that both the academic and the policy-community wanted to refine the concepts which were to become the focus of the IGC negotiations. It should be pointed out that there has been a certain symbiosis between the theoretical and the political debate. The two have flowed in and out of each other – H. and W. Wallace (1995), for instance, formed a part of the Dutch strategy on flexible integration, and Justus Lipsius (1995) and Charlemagne (1994) were written by the same civil servants of the Council Secretariat who played a central role in the actual IGC debate.

¹⁰ Literature analysing the new flexibility clauses in the Amsterdam Treaty will be dealt with in chapter 3.

Secondly, no one has discussed how the principle of flexibility was negotiated into the Amsterdam Treaty. This is partially due to the fact that the *principle* of flexibility had not been negotiated before the 1996-97 IGC. The TEU institutionalised flexibility in important *functional* areas, but the institutionalisation of flexibility as a basic principle in the treaties did not take place until Amsterdam. For this reason it is important to assess why and how the notion of flexibility emerged on the negotiating agenda of the 1996-97 IGC and how it was negotiated throughout the Conference. Related to this is an assessment of the influence of the general debate of flexibility on the policy-makers of the IGC - an examination of how the normative suggestions of the flexibility literature, be they theoretical or practical, spilled over to the IGC negotiations. But before we do this it is important to conceptualise the flexibility debate by providing a set of definitions, categories and examples.

2. TOWARDS CONCEPTUAL CLARITY: MERGING THEORETICAL AND PRACTICAL FLEXIBILITY

What then are the key theoretical and practical definitions and examples of flexibility and how can they be categorised¹¹? The gap between theory and practice in the study of European integration is usually rather wide¹². The ivory tower of the academic world produces a plethora of theoretical frameworks and analytical tools which, some practitioners claim, often fail to explain let alone predict the integration process. On the opposite side of the spectrum the practitioners of European integration focus on the day-to-day management of the Union and forget that the use of an analytical framework can be useful. Finding the middle ground between theory and practice is difficult. Nevertheless, this thesis argues that flexible integration was an issue where theory and practice were in a fertile symbiosis before and during the IGC negotiations.

What follows is an attempt to bring conceptual clarity to the flexibility debate (see table 2). Drawing on the literary overview above, it is suggested that the current

¹¹ For summary please refer back to table 2. This thesis uses the new numbers of the articles – the old number is provided in parenthesis.

¹² It should be pointed out that many of the works cited in the previous sections were actually not very academic in character. On the contrary flexibility seemed to be an issue which analysed mainly by

flexibility debate should be taken a step further by merging the theory and practice of flexible integration. The pre-IGC debate on flexible integration was mainly concerned with theoretical models of differentiation. Multi-speed, variable geometry and à la carte were the three primary models which functioned as the basis for discussion at the IGC. On the basis of these models the Amsterdam Treaty institutionalised the principle of flexibility using different terminology. The new treaty introduced enabling clauses, case-by-case flexibility and created further examples of pre-defined flexibility. Transitional clauses were already commonplace in the treaties. By connecting the theory and practice of flexibility one can better illustrate the evolution of the debate from the launching of the Schäuble and Lamers paper in September 1994 to the signing of the Amsterdam Treaty on 2 October 1997. The categorisation and set of definitions is a way to chart the debate on flexibility and elucidate how the subject was tackled in the actual IGC negotiations. It will furthermore demonstrate that talking about broad ideas such as multi-speed, variable geometry and à la carte is far easier than discussing the complex detail of transitional and enabling clauses, case-by-case flexibility and pre-defined flexibility.

2.1. Some general considerations

Before examining the practical and academic forms of flexibility, however, it is useful to make a few observations about the general use of terminology in the IGC debate. There was an interesting shift in the debate from the Schäuble-Lamers (1994) paper to the conclusions of the Turin (European Council 1996a) and Florence European Councils (European Council 1996b). When the debate began in September 1994, Schäuble and Lamers spoke of a "hard core" of willing and able member states which could pursue further integration in specific policy areas. The immediate reactions of the member state governments were negative (Stubb 1995a, 1995b). The attitude of the member states softened and finally changed as the debate matured. After the "hard core" debate the semantics shifted to "differentiated integration", a term most often used in academic literature (Edwards and Philippart 1997, Stubb 1996b, 1997b). The Reflection Group (1995) added a more politically acceptable term, "flexible integration", to the vocabulary. And finally,

the Turin European Council (1996a) used the most politically correct term, "closer cooperation". During the IGC the debate shifted between flexibility and closer cooperation, the latter being finally chosen for the treaty. The problem with reference to closer cooperation as the broad term for differentiation is that it relates more to enabling clauses than to transitional clauses, case-by-case or pre-defined flexibility. For this reason flexibility should still be used as the all-encompassing term for differentiation, even though the treaty refers to closer cooperation¹³.

As Shaw (1997) has pointed out, the change from flexibility to closer cooperation marks the general trend towards the use of less ideologically charged terminology. The focus of closer cooperation is in a sense more practical and mechanical than the more academic and often ambiguous connotation of flexible integration. Flexibility shares a common vocation with other plastic concepts such as subsidiarity or federalism (Shaw 1997, Edwards and Philippart 1997, Stubb 1997a). In other words, it can be made to mean most things to most people, depending on their perception of the term. Much like the notion of federalism - which some see as creeping centralisation which may be counteracted by the principle of subsidiarity, and others see as a division of powers based on the principle of subsidiarity and de-centralisation - flexibility can be used for two purposes: integration and disintegration. The juxtaposition is between the intergovernmental call for an opt-out and the integrationist call for an opt-in. The intergovernmentalists see flexibility as a way in which to stall the Community dynamics, whereas the integrationists see it as a way to strengthen the Community impetus. Furthermore, the debate about flexible integration has been characterised by a superfluity of sub-terminology which is daunting even to the most experienced specialist of European integration. Various studies have shown that there are at least thirty-seven English terms, seventeen in French and six in German that signify various forms of flexibility (Stubb 1996b, Giering 1997a) (see below).

As indicated above, this thesis suggests that the vernacular of flexible integration should be narrowed to three main concepts and divided into theoretical and

¹³ This thesis is not concerned about making a close linguistic analysis of the terms used for flexibility in different languages – this is a task for a linguist. Nevertheless it should be highlighted that the same terms which were used in the draft treaties and finally in the Amsterdam Treaty do not necessarily have the same connotation in the different Community languages. "Cooperation renforcée", for instance is a stronger term than "closer cooperation". Similarly "tiiviimpi yhteistyö" (Finnish) goes further than "närmare samarbete" (Swedish). This also indicates that a certain voluntary ambiguity was built into the multilingual negotiations.

practical flexibility. The subcategories of the theoretical discourse are (1) multi-speed, (2) variable geometry and (3) à la carte. The corresponding subcategories of the practical discourse are (1) transitional clauses, (2) enabling clauses and (3) pre-defined flexibility together with case-by-case flexibility, respectively. These main sub-categories correspond to three variables signifying flexibility - time, space and matter - which will be explained below. The distinctions between time, space and matter are used as ideal types, not absolute categorisations, because differentiated integration inevitably refers to different speeds for different member states in different policy areas and sometimes in different integrative units. Nevertheless, the categorisations and definitions given offer a method by which one can find both clarity in the debate and a more profound understanding of the concepts which relate to flexible integration.

Metcalfe (1997b) has pointed out that a further distinction between multi-speed, variable geometry and à la carte flexibility can be made. He argues that multi-speed integration is concerned with *when* integration takes place. Variable geometry signifies *what* member states integrate in and à la carte is principally about *who* integrates. The same distinctions, the argument would follow, hold true for the practical terminology. For our purposes, however, it is useful to reverse the defining variable in the latter two cases. In other words, it is suggested that *who* integrates is more useful in describing the space of variable geometry and *what* is helpful in illustrating the matter of à la carte. The underlying assumption in any flexible arrangement is that a certain number of member states are willing to deepen the integration process. Hence *who* is going in is important to variable geometry and *what* the area of further integration is from which some member states are opting out is relevant in à la carte. This analogy illustrates the fine distinction between variable geometry and à la carte. Metcalfe goes as far as to suggest that perhaps à la carte should be considered as a special case of variable geometry. However, as will be illustrated by way of example and definitions there are significant differences between the two¹⁴.

¹⁴ One of the weaknesses of the current literature on flexibility is that the focus is often on the macro issues. There is a clear lacuna in the management issues of flexibility. This has been pointed out by Metcalfe (1997b) and Shaw (1997), among others. This thesis considers the management issues of flexibility as secondary because the main aim is to explain the emergence of the institutionalisation of flexibility in the Amsterdam Treaty.

What follows is a set of definitions, categories and examples of flexible integration. Each concept is dealt with in three parts. Firstly, the term is defined together with a determining variable. Secondly, a set of subvariants and related concepts are highlighted. And finally, a list of examples is provided (see also table 2).

2.2. From multi-speed to transitional clauses

2.2.1. Definitions and variables

The definitions of multi-speed integration and transitional clauses are very similar. For this reason these two terms should be used interchangeably. Multi-speed integration can be defined as the mode of flexible integration according to which the pursuit of common objectives is driven by a group of member states which are both able and willing to pursue some policy areas further, the underlying assumption being that the others will follow later (Stubb 1996b). A transitional clause is the mode of flexible integration which is characterised by two-way transitional periods which allow either new member states or old member states to adapt to a particular policy area, the underlying assumption being that the adaptation period is temporal (Stubb 1997b, 1998, 1999). This form of flexibility is traditional and was not dealt with in Amsterdam. The approaches signify integration in which member countries decide to pursue the same policies and actions, not simultaneously but at different times. The vision is progressive in that, although admitting to differences, the member states maintain the same objectives will be reached by all members in due time. In this sense it is primarily concerned with *when* integration takes place.

There are six other characteristics which relate to the notion of multi-speed or transitional clauses. They will be dealt with in more detail in relation to the IGC negotiations but at this stage it is helpful to highlight the characteristics for each main category of flexibility. For multi-speed they are as follows:

- (1) *Participation* - all member states participate
- (2) *Forum* - the decision is usually taken at an IGC or in accession negotiations, but sometimes in the regular Community framework, as has been the case with some directives

- (3) *Decision* - the decision is taken unanimously
- (4) *Budget* - the Community budget is used
- (5) *Acquis* - the *acquis communautaire* is preserved
- (6) *Objectives* - the common objectives are preserved.

2.2.2. Subvariants and related concepts

The notion of multi-speed holds a number of subvariants which correspond roughly to the same form of differentiation. Concepts that relate to integration differentiated by time include two-speed, step-by-step, variable speed and graduated integration. The French concepts - *plusieurs vitesses*, *deux vitesses* and *intégration échelonnée* - and the terms found in German literature - *abgestufte Integration* and *Teilintegration* - add to the semantics of multi-speed. The point is that the related terminology is not sufficiently nuanced to be separated from its original form. The aim of graduated integration, for instance, is exactly the same as that of multi-speed: to allow the integration process to be flexible within the span of a set time (Stubb 1996b).

2.2.3. Examples

Multi-speed integration is not new within the Community framework. It is useful to make a distinction between multi-speed in primary legislation and multi-speed in secondary legislation. As far as primary legislation is concerned one can go all the way back to the TEC in 1958 to discover that each and every member state had transition periods in relation to particular national concerns¹⁵. Successive enlargements also brought a range of long-term special arrangements for areas such as the Faroe Islands and Greenland. Other transition periods include tariff quotas for imports of raw coffee to Ireland and the import of butter and cheese from New Zealand to the United Kingdom. Ehlermann (1984) points to a further set of examples ranging from safeguard clauses to financing supplementary research programmes.

¹⁵ For examples of transitional periods in the EEC Treaty please see Ehlermann (1984) and H. Wallace (1985).

Transitional periods can apply to new and old policy areas. The underlying idea is that the *acquis communautaire* is to be preserved and developed. Transitional clauses are often used in accession agreements to give a new member state a transitional period in a particular area. This was, for example, the case in the Finnish accession negotiations where special transitional arrangements were established in relation to environmental questions, agriculture and "duty free" goods. The reverse example is also possible. In such a case an acceding member is prevented from participating in a particular policy so as to allow the system or the existing member states to adjust. This will be the case, for example, with Polish adjustments to the Common Agricultural Policy (CAP). With each enlargement the number of cases of flexible integration, mainly transitional clauses, have grown substantially. Due primarily to domestic political pressures the applicant countries are forced to negotiate temporary derogations. Transitional clauses can also be used within the existing Community framework, for example in the realm of directives and regulations (Ehlermann 1984).

Moreover, the SEA expanded forms of multi-speed integration. Article 15 (7c) relating to the gradual establishment of the single market, exemplified flexibility of a temporary and specific nature. Due to its temporary nature article 15 was a form of transitional clause and covered the internal market as a whole. In addition, article 134 (115) referred to transitional measures of commercial policy. Article 134 is interesting because it is practically obsolete. Since the abolition of internal frontier controls, it has become virtually impossible for member states to implement it in practice. Article 134 is a form of multi-speed integration because measures based upon it are generally authorised for limited periods.

As mentioned above the TEU also introduced a very important element of multi-speed into the development of EMU. Under the terms of the treaty, the European Council was obliged to decide whether a majority of member states had fulfilled the convergence criteria and were ready to go forward to stage three of EMU and to adopt to the single currency. Save Denmark and the United Kingdom, the member states set out common objectives which were to be reached in due course. It should, however, be pointed out that EMU illustrates that a specific policy area can reflect many forms of differentiation. Though EMU is mainly a form of multi-speed integration, it could in reality turn out to be an example of variable geometry. This would be the case if Greece or the current applicant countries, for example, were

not able to meet the convergence criteria in long run. This would lead to a situation where a permanent separation between the core and the periphery would take place. Furthermore EMU also exemplifies *à la carte* integration because the United Kingdom, Denmark and Sweden have currently chosen not to participate in the third stage of the single currency.

Secondary legislation also portrays a wide variety of examples of multi-speed integration. Ehlermann (1984) points to examples such as the progressive elimination of agricultural support prices, the gradual abolition of monetary compensatory amounts, the implementation of value-added-tax (VAT) and the approximation of national law. Further examples of temporary solutions in secondary legislation include the solving of the British budgetary problem, interest subsidies granted to Ireland and Italy, the longer delay of the deadline for implementation of non-automatic weighing machines in favour of the United Kingdom and Ireland, the successive extensions of the deadline for implementation of turnover taxes for Belgium and Italy, the temporary derogation from the common rules on allowances for travellers in favour of Ireland and Denmark (and later Finland and Sweden) and the temporary Irish derogations from the common rules on lead content in petrol¹⁶. The list is extensive.

It is clear that multi-speed integration, be it in primary or secondary legislation, is an old tool for EC policy-making. It is a tool that has been used in the past and will be used increasingly in the next rounds of enlargement. The risks of multi-speed integration leading to permanent differentiation among the member states is minimal. This has been clearly illustrated by previous examples of transitional clauses: when the aim is the same, temporal differentiation does not create permanent separations between a core and a periphery. For permanent differentiation we have to turn to variable geometry or what is now often called enabling clauses.

¹⁶ For examples of multi-speed in secondary legislation see Ehlermann (1984) and H. Wallace (1985).

2.3. From variable geometry to enabling clauses

2.3.1. Definitions and variables

The next two concepts of flexibility - variable geometry and enabling clauses - can also be used interchangeably. Variable geometry can be defined as the mode of flexible integration which admits to irreconcilable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units (Stubb 1996b). An enabling clause is the mode of flexible integration which enables willing and able member states to pursue further integration - subject to certain conditions set out in the treaties - in a number of policy and programme areas within and outside the institutional framework of the Union (Stubb 1997b, 1998, 1999). The corresponding variable of these two terms is space. A Europe differentiated by space goes further in institutionalising diversity than integration differentiated by time. Whereas integration differentiated by time defines and maintains a wide range of common objectives and goals, integration differentiated by space takes a view beyond the common objectives. According to this view, Europe in all its diversity, should always organise itself around a multitude of integrative units. The emphasis is on *who opts into what*.

There are six other characteristics which relate to the notion of variable geometry and enabling clauses. As mentioned above, they will be dealt with in more detail in relation to the IGC negotiations, but at this stage it is worth highlighting them in order to make a clearer distinction between the three main forms of flexibility. For variable geometry the characteristics are as follows:

- (1) *Participation* - not all member states participate; within the treaty framework the minimum requirement is half of the member states
- (2) *Forum* - decisions are made according to normal Union procedures; an IGC is not necessary
- (3) *Decision* - within the treaty the decision is taken by a qualified majority with an "emergency brake" (see chapter 3); outside the treaty it is taken informally

- (4) *Budget* - a special budget whereby participating member states pay for all but the administrative costs; a unanimous Council decision allows for the use of the Community budget
- (5) *Acquis* - beyond the *acquis communautaire*
- (6) *Objectives* - beyond common objectives.

Underlying the approach of variable geometry is a dichotomy of will and ability. From this perspective the member states can be divided into four categories: (1) those who are both willing and able to pursue further integration, (2) those who are able but not willing, (3) those who are willing but not able, (4) those who are not willing or able. If applied to EMU, eleven member states fall into the first category (FIN, D, I, NL, B, LUX, IRL, POR, ES, AUS and F). Two countries belong to the second category (UK and DK) and only Greece seems to be willing, but not able to participate in the third stage of EMU. Theoretically Sweden constitutes a group on its own (not willing and not able). If the convergence criteria were interpreted strictly, Sweden would have failed to qualify since it has not joined the ERM mechanism and it has not given its central bank necessary independence. When variable geometry is examined from this angle it bears a very close resemblance to the notion of a *directoire* (see below). This point needs to be highlighted because much of the debate about flexibility during the IGC focused on a set of regulatory conditions which were designed to prevent the creation of a *directoire* or an *avant garde* group which would forge ahead towards deeper integration, leaving behind those which were either not willing or not able.

2.3.2. Subvariants and related concepts

The notions of variable geometry and enabling clauses also have numerous similar subvariants. Integration differentiated by space comprises the concepts of two-tier, multi-tier, two-level, multi-level, "swing-wing", circles of solidarity, many circles, imperial circles, restrained differentiation, multi-track, two-track, multi-floor, two-floor, opt-up, opt-in and structural variability. The notion of a solid or hard core is the driving force of further integration according to the variable geometry formula. The French terminology includes: cercles concentriques, géométrie variable, plusieurs niveaux, plusieurs étages, plusieurs voies, variante unionnaire, deux niveaux, noyau dur, noyau solide, *directoire* and différenciation restreinte. The terms noyau dur,

noyau solide and directoire signify an important element of enabling clauses whereby a conglomeration of member states create the momentum for further integration by opting into integrative units which want to pursue a deeper pooling of sovereignty outside or beyond the *acquis communautaire*. Similarly, German terms such as Kern, harter Kern, fester Kern and Kerneuropa relate to variable geometry (Stubb 1996b).

2.3.3. Examples

Within Europe, but outside the Union, there are a number of examples of variable geometry. In defence, peace-keeping and crisis management, variable geometry is illustrated by the WEU, Eurogroup, Eurocorps, Euromarfor and Eurofor, where a number of member states have opted in by participating in deeper integration outside the *acquis* of the second pillar. And in the sphere of the third pillar, the pre-Amsterdam arrangements of the Schengen Agreements is an example of a conglomeration of states which pursue deeper integration within a separate integrative unit. Variable geometry has also been a permanent feature in fields relating to industry, technology and energy. Examples include the Joint European Torus (JET), Airbus, Eureka and Ariane. These differentiations are not a form of multi-speed integration because they are not a part of the common objectives established in the treaties. Nor can they be considered as examples of à la carte integration mainly because they are forms of opting-in, as opposed to opting-out.

Variable geometry existed inside the treaty framework, in a non-institutionalised form, before the Amsterdam Treaty. Article 306 (233), for example, refers to the pre-existing Benelux cooperation. In essence article 306 is a form of variable geometry because it allows for a specific group of member states to pursue integration in a general policy area, in this case outside the treaty framework. Declaration 28 of the Accession Treaty of 1994 of Austria, Finland and Sweden, referring to Nordic cooperation, also bears close resemblance to article 306. Both cases exemplify deeper cooperation pre-dating membership in the Union. Article 168 (130k) is also an example of variable geometry. Article 168 refers to cooperation programmes in research, which do not necessarily require the participation of all member states. They are funded by some member states and benefit those member states alone. These research programmes are carried out in areas such as health, education, and combating social exclusion. Article 306 and

168 demonstrate variable geometry within the treaty and entail opting-in, as opposed to opting-out. In other words, they allow the willing and able member states to pursue cooperation beyond the common objectives established by the treaties.

Within the Union, in the fields of the second and third pillars, several examples of flexibility can also be highlighted. They primarily illustrate variable geometry because they exemplify opting into deeper integration and do not necessitate common objectives agreed by all member states. There were two forms of flexibility in Title V of the TEU. Firstly, article 14(7) (J.3(7)) contains a diplomatic form of flexibility: "Should there be any major difficulties in implementing a joint action, a member state shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the joint action or impair its effectiveness". Secondly, article 17(4) (J.4(5)) provides directly for possible flexibility in the field of defence: "The provisions in this Article shall not prevent the development of closer cooperation between two or more member states on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Title".

The flexibility exemplified in the JHA by old article K.7. is of a general nature. It makes an indirect reference to the Schengen agreement by stating that: "The provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more member states in so far as such cooperation does not conflict with, or impede, that provided for in this Title".

From the beginning variable geometry has been designed as a practical means of developing cooperation in fields where flexibility seems sensible. Its proponents did not try to undermine the existing objectives. Originally a French idea established in the late 1970s, variable geometry was always about driving the integration process forward. As H. Wallace (1985, p.36) puts it: "[The French] were not advocating a downgrading of the Community method for existing areas, but rather a Community framework for these new areas which, to be realistic, required more flexible and selective methods of collaboration". In order to examine flexibility which takes the integration process in the opposite direction, even undermining the existing *acquis*,

we have to turn to à la carte integration, case-by-case flexibility or pre-defined flexibility.

2.4. From à la carte to case-by-case and pre-defined flexibility

2.4.1. Definitions and variables

The third main concept of differentiation is pick-and-choose or à la carte flexibility. By definition, the culinary metaphor of a Europe à la carte allows each member state to pick and choose, as from a menu, in which policy area they would like to participate, whilst at the same time maintaining a minimum number of common objectives (Stubb 1996b). This approach is focused on matter - i.e. specific policy areas. The question here is *what* member states opt out of. This stands in stark contrast to both a multi-speed Europe, which defines common objectives towards which member states strive (in due time) according to ability; and variable geometry, which institutionalises differentiation of the member states so as to create space between the various integrative units or forms of integration.

A la carte integration corresponds to both case-by-case flexibility and pre-defined flexibility. Case-by-case flexibility can be defined as the mode of flexible integration which allows a member state the possibility of abstaining from voting on a decision and formally declaring that it will not apply the decision in question whilst at the same time accepting that the decision commits the Union (Stubb 1997b, 1998, 1999). This so-called constructive abstention is a mix between a decision-making mechanism and flexibility. Pre-defined flexibility is the mode of flexible integration which covers a specific field, is pre-defined in all its elements, including its objectives and scope, and is applicable as soon as the treaty enters into force (Stubb 1997b, 1998, 1999). Case-by-case flexibility was introduced by the Amsterdam Treaty whereas pre-defined flexibility has always existed in the treaty framework (see below for examples).

There are six other characteristics which relate to the notion of à la carte, case-by-case and pre-defined flexibility:

- (1) *Participation* - not all member states participate; usually a particular opt-out is granted to one member state; opt-outs have so far been granted to no more than three member states at a time
- (2) *Forum* - decision is usually taken in an IGC or in special cases within the realm of usual Union business (ex. directives with derogations); an exception to this rule is provided by constructive abstention which can be used in regular second pillar decision-making
- (3) *Decision* - decision is taken unanimously
- (4) *Budget* - a special budget whereby participating member states pay for all but the administrative costs; a unanimous Council decision allows for the use of the Community budget
- (5) *Acquis* - an opt-out usually means that the *acquis communautaire* is undermined
- (6) *Objectives* - an opt-out usually means that the common objectives are undermined.

2.4.2. Subvariants and related concepts

Though Europe à la carte is the most metaphorical of the main concepts which relate to differentiated integration, it has significantly less sub-variant jargon. The English language contains related terms such as pick-and-choose, maximum flexibility, opt-out, opt-down and bits-and-pieces. The term à la carte does not have any sub-variants in the French language. The German language, equally poor on parallels, borrows its à la carte metaphor from Latin: *ad libitum*. The lack of synonyms for à la carte can be explained by the fact that the metaphor is self-explanatory. It is easy to understand that according to this form of differentiated integration a member state is allowed to pick-and-choose, as off a menu, from respective policy areas (Stubb 1996b).

2.4.3. Examples

The classic examples of pre-defined flexibility in the pre-Amsterdam era can be found in the opt-out clauses provided for the United Kingdom and Denmark. Protocol No 11 (TEU) states that "...Unless the United Kingdom shall notify the Council whether it intends to move to the third stage [of EMU], it shall be under no obligation to do so". Similarly, the Edinburgh European Council (1992) agreed to

give Denmark "the right to notify the Council of the European Communities of its position concerning participation in the third stage of economic and monetary union". Another classic example of à la carte flexibility can be found in the British derogation from the Social Chapter. Protocol 14 states that "...The United Kingdom...shall not take part in the deliberations and in the adoption of...proposals made on the basis of this [Social] Protocol...". A more recent form of à la carte is illustrated by the Swedish accession agreement, which permitted the continued use of *snus* (snuff), despite its use being illegal in the rest of the Union. The reason was pragmatic: of Sweden's 8 million eligible voters, over 10% use *snus* - these 800,000 "snuffers" were regarded as essential for securing a "yes" majority in the Swedish referendum.

In sum, à la carte, much like multi-speed and variable geometry, has been a part of the Community process from the beginning. It might not always have been the preferred form of flexibility but it has helped the Community to overcome log jam. This will be analysed more specifically in relation to the Amsterdam Treaty and Danish, British and Irish opt-outs from questions relating to the new title on free movement, immigration and asylum and parts of the Schengen agreements. Before that, however, it is important to point out some fundamental differences between the three central forms of flexible integration.

2.5. Comparisons

Multi-speed/transitional clauses and à la carte/case-by-case/pre-defined flexibility are at the two extremes of the spectrum of flexible integration. Both concepts work within a single institutional framework and maintain the established *acquis communautaire*, the main difference being that multi-speed maintains an ambitious and often supranational set of common objectives which will be reached by all member states in due course, whereas the à la carte solution maintains a less ambitious and intergovernmental view of integration in which common objectives are sacrificed on the altar of national interest and hence each member state is able to pick-and-choose in which policy area to participate. Member states integrating in one area will not necessarily do so in another. Hence à la carte is more concerned with *what* is integrated than *when* integration takes place. The similarity between à la carte and multi-speed is that both forms of flexibility are usually pre-defined. That

is to say, they are determined in an IGC, as was the case with the British opt-out from the Social Chapter and the timetable of EMU.

Variable geometry/enabling clauses exemplify the middle ground between multi-speed and à la carte. This form of integration is differentiated by space in that it recognises permanent differences among both the core and periphery, thus creating various conglomerations of integrative units and subsystems which are potentially overlapping. By definition variable geometry is more integrationist than à la carte. The former can create a hard core which drives for deeper integration in a specific policy area, whereas the latter is usually characterised by miscellaneous cooperation in areas that are not considered to intrude on national sovereignty. In essence, variable geometry is concerned with *who* integrates. The resemblance to à la carte stems from the fact that variable geometry is not only concerned with *who* integrates but also with *what* is integrated. In this respect it is a mix between space and matter. For our purposes, however, the distinction is useful, especially if we qualify it by establishing that variable geometry is mainly focused with *who opts into what*; whereas as à la carte describes *who opts out of what*. Variable geometry differs from multi-speed and à la carte in that it is not determined in advance.

The difference between variable geometry and multi-speed is the degree of common objectives involved. Variable geometry builds on the *acquis communautaire* or seeks solutions outside the treaty framework. Multi-speed, on the other hand, maintains the established *acquis* and avoids any form of differentiated integration outside the Community structure. The question of *who* integrates and in *what* areas is irrelevant to multi-speed because eventually everyone will join the formation in whichever area common objectives have been established.

Whereas time is a self-evident variable for multi-speed, the distinction between space and matter is more blurred. All three sub-categories of differentiation obviously involve matter, i.e. various policy areas. Moreover, they all have institutional implications. The reason that this thesis pegs matter to à la carte, is that it is the most obvious example whereby the focus of differentiation is on scattered policy areas. Space, on the other hand, is used as a variable because variable geometry is, firstly, a metaphor drawn from aeronautical innovations (H. Wallace 1985), and secondly because the various larger areas of cooperation which illustrate variable geometry maintain their own set of common objectives - a number

of these conglomerations create a certain space between each other. The main distinction between variable geometry and à la carte is that the former exemplifies a certain opt-in or opt-up to a conglomeration of member states which have already pursued deeper integration in a specific policy area (e.g. the Schengen Agreements). The latter, on the other hand, is a form of differentiation whereby a member state opts out or opts down, away from a specific policy area (e.g. the United Kingdom and the Social Agreement).

Furthermore, when examining the other six characteristics of multi-speed, variable geometry and à la carte - (1) participation, (2) forum, (3) decision, (4) budget, (5) *acquis* and (6) common objectives - the following observations can be drawn. (1) All member states can participate in a multi-speed arrangement because the final objective is the same. Variable geometry can take place inside the treaty framework when at least half of the member states participate. A la carte integration is often granted to a maximum of three member states. (2) Multi-speed and à la carte arrangements (save constructive abstention) are usually decided in an IGC, whereas variable geometry solutions can be achieved in regular Union business (after the ratification of the Amsterdam Treaty). (3) Multi- speed and à la carte solutions usually require a unanimous decision whilst variable geometry uses qualified majority with an "emergency brake" (see chapter 3). (4) Variable geometry and à la carte have special budgetary solutions whereby only the participating member states share the burden, unless the Council decides otherwise by unanimity. Multi-speed uses the Community budget. (5) Multi-speed maintains the *acquis communautaire*. Variable geometry takes the *acquis* further and à la carte undermines the *acquis*. (6) Multi-speed maintains the common objectives whereas variable geometry goes beyond the common objectives and à la carte undermines the common objectives.

The above examples in the TEU and the TEC illustrate the nature of existing flexibility within the treaty and demonstrate that concrete examples of flexibility already existed before the Amsterdam Treaty: the doctrine of the Community may be uniformity, but the implementation of policies sometimes bears resemblance to diversity and flexibility. The impact of flexibility on the Union is much less dramatic than is often thought - none of the forms of flexibility have interfered drastically with the common objectives of the Union and flexibility provides the member states with

fall-back positions or positions of last resort. In this sense flexibility can be seen as a way to find compromise and avoid log jam.

CONCLUSION

Though flexibility is more the exception than the rule it should be clear by this stage that the Community and the Union have always used flexible formulae as a means of driving the process of European integration forward. Sometimes it has been a case of allowing an acceding country time to adapt to Community policy, as was the case with Finnish agriculture. At other times the Community has adjusted to a newcomer's agricultural policy, as was the case when Spain joined the Community in 1987. And at other times flexible solutions have been prevalent in secondary legislation such as directives and regulations. The TEU introduced opt-outs for Denmark and the United Kingdom and flexible formulae for EMU. And the Amsterdam Treaty institutionalised the principle of flexibility in the form of variable geometry or so-called enabling clauses, including different forms of pre-defined flexibility for the United Kingdom, Ireland and Denmark.

The literary overview showed that the pre-IGC flexibility debate was rather patchy. Lawyers have addressed legal issues relating to flexibility. Economists have looked at flexibility in relation to economic power and budgetary questions. And political scientists have addressed the policies and politics of flexibility. This thesis is an attempt to take the debate one step further and relate flexibility more specifically to the Amsterdam Treaty which provides for the first actual institutionalisation of the principle of flexibility. In essence it is an attempt to fuse two parts of the debate: the theoretical and the practical. The connection was made in this chapter between multi-speed and transitional clauses, variable geometry and enabling clauses, and à la carte, case-by-case flexibility and pre-defined flexibility. The hope is that the debate will move away from ideologically charged terminology, which can mean different things to different participants, towards a more practically oriented flexibility debate which revolves around the existing examples of flexibility.

Furthermore, the flexibility debate in the pre-IGC era clearly left the negotiators with more questions than answers. How should flexibility be managed in practice? How

should a flexible arrangement be triggered? What would the relationship be between the ins and the outs? Who should be able to initiate a flexible arrangement? How many member states would be needed for a flexible arrangement? Who should rule on conflicts within a flexible solution? The point is that the flexibility debate in the pre-IGC era had failed to answer some crucial questions. Against this background chapter 4 will elaborate on the plethora of questions about flexibility that the negotiators had to grapple with. Flexibility was an extremely difficult question to negotiate mainly because it was a politically sensitive issue with legal complexity beyond anything that the IGC negotiators had ever experienced.

Before examining the IGC negotiations leading to the institutionalisation of flexibility it is important to examine and assess the flexibility clauses in the new treaty. This approach reveals certain underlying themes and assumptions which were evident in the thinking of the key actors in the negotiations.

Chapter 3

AN ASSESSMENT OF THE FLEXIBILITY CLAUSES IN THE AMSTERDAM TREATY

INTRODUCTION

Chapter 1 outlined a framework analysis and chapter 2 provided a roadmap of the evolution of the flexibility debate since 1974. This chapter examines the outcome of the flexibility provisions in the Amsterdam Treaty and gives a "peak preview" of how flexibility was institutionalised. Before analysing the IGC negotiations leading to the institutionalisation of flexibility (chapters 4, 5 and 6) it is important to examine and assess the flexibility clauses in the new treaty. This "reverse" approach - i.e. looking at the end result before analysing the process - is adopted in order to be able better to discuss how and why the Amsterdam Treaty ended up with the new flexibility provisions. In other words, it is important to look at the end station before one sets out on the intellectual journey that maps out the evolution of the flexibility negotiations in the 1996-97 IGC. The aim of the chapter is to clarify the complex web of rules and issues relating to the different forms of flexibility.

The immediate post-Amsterdam era witnessed a plethora of useful commentaries on the new flexibility provisions. Edwards and Philippart (1997 and 1999), Stubb (1997b, 1998, 1999), de La Serre and H. Wallace (1997), H. Wallace (1999), Janning (1997), Metcalfe (1997b), Nornden (1997), *CMLR* (1997), Dashwood (1997), Friis (1997), Deubner (1997), Kortenberg (1998), Chaltiel (1998), Gaja (1998), Ehlermann (1998), Philippart (1998) and Beneyto (1998) analysed the flexibility clauses in the Amsterdam Treaty in general. Roper (1997) and Missiroli (1998) assessed flexibility in the second pillar. Demmink (1997) and Monar (1997, 1998) examined third pillar provisions on flexibility, whereas Curtin (1997) looked at the complexities of incorporating the Schengen agreement into the treaty framework. Edwards (1997), Edwards and Wiessala (1998), Scott (1997) and Shaw (1997, 1998) focused on legitimacy and flexibility after the Amsterdam Treaty.

Müller-Brandeck-Bocquet (1997) and Bæk Sørensen (1998) examined flexible possibilities for environmental policy and McGuin (1997, 1999) looked at specific member states' approaches to flexibility in the 1996-97 IGC. Constantinesco (1997), Cremona (1998), Crivat (1998), Labayle (1998a, 1998b), Wind (1998) and Leslie (1999) examined flexibility in general. In addition an expert group, lead by Christian Deubner (1999), is in the process of publishing the results of round-table discussions about the future prospects of flexibility with the governments of five member states, the Commission and Poland. All of the above studies provide useful tools for the analysis of the new provisions on flexibility.

What kind of flexibility does the new treaty provide? As indicated in chapter 2 there are three basic forms of flexibility in the Amsterdam Treaty: (1) enabling clauses, (2) case-by-case flexibility and (3) pre-defined flexibility. Transitional clauses are not an issue relating to the Amsterdam Treaty, they are more closely linked to enlargement. The chapter illustrates that contrary to the original aim the Amsterdam Treaty incorporates no multi-speed, some variable geometry and a lot of à la carte. In order to be able to assess the new flexibility provisions the chapter is divided into three parts:

- (1) enabling clauses
- (2) case-by-case flexibility
- (3) pre-defined flexibility.

The following analysis examines the three different forms of flexibility in detail. After a general assessment each form of flexibility in the Amsterdam Treaty is defined. Then each article is analysed separately by looking at the conditions, decision-making and institutional implications of flexibility.

1. ENABLING CLAUSES

What is an enabling clause? As argued in chapter 2 it is the mode of flexible integration which enables willing and able member states to pursue further integration - subject to certain conditions set out in the treaties - in a number of policy and programme areas within and outside the institutional framework of the Union. The enabling clauses represent the main flexibility innovation of the

Amsterdam Treaty. Examples include general flexibility clauses in the TEU (articles 43-45) and clauses specific to the first pillar (article 11) and the third pillar (article 40). As argued in chapter 2 the enabling clauses correspond to the notion of variable geometry because they allow a limited number of member states to pursue deeper integration without all being involved.

1.1. General enabling clauses in the TEU (articles 43-45)

The general flexibility clauses, inserted as the new title VII of the TEU (articles 43-45), provide the general conditions and institutional arrangements for the enabling clauses. Article 43 sets out the conditions, article 44 deals with institutional and budgetary arrangements, and article 45 stipulates the need to keep the European Parliament regularly informed. The aim is to preserve the basic principles of the treaties and safeguard the interests of any member state which is outside the framework of closer cooperation. The general enabling clauses provide an overarching framework for flexibility in the first and the third pillar. But although they constitute a free standing title on their own, the general enabling clauses do not form a separate pillar because any flexible cooperation should fulfil specific additional criteria laid down in the specific enabling clauses (Shaw 1998).

1.1.1. Article 43 - conditions

The conditions outlined in the general flexibility clauses are important because they create the framework for closer cooperation. Article 43(1) states that member states which wish to establish closer cooperation may use the institutions, procedures and mechanisms of the Union, provided that the cooperation:

- (a) *Is aimed at furthering the objectives of the Union and at protecting and serving its interests.* The idea behind this condition is that closer cooperation should be a way forward, towards deeper integration. The condition also means that closer cooperation must remain within the competence of the Union. Flexibility is not a means by which a limited number of member states can expand the competence of the Union (Kortenberg 1998). In other words, it is not similar to article 308 (235) which allows the Union to add on competence, when necessary. This condition also means that there is scope for flexible integration outside the treaty framework

in those areas which do not belong to the sphere of competence of the Union (Ehlermann 1997).

(b) *Respects the principles of the treaties and the single institutional framework of the Union.* The reference to the single institutional framework is self-evident – the basic idea behind the incorporation of flexibility was that it would take place within the institutional framework, not outside of it. Equally, the reference to the principles of the treaties is straight forward – flexibility must not violate Community law. However, it should be pointed out that this principle is really only a matter of course, since the sole aim of the provisions is to create the possibility for willing member states to use the institutions for the purpose of flexible integration (Ehlermann 1997).

(c) *Is only used as a last resort, where the objectives of the treaties could not be attained by applying the relevant procedures laid down therein.* This principle is more political than legal. It sounds rather obvious, but it may be hard to apply. Are there objective criteria determining what is a last resort? How much time can the Council take before it declares measure of last resort (Edwards and Philippart 1997 and 1999, Ehlermann 1997)? Indeed, it is very difficult to outline tangible rules for this condition (Kortenberg 1998). The ultimate decision will be political. One could argue that since the last of the conditions (h) states that the general conditions should comply with the additional criteria laid down in the specific provisions, the ECJ could be called upon to act as the final referee.

(d) *Concerns at least a majority of member states.* Much of the debate in the IGC revolved around numbers (H. Wallace 1999). Some member states wanted to have a large majority of states behind any flexible solution. Others argued that a minority of members should be able to forge ahead. The compromise was that eight member states have to participate in a given flexible format. It should be borne in mind that this is less than is required for a qualified majority. Some critics have argued that this condition could be problematic in that it would force member states to cooperate outside the treaty framework (Ehlermann 1997). The example used is the Schengen agreement which was kicked off in 1985 by Germany, France and the Benelux countries. The general line of argumentation is sound, but one must keep in mind that the founding states of Schengen constituted exactly half of the member states of the Community in 1985. This condition was inserted because a majority of the negotiators wanted to avoid the creation of a hard core around a limited number of member states (see chapters 4, 5 and 6).

- (e) *Does not affect the "acquis communautaire" and the measures adopted under the other provisions of the treaties.* This is the most fundamental condition. It refers to the first pillar and was repeated by every delegation in the course of the IGC negotiations. Preserving the *acquis communautaire* is also an indirect reference to condition (a) which notes that flexibility should only be used as a way forward and not as a means of derogation. However, the flexible incorporation of the Schengen *acquis* – i.e. the opt-outs for the United Kingdom, Ireland and Denmark – will make it difficult to abide by this condition. By definition these special arrangements already break the condition.
- (f) *Does not affect the competences, rights, obligations and interests of those member states which do not participate therein.* This condition was important to those member states which felt that they would not participate in flexible cooperation. However, it is interesting to note that a “mirror image” (Ehlermann 1997) of this clause is provided in article 43(2) which notes that member states that do not participate in flexibility should not impede the participants. Condition (f) is a generalisation of article 11 (enabling clause of the first pillar).
- (g) *Is open to all member states and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework.* The condition of “openness” is also fundamental if the creation of a hard core of member states that would take distance from the periphery is to be avoided. All member states can join any given form of flexible arrangement, provided that they fulfil the criteria.
- (h) *Complies with the specific additional criteria laid down in Article 11 of the TEC and Article 40 of the TEU, depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.* This final condition notes the fact that the eight basic conditions apply to both the first and the third pillar enabling clauses which, however, stipulate additional criteria which must be met if flexible integration is to take place.

These eight conditions correspond to the basic philosophy of the new flexibility clauses: namely the aim to find a balance between the interests of the participants and non-participants. However, several of the conditions are of a political, as opposed to legal, nature. Some criticism has been directed towards the blurred mechanisms for joining a flexible arrangement (Deubner 1998). This might not be a problem for those who do not want to be in, but it does pose a dilemma for those who would like to join but are unable to do so because they do not meet a certain

set of criteria (Edwards and Philippart 1997, 1999). This problem will be exacerbated with enlargement when some of the new member states want to join a flexible arrangement. Indeed “difficulties in interpreting the provisions surrounding the concept may in the longer term have implications for the legal order” (Edwards and Philippart 1997, p.14). Nevertheless, the conditions outlined in the general flexibility clause are important because they set out the framework for closer cooperation.

1.1.2. Article 44 – institutional and financial provisions

The general flexibility clauses do not contain decision-making mechanisms for the enabling clauses. These are left to the specific enabling provisions in the first and third pillars. By contrast some institutional and budgetary considerations have been incorporated into article 44(1), which notes that the relevant institutional provisions of the treaties apply to the implementation of flexibility. The article follows regular EMU decision-making provisions in outlining that all Council members can take part in the deliberations, but only those representing the participating member states may take part in the adoption of decisions. However, here it is important to point out that the possibility of non-participating member states sitting around the table where formal flexible decisions are made is in stark contrast to both the informal Euro-11 Council which deliberates without non-EMU members present and the provisions for the Social Protocol which excluded Britain altogether.

The notion of inclusion in formal flexibility deliberations is a clear indication that some of the “reluctant” member states were able to push through provisions which would guarantee that they had more influence over flexibility which was managed within, as opposed to outside the treaty framework. The decisions, however, are taken by the participating member states. Qualified majority is defined as the same proportion of weighted votes as laid down in article 205(2) (148(2)). This is the same format as is used for EMU. Shaw (1998) argues that it is problematic that no detailed arithmetic has been provided and that this could cause friction among the participating member states. I disagree for two reasons. Firstly, one should keep in mind that the participating member states have taken the original decision to move to a flexible solution together – they are like-minded and believe that a flexible solution in a given area is beneficial so one will rarely see a qualified majority vote

taking place. Secondly, the arithmetic is actually self-evident – member states are allocated their usual votes and the required threshold is the result of a simple calculation. It is, however, possible that smaller member states might lose out proportionally if most of the participants are large, and *vice versa*.

Article 44(2) of the general flexibility clause establishes that expenditure for the implementation of the cooperation, other than administrative costs incurred by the institutions, will be borne by the participating member states. All costs, however, can be borne by the Community if the Council so decides by unanimity. This was also a contentious question throughout the Conference. Some member states wanted all costs to be drawn from the Community budget, whereas others argued that only the participants should be responsible for incurred costs. The article is a clear compromise between the two. The idea is that there might be flexible forms of cooperation which benefit the Union as a whole and hence there should be a window of opportunity for all member states to share the costs. The more contentious issue will be that of the definition of an administrative cost. It will be very difficult to draw a distinction between what is operational and what is administrative.

1.1.3. Article 45 – the role of the European Parliament

The role of the European Parliament in flexibility deliberations was also contentious (article 45). In the early stages of the negotiations it was suggested that the Parliament should be treated in the same way as the Council, that is to say that only those MEPs who were nationals of the member states participating in a flexible arrangement should be able to vote. This was not, however, considered to be appropriate especially since MEPs do not represent their member states. In the end the European Parliament was considered to be indivisible. The role of the Parliament in flexible integration is, however, very limited. Article 45 states only that the Council and the Commission should keep the European Parliament regularly informed of the development of flexibility. And, as will be shown below, the Parliament also has only a very limited role in triggering flexibility. The Parliament's role can, however, be more important in legislation based on the flexibility clauses. It should also be pointed out that there is no mention of the other institutions in the general enabling clauses. Nevertheless, the assumption is that the Commission, the Court of First Instance and the Court of Justice decide in their normal composition.

This is only logical since the European Parliament also deliberates in its full composition. The fact that the institutions meet in full composition, albeit that the non-participating member states are not allowed to vote in the Council, is symbolically important and indicates that the member states wanted to avoid a situation whereby the unity of the institutional structure was damaged.

1.2. Specific enabling clause in the TEC (article 11)

The specific enabling clauses applicable to the first and third pillars set out the specific conditions and decision-making mechanisms in each area. As chapters 4, 5 and 6 will show the debate about flexibility in the first pillar was difficult. In the early stages of the negotiations most member states opposed any form of flexibility in the first pillar. As the negotiations proceeded, flexibility in the first pillar became a more viable option. Nevertheless, the basic framework of the article is complex because "the negotiators of the IGC had to design a system that achieved some balance between the protection of the core elements of the Union, reassurance for non-participating member states and political versatility" (Philippart and Edwards 1999, p.12).

1.2.1. Article 11(1) – negative list

The first pillar enabling clause clarifies how the *acquis communautaire* is to be maintained. The provisions concentrate especially on the internal market and its accompanying policies. For this purpose there was talk about a negative list of issues which were not suited to flexibility or a positive list of issues to which flexibility could apply. At one stage a combination of the two was proposed. However, the negative list eventually gained support and now complements the specific conditions in the general flexibility clauses (article 43) by stating that flexibility can be established as long as the cooperation proposed:

- (a) *Does not concern areas which fall within the exclusive competence of the Community.* This is a logical condition because in areas of exclusive competence it is only the Community, not the member states, which has the right to act. The problem, however, is that the notion of exclusive competence is not defined (Shaw 1998, Edwards and Philippart 1997, 1999, Ehlermann 1997). Much as with the

principle of subsidiarity, this could lead to divergent interpretation. In addition this clause is closely linked to article 43(1b) which notes that any flexible arrangement should respect the principles and the single institutional framework of the treaty.

- (b) *Does not affect Community policies, actions or programmes.* This part of the negative list reinforces article 43(1e) by excluding flexible arrangements in areas closely related to the *acquis communautaire*. Some might argue that this clause excludes flexibility in the Community pillar altogether. This, however, seems to be too narrow an interpretation. If the clause had stated, as was suggested at one stage, that flexibility should not "concern Community policies", then the clause would indeed rule out flexibility in the first pillar. The use of the word "affect", however, allows for more leeway.
- (c) *Does not concern the citizenship of the Union or discriminate between nationals of member states.* The aim of this clause is to guarantee that uniformity of citizenship remains intact and that two or more strands of citizenship do not develop (Kortenberg 1998). It would not be politically feasible to have different types of citizenship attracting different rights and obligations. In addition this clause is an attempt to appease the non-participants by stipulating that flexibility should not discriminate between member states. This latter concern is somewhat strange since flexibility by definition discriminates against those member states that do not participate in the cooperation by creating two pools of cooperation.
- (d) *Remains within the limits of the powers conferred upon the Community by the Treaty.* This clause is about "ins" and "outs" and reflects the centrality of the Community constitutional order (Shaw 1998, CMLR 1997). Shaw (1998) has even argued that the order of the negative list should be changed so as to highlight the degree of importance and the level of generality of the clauses. To this end she argues that clause (d) should be moved up in ranking order to become the first condition in the list. From a political perspective this would be feasible, but legally it makes no difference.
- (e) *Does not constitute a discrimination or a restriction of trade between member states and does not distort the conditions of competition between the latter.* Much like the previous clause this one is more of a principle to be applied within the arrangements for closer cooperation. The inclusion of this clause, particularly in relation to competition is politically understandable, but legally it was not really necessary because competition is not an area where differentiation can be used anyway (Ehlermann 1997). However, some argue that this provision will be a limiting factor on any flexible cooperation that relates to the single market

(Kortenberg 1998). The condition is closely related to article 95(4) (100a(4)) which allows a member state to maintain national provisions which go further than the level of harmonisation on the Community level.

It should be pointed out that the new title on visas, asylum, immigration and other policies related to the free movement of persons falls under the flexibility umbrella and flexibility is indeed used as a mechanism in for instance the Schengen protocol. Here, however, it is important to highlight that the Schengen agreement is difficult to categorise because it can be seen as both pre-defined flexibility (as is the case with the opt-outs for Denmark, the United Kingdom and Ireland) and as an enabling clause (as is the case for the rest of the member states).

1.2.2. Article 11(2-5) – institutional provisions

The decision triggering flexibility in JHA is taken by a qualified majority vote. If, however, a member state declares that, for important and stated reasons of national policy, it opposes the granting of the necessary authorisation, the matter is referred to the European Council for decision by unanimity – this is generally called the “emergency brake” mechanism. The initiative for a flexible solution originates in a request from the member states concerned to the Commission. The Commission then submits a proposal. In the end the Commission has the final say on whether a particular flexible solution will be pursued. The possibility of joining a flexible solution is also dependent on a decision by the Commission, indicating that it has a central role to play in any flexibility in the first pillar. This means that no member state can prevent another from joining at a later stage.

1.3. Specific enabling clause in the TEU (article 40)

The enabling clause in the third pillar marks a major change in third pillar flexibility. Previously flexibility in the third pillar was based on article K.7, which allowed for cooperation among two or more member states outside the treaty framework. The new enabling clause allows for closer cooperation inside the treaty and as such departs from previous practice. It should also be borne in mind that the enabling clause of the third pillar, though debated throughout the Conference, was left in the shadow of pre-defined flexibility. It is in the special pre-defined provisions relating to

new title IV and the incorporation of the Schengen agreement that we find most flexibility in the old justice and home affairs pillar.

1.3.1. Article 40(1) - conditions

In the third pillar, which is now called “provisions on police and judicial cooperation in criminal matters”, two conditions apply to flexibility. Article 40(1) states that member states intending to establish closer cooperation between themselves may be authorised to do so provided that the cooperation proposed:

- (a) *respects the powers of the European Community, and the objectives laid down in the third pillar, and*
- (b) *has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice.*

These conditions are in line with the more specific conditions set out in areas covered by pre-defined flexibility (see below), but they are not as extensive as those established in the first pillar. This illustrates that the negotiators were more concerned with preserving the unity of the first pillar than the unity of the third pillar. In addition it should be pointed out that there is a slight contradiction between the conditions in the first and the third pillar. In the first pillar one of the conditions states that flexibility should not concern citizenship of the Union or discriminate between nationals of member states. Yet the same condition is not provided in the third pillar which has a close link to the notion of EU citizenship especially through police and judicial cooperation in criminal matters.

1.3.2. Article 40(2-5) – institutional provisions

The trigger mechanism for flexibility is similar to that in the first pillar, the exception being the relatively weakened position of the Commission in the third pillar. Instead of a binding *proposal*, the Commission gives only a non-binding *opinion* on the initiative put forward by the member states. The authorisation for flexibility in the third pillar is given by the Council by qualified majority accompanied, as in the first pillar, by an “emergency brake”. In addition, article 40(3) provides that instead of the

Commission's approval being required, it is the participating member states which decide whether a non-participating member state may join the flexible solution. It is interesting to note, however, that if the Council has not reacted to the request of accession within four months, the decision shall be deemed to have been taken. It should also be pointed out that article 40(4) clearly states that disputes relating to the third pillar enabling clause are to be resolved by the European Court of Justice. Article 40(5) makes an explicit reference to the protocol integrating Schengen. This reference seems logical since part of the Schengen *acquis* will fall under the third pillar.

Quite apart from the third pillar enabling clause, an element of flexibility can also be seen in article 34(2d) which provides that "conventions shall, once adopted by at least half of the Member States, enter into force in those Member States". Put simply, not all member states will have to have ratified a convention in order for it to enter into force.

1.4. Summary of the enabling clauses

The general enabling clauses and the specific enabling clauses in the first and the third pillar are a modified form of variable geometry. In other words, they allow a limited number of willing and able member states to pursue further integration within the institutional framework of the Union but they do not allow a permanent or irreversible separation between a hard core and lesser developed integrative units (Stubb 1998). That it is to say, the enabling clauses are not as radical as the original ideas floated by Schäuble and Lamers in 1994 and by the French delegation, in particular, during the IGC. Instead, modifications were made so as to guarantee the interests of non-participants. The aim was to allow for differentiation but to avoid the creation of a hard core. It has been suggested that perhaps there is an element of multi-speed in the enabling clauses because closer cooperation is open to all member states (Edwards and Philippart 1997). The cooperation is indeed open to all but this does not automatically mean that the aim is the same for all member states. Nor does it mean that all states will necessarily join the proposed cooperation at a later stage. Nevertheless, I agree with the conclusion of Edwards and Philippart (1997, p.14) that the loose interpretation of the criteria for joining the flexible arrangement "may not be a problem for those member states who wish to be 'out', but is a serious matter for those who are unable to be 'in', yet who wish to be so –

as has been clearly revealed in the debates over meeting the convergence criteria for the single European currency". The conclusion then follows that the enabling clauses more closely resemble variable geometry than multi-speed.

In addition it seems that the conditions regulating the enabling clauses in the first pillar are more limiting than those in the third pillar. On an institutional level the Commission has a central role in the first pillar, but logically a less important role in the third pillar. The European Parliament has a limited role in triggering flexibility, i.e. it is only informed or consulted. However, it retains its usual role on legislative matters based on the enabling clauses. It is interesting to note that nothing is mentioned about international agreements (Kortenberg 1998). It seems that nothing prevents the participating member states from signing agreements with third parties. A similar provision was established for EMU. There are of course a multitude of questions that emerge from the enabling clauses. They will, however, be dealt with in more detail in the conclusions of the thesis, after the reasoning behind the new provisions has been established in chapters 4, 5 and 6.

2. CASE-BY-CASE FLEXIBILITY

Case-by-case flexibility can be defined as the mode of flexible integration which allows a member state the possibility of abstaining from voting on a decision and formally declaring that it will not apply the decision in question whilst at the same time accepting that the decision commits the Union. This so-called *constructive abstention* is a mix between a decision-making mechanism and flexibility. As argued in chapter 2, constructive abstention pays a close resemblance to the notion of à la carte because member states can pick and choose in which policy area they would like to participate¹.

¹ At the start of the negotiations the second pillar was seen as the primary area for flexibility in general. As the negotiations proceeded it became evident that flexibility in the second pillar could be achieved by other means. Consequently a system of case-by-case flexibility was adopted. Case-by-case flexibility is closely linked to decision-making and as such is not a form of differentiation in the traditional sense. Nevertheless it was examined in the 1996-97 IGC under the umbrella of flexibility (see chapter 6). The Draft Treaty tabled before the European Council of Amsterdam (CONF 4000 1997) had included an enabling clause for the second pillar for which the trigger would have been unanimity. The conditions for that enabling clause were similar to those in the third pillar, namely that enhanced cooperation could be pursued as long as it:

(1) *respected the powers of the European Communities as well as the objectives set for the common foreign and security policy ... and the guidelines defined by the European Council*

2.1. Article 23 - constructive abstention

Constructive abstention is not a new innovation in the treaties. Article 205(3) (148(3)) of the TEC states that "abstentions by members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity". Almost the exact wording is now used, however, for the first time in the second pillar in article 23. Referring to common strategies the article stipulates that "abstentions by members in person or present shall not prevent the adoption of ... decisions". The difference between the two forms of constructive abstention is that in the first pillar the decision binds the Union as a whole, including the abstaining member states; whereas in the second pillar the decision does not bind the abstaining member state. Nevertheless, article 23 of the Amsterdam Treaty includes a mutual solidarity clause similar to that of declaration 27 of the TEU. Article 23 states that "In a spirit of mutual solidarity, the Member States concerned shall refrain from any action likely to conflict with or impede the Union action...". If the member states wishing to abstain from a given action or position represent more than one third of the votes as outlined by qualified majority, then the decision is not adopted.

Interestingly an "emergency brake" has been inserted into a different element in the second pillar, namely to the adoption and implementation of joint actions and common positions. When a unanimous common strategy has been established – with or without constructive abstention – joint actions and common positions can be adopted by qualified majority. However, if a member state declares that "for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken". In this case the Council can refer the issue to the European Council, which decides by unanimity.

There is no special mention of financing constructive abstention in common foreign and security policy. An exception is made only for financing measures with military

(2) *aimed to promote the identity of the Union and did not impair its effectiveness as a cohesive force in international relations.*

The fact that the enabling clause was dropped in favour of case-by-case flexibility was an interesting, but not necessarily a surprising development in the IGC – some member states, such as the United Kingdom, Austria, Ireland, Greece, Sweden and Denmark, were opposed to the enabling clause in the second pillar. In the early debates on flexibility France, Germany, Italy, Luxembourg and Belgium had argued that flexibility was particularly needed in the second pillar (see chapter 4). In the end, however, no real flexibility was established in common foreign and security policy.

or defence implications. In these cases non-participating member states are not required to contribute. This could be problematic because a given member state could theoretically choose not to participate in a common position or a joint action only in order to be able to avoid the cost (Stubb 1997).

It should also be mentioned that article 24 enables the Union, for the first time, to sign up to international agreements within the second pillar. This substitute to a full legal personality requires unanimity. Nevertheless in principle it should be possible for a member state to abstain. Much like in the third pillar the entry into force of these agreements can take place before they have been approved in all member states.

3. PRE-DEFINED FLEXIBILITY

Pre-defined flexibility is the mode of flexible integration which covers a specific field, is pre-defined in all its elements, including its objectives and scope, and is applicable as soon as the treaty enters into force. Pre-defined flexibility can be established only in IGCs, by unanimous decision. Exceptions to this rule were the four Danish derogations (defence, citizenship, police cooperation and EMU) which were issued at the European Council of Edinburgh and later attached to the Maastricht Treaty. In the Amsterdam Treaty, pre-defined flexibility was primarily established in protocols and declarations to take account of the different situations of the United Kingdom, Ireland and Denmark. For the United Kingdom and, as a consequence, for Ireland it was a question of maintaining the Common Travel Area (CTA) between the two countries. For Denmark it was a question of competence in areas which have traditionally belonged to the nation state. The Danish problem was both constitutional and political (see chapter 6). Examples of pre-defined flexibility include protocol No. 2 integrating the Schengen *acquis* into the framework of the EU, protocol No. 3 on the application of certain aspects of article 14 of the TEC to the United Kingdom and to Ireland, protocol No. 4 on the position of the United Kingdom and Ireland in the new 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. The most obvious old examples of pre-defined flexibility are the British opt-outs from the Social Protocol and EMU and the Danish opt-outs from EMU, defence, citizenship and police cooperation. Pre-defined flexibility is closely

linked to the notion of à la carte because it gives the member state an opportunity to pick and choose the area of cooperation. It should be borne in mind that the arrangements relating to Schengen and the new title represent the most extensive use of pre-defined flexibility ever created in the first pillar (Edwards and Philippart 1997).

The notion of pre-defined flexibility was an issue which was dealt with in the final stages of the negotiations. This was not surprising since pre-defined flexibility revolves around special arrangements for member states which find it difficult, usually for political reasons, to participate fully in a given area. Only once the scope of cooperation has been decided can special opt-outs then be agreed. Because pre-defined provisions are dealt with late in IGCs they often end up being legally complex. This is the case particularly with the provisions relating to the Schengen agreement, but also with the special provisions for the United Kingdom, Ireland and Denmark, although it has been argued that the legal complexity that emerges from these protocols is due to the fact that there was poor coordination between the negotiations on the new title IV on visas, asylum, immigration and other policies relating to the free movement of persons, the Schengen protocol and the provisions related to the United Kingdom, Ireland and Denmark (Kortenberg 1998, Edwards and Philippart 1997). In the following, pre-defined flexibility will be examined in detail.

3.1. Protocol No. 2 – the incorporation of Schengen

Protocol No. 2 deals with the integration of Schengen into the treaty framework. The protocol creates an interesting and complicated form of pre-defined flexibility. The complexities encountered when incorporating the Schengen protocol into the treaties are explained by the following factors:

- the current Schengen agreement encompasses 13 EU member states
- the United Kingdom and Ireland are not members of Schengen, but are members of the European Union
- Iceland and Norway (Nordic Passport Union) are not members of the European Union, but are associate members of Schengen
- Denmark, a member of Schengen, has special opt-out provisions from the part of the Schengen *acquis* which will be incorporated into the first pillar.

Against this background one of the aims of the 1996-97 IGC was to incorporate the Schengen agreement in such a way that the interests of the Schengen members, the United Kingdom, Ireland and the Nordic Passport Union were respected. The Schengen protocol attached to the Amsterdam Treaty has 8 articles and an annex relating to the Schengen *acquis*.

3.1.1. Articles 1-2 – authorisation and application

Article 1 sets the scene for the rest of the protocol. It authorises the 13 signatory states of the Schengen agreement: "...to establish closer cooperation among themselves... 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". To put it simply, the article authorises the incorporation of the Schengen agreement into the treaty framework.

Article 2 of the protocol provides that from the date of entry into force of the Amsterdam Treaty the Schengen *acquis* shall apply to its thirteen signatory states. From the same date the Council replaces the Schengen Executive Committee. Decisions on the incorporation of the Schengen *acquis* be taken by unanimity and initiatives and provisions will be subject to relevant provisions of the treaties. And indeed: "The Council, acting unanimously, shall determine, in conformity with the relevant provisions of the Treaties, the legal base for each of the provisions or decisions which constitute the Schengen *acquis*".

3.1.2. Articles 3-6 - United Kingdom, Ireland, Denmark, Iceland and Norway

Special arrangements are made for Denmark, the United Kingdom, Ireland, Iceland and Norway in relation to the Schengen agreement. Article 3 of the protocol outlines Denmark's special position both in relation to the Schengen *acquis* which is located in the new title IV and that which finds its legal base in the third pillar. This position is in line with the general Danish approach to new title IV. The protocol notes that Denmark will have the same rights and obligations as the other Schengen members in all legislation which is implemented in the third pillar. If Schengen *acquis* is

transferred to the first pillar, then protocol 5 relating to the position of Denmark in title IV will apply.

Article 4 deals with the United Kingdom and Ireland in relation to the Schengen protocol. It notes that the United Kingdom and Ireland may at any time “request to take part in some or all of the provisions of” the Schengen *acquis*. The accession mechanism is different to that relating to new title IV in general (see below). The Council must decide unanimously whether the United Kingdom and/or Ireland fulfil the criteria to join the Schengen *acquis* in the first or the third pillar.

Article 5 deals with proposals and initiatives which build on the Schengen *acquis*. Whenever the United Kingdom and/or Ireland decide not to take part in a measure which builds on the Schengen *acquis* then the enabling clauses of either the first pillar (articles 43-45) or the third pillar (article 40) will be used as a legal base. This provision allows Schengen members to bypass non-members from the development of the Schengen *acquis*.

Article 6 deals with Iceland and Norway. Iceland and Norway will be associated with the incorporation of the Schengen *acquis* and its further development on the basis of the agreement signed in Luxembourg on 19 December 1996. Nevertheless, the procedure governing the participation (e.g. financial contributions) of Iceland and Norway has been left open and will be decided at a later stage. Their participation is a legacy of the longstanding Nordic Passport Union. Separate agreements will be concluded, also at a later stage, for the establishment of rights and obligations between the current *Schengen* countries and Ireland and the United Kingdom on the one hand, and Iceland and Norway on the other.

3.1.3. Articles 7, 8 and annex – the Schengen Secretariat, enlargement & *acquis*

Article 7 deals with the integration of the Schengen Secretariat into the General Secretariat of the Council. The Council decides on the modalities of these issues by qualified majority. Article 8 is revolutionary in that it provides that the Schengen *acquis* and further measures taken by Schengen participants are “regarded as an *acquis* which must be accepted in full by all States candidates for admission”. This is a clear indication that the Schengen *acquis* has become general *acquis*. It remained

unclear when the treaty was signed what the actual Schengen *acquis* comprised. The *acquis* is approximately 3,000 pages of secondary legislation which have accumulated since the signing of the Schengen implementation agreement of 1990. The Amsterdam Treaty defines the Schengen *acquis* in half a page, citing the agreements, conventions, accession protocols, decisions and declarations established under the Schengen Agreement.

3.2. Protocol No. 3 – the United Kingdom and Ireland on border control

Protocol No. 3 relates to the application of certain aspects of Article 14 (7a) of the TEC. It deals with the special arrangements of the United Kingdom and Ireland in relation to free movement. To a certain extent the article is a codification of existing practice and as such was not really negotiated in the IGC. Nevertheless, the protocol takes into account the special geographical aspects of the United Kingdom and Ireland, including their Common Travel Area. The specific reference of the protocol is to external border controls.

3.2.1. Article 1 – external border controls of the United Kingdom and Ireland

Article 1 of the protocol focuses on the right of the United Kingdom to maintain its external border controls. The article states that: "The United Kingdom shall be entitled...to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary...".

3.2.2. Article 2 – the CTA between the United Kingdom and Ireland

Article 2 relates to the CTA between the United Kingdom and Ireland. The article states that: "The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories...while fully respecting the rights of persons" from other member states and the European Economic Area (EEA). In this clause we can already see that Ireland has been pushed into the opt-outs mainly due to circumstance, i.e. its special relationship with the United

Kingdom. This trend will become more obvious in the opt-out provisions from new title IV.

3.2.3. Article 3 – reverse guarantees for the other member states

Article 3 reverses the guarantees for the other member states. That is to say “the other Member States shall be entitled to exercise at their frontiers or at any point of entry into their territory [similar] controls on persons” coming from the United Kingdom.

3.3. Protocol No. 4 – the UK and Ireland in title IV

As mentioned above, the Amsterdam Treaty transfers a number of issues from the third to the first pillar. As a result a new title IV on visas, asylum, immigration and other policies related to free movement of persons has been created in the first pillar. The United Kingdom, Ireland and Denmark have opt-outs from this title. The nature of the opt-outs and possible opt-ins is different, but the bottom line is the same: all three countries can pick and choose how and when they want to participate in legislation based on the new title. In the following, the special provisions for the United Kingdom and Ireland will be examined.

3.3.1. Articles 1 and 2 – authorisation and application

Article 1 of the protocol states that the United Kingdom and Ireland shall not take part in legislation adopted pursuant to the new title. On an institutional level the two member states do not figure in the qualified majority and unanimity calculations. Article 2 provides that none of the provisions, measures, provisions of any international agreement or any decision of the Court of Justice relating to the new title is binding on or applicable to the United Kingdom or Ireland. As if to make sure that they have no effect on the non-participating member states the article restates that “no such provision, measure or decision shall in any way affect the competences, rights and obligations of [non-participating] States”, nor shall it “in any way affect the acquis communautaire nor form part of Community law as they apply to the United Kingdom or Ireland”. This strong wording is a clear indication that the United Kingdom, in

particular, wanted to be 100 percent sure that the new title would have little or no effect on its policies.

3.3.2. Articles 3-8 – institutional questions

Article 3 deals with the way in which the United Kingdom and/or Ireland can join legislation based on the new title. The United Kingdom and/or Ireland can notify the Council within three months after a proposal or initiative has been presented, that it/they wish to take part in the new legislation. It should be pointed out, however, that a declaration of intent to join cannot be used to delay or block the decision-making process. The second paragraph of the article explicitly states that the Council may adopt the measure without the participation of the United Kingdom and/or Ireland if it/they does/do not intend to participate within a “reasonable period of time”.

Article 4 of the protocol enables the United Kingdom and/or Ireland to declare that it/they wishes to accept a measure based on the new title. The procedure for adapting the measure retrospectively is outlined in article 40(3) which deals with the required mechanism for joining closer cooperation. Article 5 provides that the non-participating member states bear no financial consequences, save administrative expenditure, of the new title. Article 6 of the protocol specifies that where the United Kingdom and Ireland are bound by a measure taken under title IV “the relevant provisions, including article 68 [preliminary ruling procedure for the ECJ], shall apply to that State in relation to that measure”. In other words, if either (or both) of the member states participate in a measure under title IV, it/they is/are also subject to the scrutiny of the ECJ.

Article 7 of the protocol makes explicit reference to the Schengen protocol. It argues that the provisions of the new title “shall be without prejudice to the Protocol integrating the Schengen acquis into the framework of the European Union”. Article 8 illustrates the United Kingdom’s and Ireland’s different approaches and attitudes to the new title. The article notes that “Ireland may notify the President of the Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the normal Treaty provisions will apply to Ireland”. This means that Ireland can waive the protocol at any time. The same possibility does not exist for the United Kingdom. If it wants to reverse the effect of the protocol an IGC will have to be organised. In addition to article 8 of the protocol there is an Irish declaration to the

final act of the treaty. The declaration states that Ireland will take part in the adoption of measures under the new title to the maximum extent compatible with the maintenance of its CTA with the United Kingdom.

3.4. Protocol No. 5 – on the position of Denmark

Protocol No. 5 relates to the special position of Denmark in three issues in particular: the Schengen agreement, the new title IV on visas, asylum, immigration and other policies related to free movement of persons, and defence. The protocol is a legacy of the special provisions on citizenship, EMU, defence and police cooperation that were established at the European Council of Edinburgh in 1992. It is interesting to note that the protocol was never discussed in the IGC and it was crafted in Amsterdam in secrecy by representatives of the Danish delegation and the Council Secretariat, away from the other member states (see chapter 6).

3.4.1. Articles 1-4 – authorisation and application

Articles 1, 2 and 3 largely correspond to provisions in the protocol on the position of the United Kingdom and Ireland in the new title IV. Article 1 states that Denmark will not take part in the adoption by the Council of measures taken under the new title. Article 2 notes that the measures taken under the new title will not be binding on Denmark. And article 3 provides that Denmark shall bear no financial consequences, other than administrative costs, of the new title. Here, however, the similarities to the British-Irish protocol end. Whereas none of the three countries have to participate in measures based on the new title, in contrast to the British-Irish protocol, article 4 notes that Denmark will participate in measures already taken under the old article 100c which referred to visa policy. And there is no equivalent need for the Danish protocol to make reference to article 14 (7a).

3.4.2. Article 5 – institutional provisions

The biggest difference between the three member states is that the Danish protocol does not provide any possibility for an opt-in. There is no equivalent in the Danish Protocol to articles 3, 4 and 6 of the United Kingdom and Ireland protocol. As a consequence no Community law relating to the new title can be applied to Denmark for

as long as it does not, in full or in part, waive the application of the protocol. Danish participation in the new title is truly *sui generis*. Denmark has six months, after a decision by the Council to build on the Schengen *acquis* under the new title, to declare whether it is going to implement the decision in national law. If it decides to do so, the decision will create an obligation under international law between Denmark and the other member states. It is no surprise that this protocol has been described by some as "truly bizarre" (Edwards and Philippart 1997).

The Danish opt-out is a response to constitutional obligations and a sceptical public opinion which fears any transfer of competence to the Community level. Nevertheless, the Danish position on the new title and especially the incorporation of Schengen is somewhat contradictory to its reputation as a promoter of democracy and transparency. Some commentators have correctly pointed out that Denmark seems to be resisting "those aspects of the integration of the Schengen *acquis* which are highly positive..." (Shaw 1998, p.18). Since the Schengen agreement established outside the treaty framework has often been considered to be secretive and undemocratic, it is easy to say that in its chosen approach "Denmark seems to be sacrificing democracy and openness on the altar of resistance to encroachment in its state sovereignty" (Shaw 1998, p.18).

3.4.3. Article 6 - defence

Article six codifies the Danish opt-out from defence. The article states that "Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications". In the same vein the article notes that Denmark will not prevent the closer cooperation of member states in that area. Denmark will not participate in or pay for operational expenditure arising from defence measures.

3.4.4. Article 7 – abolishing the protocol

Denmark, much like Ireland, can at any time notify the Council that it no longer wishes to avail itself of all or part of the protocol. In this case it will apply in full all relevant measures that have been taken on the basis of the new title IV. This is a clear

indication that Denmark will most probably try to participate in most, if not all, of the new measures and when the time is right it will abolish the whole protocol and participate fully in the new title IV.

3.5. Summary of pre-defined flexibility

Most pre-defined forms of flexibility – protocols 2, 3, 4 and 5 - were subject to negotiation only in the final stages of the IGC. The incorporation of the Schengen agreement provided an exception to the rule in that it was discussed throughout the Dutch Presidency. The special provisions for the United Kingdom and Ireland in relation to article 14 and title IV were sorted out in bilateral negotiations with the Presidency some two weeks before the European Council of Amsterdam. The Danish opt-outs from title IV and Schengen *acquis* in the first pillar were discussed bilaterally in Amsterdam. Pre-defined flexibility is a clear example of differentiation which is forced into the system by political necessity and negotiated bilaterally with the parties involved. Perhaps the bilateral nature of developments is the reason for these provisions seeming somewhat inconsistent and complex.

Pre-defined flexibility is the most radical form of flexibility introduced into the Community pillar (Edwards and Philippart 1997). In essence it allows a limited number of member states to opt out from one of the most fundamental principles of the Community – namely the development of free movement of persons. The reasons for the opt-outs are as different as the rules governing the articles themselves (see chapters 4, 5 and 6). There has been much criticism of pre-defined flexibility because it is seen as à la carte integration which allows member states to pick and choose the policy areas in which they want to participate. Perhaps this is the case, but one should bear in mind that the incorporation of these provisions was necessary if any progress in Schengen and the transfer of competence from the third to the first pillar was to be made. So it might be seen as a small step backwards in order to be able to take further steps along the road to full integration.

CONCLUSION

The new flexibility provisions in the Amsterdam Treaty have been subject to criticism. Commentators have seen some positive but many negative sides to the new provisions. On the positive side it has been argued that the institutionalisation of flexibility has minimised the temptation of establishing differentiated arrangements outside the treaty framework and hence created the tool for managing diversity within the Union (Ehlermann 1997, Shaw 1998, Curtin 1997, Stubb 1997b, 1998, Edwards and Philippart 1997). It has also been argued that the new provisions might turn out to be useful instruments in relation to enlargement (Monar 1997, Stubb 1997b, 1998, Kortenberg 1998). Furthermore some commentators have said that one of the good points about the new clauses is that they allow the willing and able member states to pursue deeper integration and hence the new clauses will be a source of dynamism for the Union (Kortenberg 1998, Monar 1997, de La Serre and Wallace 1997).

But most of the commentary thus far has been negative. Curtin (1997), pointing to the lack of transparency and adequate parliamentary control, has called some of the elements of the new flexibility clauses, especially the incorporation of the Schengen Agreement, a "poisoned chalice". Monar (1997, p.27) has argued that the system "opens the door for political and legal fragmentation, increased complexity, and additional strain on the institutional system". Indeed much of the focus of the criticism has stressed the legitimacy deficit of the system – namely the lack of coherence, transparency and democratic control of the new clauses (Nomden 1997, Monar 1997, Edwards and Philippart 1997, Shaw 1998, Edwards 1997, Scott 1997). Nevertheless most of the commentary has had one thing in common: the new flexibility provisions have been seen as a Pandora's box with a high degree of uncertainty as to how, where and when the flexibility clauses will be used.

The rules and regulations of the different forms of flexibility are as diverse as the provisions themselves. Enabling clauses require a minimum of eight member states. The bottom line is that the enabling clauses entail a different set of objectives for the member states that are both willing and able to build on the *acquis* further. Case-by-case flexibility is radically different from the enabling clauses in that it is more of a decision-making mechanism than a form of flexibility. It allows a number of member

states – anywhere from one to three – to abstain from a given decision in the second pillar. No IGC decision is required and the member states can decide, on a case-by-case basis, the areas in which they want to pursue different objectives. Finally pre-defined flexibility takes differentiation to the extreme by allowing the *acquis* to be undermined by the United Kingdom, Ireland and Denmark. The objectives, which must be established in an IGC, are very different for the three member states that have been allowed to opt out.

The aim of this chapter was not to discuss all the problems related to the new flexibility provisions, rather it was to outline the content of the new articles and highlight some of the key areas in which flexibility was institutionalised in the Amsterdam Treaty. The aim was to examine what happened. In the chapters that follow the task will be to examine and analyse how and why the negotiations resulted in the set of articles which have been outlined here. In the concluding chapter the thesis will pay closer scrutiny to the future prospects of flexibility and raise a number of questions which were perhaps overlooked by the negotiators. Part 2 of the thesis deals with the actual 1996-97 IGC negotiations which led to the institutionalisation of flexibility in the Amsterdam Treaty. The preceding chapters have set out the framework for this empirical examination. Chapter 1 established some tools for analysis, chapter 2 examined the flexibility debate since 1974 and this chapter outlined the new flexibility provisions. Now it is time to look at the process of the IGC negotiations on flexibility and determine why and how the new flexibility provisions came about. This will be the subject of chapters 4, 5, and 6.

PART 2

THE PROCESS

Chapter 4

THE AGENDA-SETTING STAGE: FROM CORFU (JUNE 1994) TO TURIN (MARCH 1996)

INTRODUCTION

The 1996-97 IGC process can be divided into three stages: agenda-setting (Kingdon 1984), decision-shaping and decision-taking. This chapter deals with the first of these three stages beginning with the European Council of Corfu in June 1994 and ending with the European Council of Turin in March 1996. It was during this period of setting the agenda that some of the most important questions on flexibility were raised and member governments were forced to start thinking about differentiation. From Corfu to Turin the institutions and the member states discussed and assessed various forms of flexibility. The flexibility debate was wide-ranging: academics, think-tanks, member state governments and institutions alike were involved. Nevertheless, Schäuble and Lamers (1994), Major (1994b) and Balladur (1994) launched the debate and the Reflection Group suggested to the IGC that flexibility should be on the agenda.

It is important to look at the political context in which the flexibility debate was launched in 1994. The Maastricht Treaty had in many ways institutionalised differentiation in its approach to EMU and opt-outs for the United Kingdom and Denmark. Hence the task for the follow up IGC was whether this principle should be extended or generalised. The key areas in which the member states had disagreed on the degree of integration related to EMU and the intergovernmental second and third pillars. Some member states had the will and ability to pursue deeper integration in all or some of these areas, others had the ability but not the will, yet others had the will but not the ability and finally some had neither the will nor the ability to participate (see below). The basic question became: what are the member states willing and able to do together? Domestic debates in respective member

states revolved around three key themes: meeting the convergence criteria for EMU, the European security structure and enlargement. All of these issues were linked to flexibility in one way or another.

This chapter seeks to demonstrate that the flexibility debate during the agenda-setting stage was characterised by a high level of uncertainty and unpredictability. The debate comprised a loose collection of floating ideas in which there was little coherence and the negotiators appeared to be discovering preferences through action – they did not seem to act on the basis of specific pre-established preferences. It was clear in the early flexibility debate that observers and participants did not necessarily understand the nuances of flexibility – it meant different things for different people. They operated on the basis of simple trial-and error and the pragmatic inventions of necessity.

This chapter also examines the three different negotiating angles outlined in chapter 1 – *environment, process and style* - during the agenda-setting stage. The negotiating environment was perhaps not as objective and independent as had been intended when the Reflection Group was established. The idea had been that a group of free thinking individuals should establish the preliminary agenda for the 1996-97 IGC. The problem was twofold. Firstly, the members of the group were labelled as the “personal representatives of the Ministers for Foreign Affairs”. This meant that they were tied to respective Foreign Ministries and most of the ideas presented reflected positions of the member states rather than objective assessments of the issues for the agenda of the IGC. The second problem was that the group was too diverse, it contained politicians, civil servants and academics. Consequently some of the members of the group were negotiating, others reflecting and yet others making politics.

The central argument of the chapter is that the Schäuble and Lamers paper set the flexibility debate off on the wrong foot because it was interpreted by many observers as a first step towards a permanent core of member states which would drive the integration process forward. Those countries not mentioned in the Schäuble-Lamers paper were afraid of exclusion and took a defensive stance towards flexibility. Moreover the variety of flexibility visions from the three largest countries – Germany, France and the United Kingdom – meant that the other member states had to start thinking about flexible solutions in more depth. The problem, however,

was that the three big member states had not given much thought to the practical aspects of flexibility and were not able clearly to explain what they actually meant by flexibility. After the early visions it was the task of the Reflection Group to clarify the debate and come up with different options for the institutionalisation of flexibility.

This chapter tries to answer four basic questions:

- (1) What was the political context in which the flexibility debate was launched?
- (2) Why did flexibility emerge on the IGC agenda and what were the underlying issues?
- (3) Who were the main actors influencing the flexibility debate?
- (4) What were the early positions of the member states and why did they adopt these positions?

In order to answer these questions the chapter is divided into four parts:

- (1) The political context of the flexibility debate
- (2) From Corfu (June 1994) to Rome (June 1995) – Schäuble and Lamers
- (3) From Rome to Madrid (December 1995) – the Reflection Group
- (4) From Madrid to Turin (March 1996) – the reports of the member states.

The first part examines the political context in which the flexibility debate was launched. Special focus will be given to debates on EMU, CFSP, JHA, enlargement and the recalcitrance of certain member states to pursue deeper integration. The second part examines the informal political debate and the formal institutional debate from the European Council of Corfu in June 1994 to the launch of the work of the Reflection Group in June 1995. It was during this period that the Schäuble and Lamers paper was released. This section will primarily consider the domestic context of the flexibility debate and the reactions of the member states to the Schäuble and Lamers paper. The third part examines the work of the Reflection Group from June 1995 to the submission of its final report in December 1995 in Madrid. It was during this period that some of the key concepts and categories of flexibility began to take form. This section will look at the ideas floated by the members of the Reflection Group and assess the impact of the group on the rest of the flexibility debate in the 1996-97 IGC. The fourth part looks at the early position papers of the member states up until the beginning of the IGC in Turin in March

1996. The conclusion to the chapter assesses the state of the debate in March 1996.

1. THE POLITICAL CONTEXT – FROM MAASTRICHT TO CORFU AND BEYOND

This section examines the political context in which the flexibility debate was launched. Few negotiations of IGC calibre take place in a political vacuum. The early 1996-97 IGC debate on flexibility was influenced by a set of external events which forced flexibility on to the agenda. As argued in chapter 2 debates on flexibility in the EU context emerge for five key reasons: uncertainty about participation in economic and monetary union, a desire by certain member states to develop the defence dimension of the Union, a willingness to improve the work relating to justice and home affairs, the need to accommodate enlargement and a desire to bypass awkward member states. The 1996-97 IGC was different from previous Conferences in that all of these five issues were on the agenda. These five main issues were a legacy of the Maastricht negotiations (Kaufmann 1997, Padoa-Schioppa 1995, Laursen and Vanhoonacker 1994), the 1995 enlargement and the possibility of subsequent enlargements, constraints in the Franco-German relationship – including fears of German hegemony after re-unification (Nonnenmacher 1993, Kohl 1993 and 1995, Ross 1995), economic convergence problems - notably the currency turmoil and devaluations in Italy, Spain and the United Kingdom, the desire to improve cooperation in the second and third pillars and the recalcitrant position of the British government (Baker 1994, Edwards and Pijpers 1997). These issues formed the political backdrop against which the flexibility debate was launched in 1994.

At Maastricht it became evident that a clear consensus on the ultimate goals of integration no longer existed. This was characteristic of the differentiation that resulted from EMU, the new pillar structure and opt-out clauses for individual member states. Member states disagreed about the degree of integration in three key areas: EMU, CFSP and JHA. The convergence criteria meant that not all member states would participate in the third stage of EMU from the beginning. The creation of the pillar system reflected the longstanding division between

supranationalist member states, such as France and Germany, and intergovernmentalists, such as the United Kingdom: both internal and external security ended up being treated as semi-detached areas of the EC characterised by traditional intergovernmental cooperation (Harmsen 1994). A further differentiation was provided in the form of opt-outs from EMU and the Social Protocol for the United Kingdom and opt-outs in the areas of defence, police cooperation, citizenship and EMU for Denmark. The differentiation which took place at Maastricht raised questions about which member states would participate in which areas, and what kind of structures and formulae would be adopted for their management. The widespread use of flexibility in the TEU represented a point of departure in recognising fundamental structural separation on the moves towards deeper integration and the objectives of political Union (Duff 1997, Edwards and Pijpers 1997).

The ratification of Maastricht turned out to be more difficult than expected. The Danish people rejected the new treaty in a referendum and in France the TEU was approved by a very narrow margin. There was a crisis of confidence in the integration process which was also reflected in the domestic arena – member state governments had to find ways in which to convince the public of the merits of EU integration. This was followed by a growing acceptance that some member states should integrate more closely and quickly than others. In practice this would mean that an EMU core would be created around France, Germany and the Benelux countries, but leaving Britain and Italy out.

Another issue which related to the emerging flexibility debate was the collapse of the ERM in 1992. This resulted in a tiering of monetary relations where a core group maintained a narrow exchange rate link, other participants formed an inner circle around a fifteen percent band and three member states formed an outer circle outside the mechanism (Arrowsmith 1995). This fracturing highlighted the domestic strains member states were facing in their attempt to convince the domestic arena of the merits of EU integration (H. Wallace 1993). The German government, in particular, had to work hard to convince the *Länder* of the long term credibility of EMU, especially after the currency turmoil which led to devaluations in Italy, Spain and the United Kingdom.

By 1995, after the complications of ratifying the Maastricht Treaty, the preparations of the 1996-97 IGC were further constrained by the accession of three new members: Finland, Sweden and Austria. This enlargement tipped the balance northwards, highlighting new problems with the EU's poorer southern member states such as Spain, Portugal and Greece. Underlying this tension was a tacit fear that the three new, formerly neutral, now militarily non-aligned, countries would slow down developments in the second pillar¹. Those fears later proved unfounded as Finland and Sweden took one of the most substantial foreign policy initiatives in the IGC by suggesting that the Petersberg Tasks should be incorporated into the treaty. Nevertheless, those ill-conceived assumptions partially fuelled the debate about flexible arrangements in the second pillar.

Second pillar flexibility was on the agenda for three further reasons. Firstly the TEU had provided in article J.9. that the next IGC should "examine whether any other amendments need to be made to provisions relating to the common foreign and security policy". The aim was to establish how the second pillar had functioned in its first few years. Another reason for dealing with second pillar flexibility was connected to EU experiences in former Yugoslavia and the Middle East. The effectiveness of CFSP since 1991 had been criticised, which gave many member governments the political incentive for pursuing flexible integration. Finally, second pillar flexibility was on the agenda because of the confusion between the rhetoric of a Franco-German core (Eurocorps), Franco-British cooperation in Bosnia and German-British cooperation in NATO (ARRC).

It should also be pointed out that Franco-German relations had been strained both during the Maastricht negotiations and in the build-up to the 1996-97 IGC. Germany's increased economic weight resulting from unification had rekindled fears of German economic and political hegemony (Nonnenmacher 1993). The French were wary of Germany's new position as a central European power which was extending its sphere of influence towards the Central and Eastern European Countries (CEEC). The fear was that the role of France in the Franco-German axis would be marginalised. Politically France and Germany were at odds in a plethora of issues ranging from the future nature of Europe's security policy to the economic implications of enlargement. EMU, however, was at the heart of the tension. The

¹ It should be pointed out that the Finnish accession agreement contained a clause in which Finland

French government opposed the strict application of the convergence criteria because it imposed excessive domestic political pressure to cut public spending. The possibility of a two-tier monetary structure would exacerbate the problems and with EMU Germany would take an even more central role in both economic and political questions. Previously France had considered itself in charge of political matters in the EU and Germany in charge of economic matters. Increasingly Germany was taking the lead in both.

The recalcitrant attitude of the British government served to add a further element to the emerging flexibility debate. Following the collapse of the ERM and the problems of Maastricht ratification, the British government found itself in a full blown civil war on European questions (Baker 1994). The government had to take an increasingly eurosceptic approach to the EU because the Conservatives found themselves at the mercy of a group of whipless Euro-rebels. The British government was further immobilised by the resignation of Prime Minister John Major one week before the European Council of Cannes. Despite Major's reinstatement after a brief leadership battle against John Redwood the British government was increasingly paralysed by domestic constraints (see below). The British position relating to the development of the third pillar in general and the incorporation of the Schengen Agreement into the EU also fuelled the debate about flexibility.

2. FROM CORFU (JUNE 1994) TO ROME (JUNE 1995) – SCHÄUBLE AND LAMERS

It was in this political context – EMU, CFSP, JHA, enlargement and British recalcitrance - that Schäuble and Lamers (1994), and shortly after, Major (1994b) and Balladur (1994), launched the flexibility debate. The preparations for the 1996-97 IGC began officially with the European Council of Corfu in June 1994. The European Council suggested that a Reflection Group should prepare the Conference (European Council of Corfu 1994). This was the official signal that debate on the next IGC could begin. It was also in stark contrast to the pre-Maastricht debate which had been virtually non-existent. The member states did not

want to make the same mistake again and urged for the debate to be open and frank – and indeed this was the case, at least up until the beginning of the IGC (see below). The debate took place on two levels: a formal institutional level and an informal political level. This section will look first at three key papers relating to flexibility – Schäuble and Lamers, Major and Balladur – with an emphasis on the Schäuble and Lamers paper which provided the springboard for the flexibility debate before the 1996-97 IGC. The second part of the section analyses the reactions of the member states to the Schäuble and Lamers paper and sketches the general approaches of member states to European integration and flexibility, and the domestic context in which the debates took place.

2.1. Launching the flexibility debate – September 1994

2.1.1. Schäuble and Lamers – 1 September 1994 – the “single core” argument

Between June and August 1994 there was virtually no debate on the upcoming IGC. This was no surprise since the work of the Reflection Group was not due to begin for another year and the actual IGC not for another twenty-one months. However, on 1 September 1994 the flexibility debate was launched in relation to the 1996-97 IGC by a controversial paper published by two high ranking CDU/CSU politicians, Wolfgang Schäuble and Karl Lamers. Schäuble and Lamers outlined their vision on the back of the German Presidency, *Bundestag* elections, and a domestic debate about German reluctance to shoulder the burdens of EMU and enlargement (see below). The paper had five interrelated aims: the further strengthening of the EU's hard core, raising the quality of Franco-German relations to a new level, developing the EU's institutions further, improving the Union's capacity in foreign and security policy and expanding the Union towards the East. All were related to the notion of flexibility.

The central claim was that the “hard core” of the EU should be strengthened. Schäuble and Lamers argued that in spite of the considerable legal and practical difficulties involved, flexibility should be institutionalised as far as possible in the new treaty. Otherwise the approach would be limited to intergovernmental cooperation and would encourage à la carte integration. According to the authors, a

flexible approach was necessary in order to stop those member states "which wish to pursue closer cooperation and integration from being prevented from doing so by other member states' vetoes" (Schäuble and Lamers 1994, p.3). The hard core would counter the centrifugal forces of an ever expanding Union with a strong centre able to avoid division between a more protectionist southern and western group led by France; and a northern and eastern group, led by Germany, committed to free trade. The authors claimed that monetary union and defence cooperation should be the core of both economic and political union. Therefore it can be argued that this part of the paper was addressed directly to those member states which were reluctant to join either EMU or defence cooperation.

The controversy surrounding the document (see 2.2.) stemmed from the claim that only five member states - Germany, France and the Benelux countries - would form the functional hard core of the Union. Schäuble and Lamers wanted to make sure that the integration process would go forward, regardless of the will and ability of all the member states. The assumption was that only the five core countries would meet all the criteria for core membership. Italy, Spain and Portugal might be willing and able to join the political core, but would not be able to participate in deeper economic and monetary integration. Finland, Sweden, Ireland and Austria would be willing and able to participate in the EMU core, but would most probably opt-out from closer defence cooperation. The United Kingdom and Greece would be left outside the core all together, the former for lack of will and the latter for lack of ability in monetary matters.

The second aim of the Schäuble and Lamers (1994, p.4) paper was to "raise the quality of the Franco-German relations to a new level". France and Germany were to form the "core of the hard core" and no significant action in any EU policy was to be taken without prior consultation between the two parties. Schäuble and Lamers clearly directed their ideas at France. Previously progress in European integration had been, at least partially, driven by France and Germany. Schäuble and Lamers had observed post-Maastricht cracks in the Franco-German relationship and tried to revive both the French and the German debate on issues such as enlargement. The aim was to reduce French fears of German hegemony in the centre of Europe, while at the same time force France to take a more active leadership role within the Union.

The third aim of the Schäuble and Lamers paper was more subtle. The claim was that the development of the EU's institutions should be based on a set principles ranging from democracy to subsidiarity. For our purposes the most interesting suggestion was that the development of the institutions "must combine coherence and consistency with elasticity and flexibility" (Schäuble and Lamers 1994, p.3). The bottom line was that widening and deepening would lead to an increase in heterogeneity and hence it would become increasingly clear that not all member states would have the will and ability to pursue the same lines of integration in the future. It would be important to make sure that no country would be allowed to use its right of veto to block the efforts of other countries wishing to pursue further integration. Implicit in this message was the need to bypass recalcitrant member states, such as the United Kingdom.

The fourth aim of the Schäuble and Lamers paper (1994, p.5) was to improve "the Union's capacity for effective action in the field of foreign and security policy". This aim was partially tied to the fear that newcomers such as Finland, Sweden and Austria, would be reluctant to back further integration in the second pillar. The suggestion was also partially addressed to the United Kingdom. The authors noted that the creation of a hard core and the strengthening of Franco-German cooperation did not "imply the abandoning of hopes that Great Britain will assume its role 'in the heart of Europe' and thus in its core" (Schäuble and Lamers 1994, p.5). It is interesting to note the underlying contradiction in the proposition about the second pillar and the role of Britain - Germany was not willing or indeed able to accept the full implications of a common security and defence policy and hence it tried to include all large member states in the security community.

Finally the Schäuble and Lamers paper dealt with enlargement. The argument was that in order to allow for economic adjustment there had to be very long transitional periods. The authors promoted flexible solutions as an instrument for enlargement by claiming that the sooner enlargement took place the less it would cost the Union and its members in the long run.

In sum, all the issues that were dealt with in the Schäuble and Lamers paper – the hard core, the Franco-German relationship, institutional change, CFSP and enlargement – were linked to the notion of flexible integration. The hard core in any flexible arrangement would be led by France and Germany. Institutional change in

the 1996-97 IGC was to guarantee that those member states which were both willing and able would be able to pursue deeper integration especially in the field of security, foreign and defence policy. And all of these changes would, the authors argued, facilitate the next enlargement of the Union. It was to these ideas that Major and then Balladur responded.

2.1.2. Major – 7 September 1994 – the “no core” argument

The Schäuble and Lamers paper was the main springboard for launching the flexibility debate for the 1996-97 IGC – it put flexibility at the top of the agenda. Only a week later, on 7 September 1994, John Major delivered a speech on flexible integration at the University of Leiden. Against the backdrop of turmoil within the Conservative party (see 2.2.2.1.), the Leiden speech set out Major's intergovernmental vision for a solution to the practical problems facing the EU, backed up with specific ideas on how best to proceed, at a stage when many members were vying to impose their views. Major's vision of a “wider not deeper” Europe involved the notion of a pick-and-choose Europe. He argued that he was not advocating chaotic non-conformity but rather the application of opt-out clauses such as those introduced by the TEU.

The Leiden speech illustrated the paradox of the British position: on one hand the government wanted to be at the “heart of Europe” and on the other hand it wanted to stay outside key cooperation such as EMU and Schengen, which struck at the heart of national sovereignty. The British government recognised that greater flexibility would be a crucial management tool for an increasingly heterogeneous Union. Yet there was a tacit fear that increased flexibility would lead to the creation of a Schäuble-Lamers-like federal hard core. Flexibility meant that Britain could continue to opt-out from core policies, but it also meant that the British government would be excluded from key decision-making in the Union. This stance was reflected in the Leiden speech where Major took issue with the Schäuble and Lamers paper by welcoming its emphasis on a more flexible Europe, but rejecting the creation of a hard core. According to Major (1994b, p.3) “diversity is not a weakness to be suppressed. It is a strength to be harnessed”. He stressed that no member state should be excluded from an area of policy in which it was qualified to participate. The choice should be with the member states themselves. Along these

lines Major argued that he saw "real danger in talk of a 'hard core', inner and outer circles, [or] a two tier Europe" (Major 1994b, p.4) and thus recoiled from an Orwellian Union in which some member states would be more equal than others. As will be demonstrated in subsequent chapters, Major's Leiden speech was a "peak preview" of the awkward relationship which the British government was to have with the concept of flexibility throughout the 1996-97 IGC – flexibility was seen as desirable from the domestic perspective but dangerous from an EU perspective.

2.1.3. Balladur – 30 November 1994 – the “multiple core” argument

French Prime Minister Eduard Balladur responded to these two visions in an article in *Le Monde* on 30 November 1994. His ambition was to extend Europe while at the same time preserving an effective central core. This, according to Balladur, necessitated fundamental institutional reform. He supported a new founding treaty which would incorporate the TEC, the SEA, and the TEU. Under this structure there were to be three organisational concentric circles. The first so-called small circle embraced a small and cohesive group of current member states. The members of this inner circle were to build closer ties among themselves in the fields of monetary and military policy. The middle circle of ordinary law - economic in character - was to encompass an EU with a single market, agreed common policies and a common external security. Though the countries in this circle were unnamed, the underlying assumption was that it would include all the applicant states, although providing some countries with transition periods. The third conglomeration of states - a wider circle - was to encompass those European countries which were not likely to become members in the near future. Balladur envisaged that the number of circles would, in due course, first reduce to two, and later - in the very distant future - to one.

Balladur's concentric circles were largely a defensive attempt to deal with German demands for France to be unambiguously a part of the vanguard. There was nothing particularly new in Balladur's vision – it was more a description of existing reality than an instrument of an enlarged Union (Rossolillo 1995). A closer examination of Balladur's proposal reveals that it diverged from the Schäuble and Lamers paper. Balladur's design rejected the Schäuble and Lamers idea of a federal core, and instead outlined a series of overlapping multiple cores with

differing membership. Balladur pointed out that the centrifugal forces of widening would demand the construction of a more flexible Union. The need for flexibility would also be exacerbated by divergent visions of the direction of European integration among the existing member states. Balladur's proposal was consistent with traditional concepts of Gaullist policy in Europe (Tiersky 1997) and French desires to conduct Europe as a political space (Jenkins 1997). The aim of the Balladur proposal was to locate France at the centre of not only one core, but multiple cores with integration on different levels, among different groupings and within different policy areas (CEPR 1996). The proposal also reflected a French desire to resolve the strained Franco-German dialogue in relation to enlargement and the Mediterranean region. The underlying aim was to maintain France's leadership parity with Germany while at the same time avoiding the division of Europe into two blocs; one centred around Germany and Central Europe and the other focusing on France and Southern Europe.

2.2. Reactions to Schäuble and Lamers

Though all three visions were important, it was the Schäuble and Lamers paper which provoked most reactions. Major's speech and Balladur's article were primarily responses to the Schäuble and Lamers paper. The reactions of each member state will be examined in relation to their respective approaches to European integration and the domestic context in which the debate took place. The member states and future member states (Finland, Sweden and Austria became full members on 1 January 1995) have been divided into two categories: those mentioned in the core and those left on the periphery by Schäuble and Lamers. A general observation which can be made is that the core countries, save the Netherlands, were generally positive to the idea of a core Europe, whereas the periphery was opposed to the creation of a hard core. As far as general flexibility was concerned, the five core countries along with Finland, Sweden, Austria and the United Kingdom tacitly approved of the idea, whereas Spain, Italy, Portugal, Greece, Ireland and Denmark were opposed to it.

Table 3 outlines the general reactions of the member states to the Schäuble and Lamers proposal. The second column signifies reactions to a hard core and the third column outlines the reaction to the idea of flexibility in general. Throughout the

thesis we will examine how and why the positions changed during the Conference. The early reactions were not pillar specific because the proposals did not deal with individual pillars. Many of these reactions can be linked to the general integration preferences of the member states and the domestic context in which the flexibility debate was launched.

Table 3 –General reactions to the Schäuble and Lamers paper

Member State	Reaction to hard core	Reaction to flexibility
Belgium (B)	Cautious	Positive
Denmark (DK)	Negative	Negative
Germany (D)	Cautious	Positive
Greece (GR)	Negative	Negative
Spain (ES)	Negative	Negative
France (F)	Cautious	Positive
Ireland (IRL)	Negative	Negative
Italy (I)	Negative	Positive
Luxembourg (LUX)	Cautious	Positive
Netherlands (NL)	Negative	Positive
Austria (AUS)	Negative	Positive
Portugal (POR)	Negative	Negative
Finland (FIN)	Negative	Positive
Sweden (S)	Negative	Positive
United Kingdom (UK)	Negative	Positive

2.2.1. The core – cautious approval

2.2.1.1. Germany

The basic European policy of most German governments has been described as "a continual effort to push European integration forward, even if the arguments sometimes cause controversy" (Janning and Algieri 1996, p.1). Germany has always seen itself in the core of the European integration process. The Schäuble and Lamers debate was influenced by Germany's changing role within Europe. Unification and the collapse of Communism increased Germany's political, geopolitical and economic weight in the centre of Europe (Anderson 1997). Germany remained firmly committed to European integration, but post-Maastricht Europe presented Germany with new internal and external constraints (Kirchner

1996). Internally there was growing resentment of the EMU project and the cost of Eastern enlargement. The Bundesbank appeared sceptical towards EMU and the SPD opposition was ready to use every opportunity to tarnish the government's policy on the single currency. Externally Germany had to convince its partners that renewed German hegemony in Central Europe was out of the question. However, the argument prevailed that Germany seemed to be actively deploying a policy of exclusion or selective participation in EMU (H. and W. Wallace 1995). Helping to strengthen the French franc, for example, was seen as a political necessity so as to ensure continued French support on EMU (McGuin 1999).

There was an avalanche of reactions throughout the EU to the Schäuble and Lamers paper – ranging from the outraged to the calm and collected (Stubb 1995a and 1995b). A common feature of many was that they were defensive. In other words, most commentators wanted to take distance from the paper and await early reactions from other member states. Nowhere else was this more apparent than in Germany. Germany's Foreign Minister Klaus Kinkel (FDP), for example, opposed the document (*ER* 7.9.1994). He argued that the Schäuble and Lamers paper was the responsibility of those who had written it, "not the government, not the Chancellor, not the Foreign Minister nor his party" (*AE* 14.9.1994). Even though Kohl had first been sceptical he later came out with a statement in which he supported the Schäuble-Lamers paper but criticised the terms used in the text by saying that "as for whether the wording of this text is a model of wisdom and light from all points of view, and above all the diplomatic angle, I do not intend to comment" (*ER* 10.9.1994, *AE* 3.9.1994). Kohl argued in a speech before the German *Bundestag* that he did not want "the slowest ship in the convoy to stop developments within the convoy" (*AE* 8.9.1994). Within the German political elite there was slowly emerging tacit support for some of the ideas launched by Schäuble and Lamers.

2.2.1.2. France

France has also always seen itself at the heart of the European integration process. However, unlike Germany, the policy debate in France regarding the future of the European Union has been characterised by unusually deep divisions among the political elite (Sutton 1993, de La Serre 1996, Enrico 1992, Menon 1996). The ERM crisis, German unification, the prospect of enlargement and the narrow victory in the

Maastricht referendum on 20 September 1992 provoked a fierce debate about the role of France in Europe. Further doubt was cast in March 1993 when President Mitterrand was forced to share power with the right-wing RPR-party professing a classic Gaullist vision of a confederation of European nations. As a consequence France found it increasingly difficult to take the lead in European policy-making. The French domestic debate focused on EMU and its implications for public spending – the immediate political question related to the price France had to pay in trying to meet the convergence criteria. These domestic constraints were coupled with French fears of German hegemony. With EFTA and CEEC enlargement Germany would undoubtedly become the political centre of a wider EU, shifting the balance north-east and pushing France to the periphery. An increase in German influence would mean a decrease in French influence (Baun 1996). The historical paradox in the French position was that much like Germany it wanted a strong Europe, but much like the British the French advocated weak intergovernmental institutions (*Le Figaro* 26.9.1995). In addition France has always advocated a small Europe, preferring deepening to widening. This runs contrary to the German vision of a wider and stronger Europe – increased French resistance to enlargement would run the risk of losing influence to Germany. To put it simply, French elite opinion favoured “monetary union with Germany and the Benelux countries, military cooperation with Britain, foreign policy cooperation also with other Mediterranean states, and political union with no-one” (H. and W. Wallace 1995, p.88).

Against this background it was rather surprising that the early French reactions to the Schäuble and Lamers paper were somewhat reserved. One would have expected a more direct approval in particular of ideas relating to France and Germany as the “core of the hard core”. In an interview President François Mitterrand, for example, said that he was not in favour of a hard core (AE 14.9.1994). Prime Minister Alain Juppé was also sceptical. He noted that even though not everyone could do the same thing at the same time it did not necessarily mean that he accepted the idea of a hard core (AE 14.9.1994). Furthermore, Minister for European Affairs Alain Lamassoure said that he was opposed to an “elitist interpretation of the hard core” (AE 15.10.1994), but nevertheless suggested that some member states could move ahead as long as the institutional unity remained intact (AE 1.2.1995). However, the French slowly warmed up to the idea of a hard core (Cohent-Tanugi 1995, 1996): four months after the publication of the Schäuble and Lamers paper Juppé said that “the possibility has to be left open for

those member states wishing to do certain things more quickly" (AE 12.1.1995). It appears that the French government had not initially thought through the implications of the Schäuble and Lamers proposal. However, there gradually emerged a consensus that some of the ideas outlined by Schäuble and Lamers were in line with French EU policy and indeed the French government began advocating flexible integration. The French debate was further strengthened by flexible ideas outlined by both Valéry Giscard d'Estaing (1994) and Jacques Delors (1994), both of whom embraced the idea of a core Europe, with France and Germany in its centre (Sutton 1993, de La Serre 1996, Martial 1992, Holm 1997, Hoffmann 1993).

These positions, combined with the Balladur (1994) proposal demonstrate that there were differences in the early French and German ideas about flexibility. Using the Schäuble and Lamers paper as a yardstick it would appear that the German position was more focused on the creation of a core around the Franco-German axis whereas the French position suggested a number of different cores around different groupings of member states. The assumption, however, was that France and Germany would participate in all flexible cooperation. It is difficult to judge how much of the Schäuble and Lamers paper was designed to provoke debate and how many of the ideas were meant to be taken seriously. The effect of the Schäuble and Lamers paper, however, was clear: it helped to provoke an important domestic debate in France.

2.2.1.3. Belgium

Since the founding of the Community Belgium has been at the centre of the integration process. Belgium has been a strong advocate of European integration because of its geopolitical location and heavy dependence on foreign trade (Vanhoonacker 1992). As a small state Belgium has capitalised on the opportunities for it to play a major role in supranational institutions. Indeed Belgium has played a major role in the integration process by, for example, proposing the development of closer economic cooperation in the 1950s, which eventually led to the founding of the EEC (Boudart 1990, Dumoulin 1987). Belgian policy towards European integration has always been characterised by a high degree of consensus. It should come as no surprise that the Belgian political elite was in favour of the ideas

articulated by Schäuble and Lamers mainly because Belgium saw itself in the core in both monetary and foreign policy matters.

Belgium's Prime Minister Jean-Luc Dehaene supported some of the hard core ideas, but noted that flexibility should be used as a last recourse and should always move towards a single goal (Dehaene 1995). The Belgian vision of a core was, however, closer to the ideas outlined by Balladur. Dehaene argued that it would be unimaginable that "France, Germany and the Benelux should not be joined by many others" (Dehaene 1995, p.2). He stressed that Belgium was not in favour of a Europe à la carte, however "as Europe is enlarged and becomes more divergent, some kind of differentiation, such as has been elaborated for the EMU, may prove fruitful" (Dehaene 1995, p.2). Moreover he believed that there should not be any exclusions or exceptions: "the final goal must always be the adhesion of all and it is the strong dynamics generated by the hard core which should help to encourage the ulterior participation of the whole in the policy or in the action mitigated by some" (Dehaene 1995, p.3). Foreign Minister Willy Claes indicated cautious approval of the Schäuble and Lamers proposal. Without rejecting the paper he believed that it was better to begin the substantive debate when the reports of the Community institutions were known (RECR 15.12.1994).

2.2.1.4. Luxembourg

Much like Belgium, Luxembourg is an avid supporter of further integration within the European Union. As the smallest member state in the Union - geopolitically squeezed between France, Germany and Belgium - Luxembourg has historically seen its integration into a wider European framework as the best avenue for autonomy (Vanhonacker 1992). The Schäuble and Lamers paper did not stir up much debate in Luxembourg. Generally it was assumed that Luxembourg would be both willing and able to participate in any future flexible cooperation. There were, however, some reservations about the nature of the suggested core. Along the more reserved comments from the core countries, Luxembourg's Foreign Minister Jacques Poos said that the document was "only a paper" and there would be many more before the IGC (interview).

2.2.1.5. The Netherlands

Up until the early 1990s the Netherlands was generally considered a member state with a positive approach towards European integration. The reasons for the positive approach can be derived from its geopolitical location, its advanced economic structure and dependence on the international economy (Wester 1992). The Netherlands has always been at the core of European integration. However, much of the pre-1996-97 IGC debate was influenced by the negative experiences of the Dutch Presidency during the Maastricht negotiations and disputes on the purpose and range of European integration that emerged during the TEU ratification process (Kwast-van Duursen 1996). This position reflected an increasingly hostile domestic debate and concerns about the Netherlands as a net contributor to the Community budget. For a long time there had been few or no disputes about EMU. Much like France and Germany, however, domestic concerns began to focus on the fiscal sacrifices that had to be made in order to meet the convergence criteria. Another factor influencing the debate surrounding the Schäuble and Lamers paper was the composition of the Dutch government. The government comprised Social Democrats, Conservatives and Liberal Democrats. The Conservatives, in particular, were trying to steer Dutch European policy in a more intergovernmental direction, with more emphasis on market integration and substantially less enthusiasm for cooperation in the fields of security and defence. This political divide was to play an important role in the IGC, especially as the representative of the Dutch Foreign Minister, Michiel Patijn, was a member of the Conservative party (see below). The Dutch were both willing and able to participate in EMU, but more reluctant in defence matters. Dutch politicians and government officials did not comment on the Schäuble and Lamers paper, but internally there were debates about the merits of core Europe (interview). The timing of the publication of the document was considered to be inappropriate (interview).

Against this background the Netherlands published four discussion papers on the IGC (see below). One of them had an extensive section on flexibility which was an indirect answer to the issues that had been raised by Schäuble and Lamers (Netherlands 1994). The paper was hesitant about the German core idea because of its possible harmful consequences on the internal market. The Dutch were not against flexibility as such so long as a set of basic criteria were met. The Dutch

position on flexibility indicated a certain hesitance which was to be reflected in the Dutch approach throughout the 1996-97 IGC.

2.2.1.6. Summary of the core

In sum, it should be pointed out that contrary to the assumptions of many observers (Stubb 1995a, Ehlermann 1995), there was not unconditional support for the Schäuble and Lamers paper within the political elites of the core states. Any support for the paper was cautious for three reasons. Firstly, the core countries did not want to offend the other member states by giving the impression that the main task of the next IGC would be to create an exclusive core which would drive the integration process forward in monetary and defence matters. Secondly, there was little consensus of what flexibility, as outlined by Schäuble and Lamers, actually meant. Some of the core countries assumed that Schäuble and Lamers advocated a closed core, whereas others had detected that the paper actually advocated a core which would be open for all willing and able member states. Because no clear definition had emerged, the core states were reluctant to give their outright support to the ideas of Schäuble and Lamers. Finally, it was clear that though the flexibility debate had been longstanding, little thought had been given to the subject in respective capitals. Flexibility was an abstract, plastic concept (Shaw 1997) and as such it was easy to support flexibility in general, but difficult to pinpoint what it would mean in practice.

2.2.2. The periphery – outright rejection

2.2.2.1. The United Kingdom

The United Kingdom has always tended to have an intergovernmentalist approach to European integration (George 1992, 1994, 1996). Europe has been one of the key dividing lines between the Conservatives, Labour and the Liberal Democrats. In the early 1990s the division was exacerbated within the Conservative Party in particular (Grabbe and Hughes 1996). The British ratification of the Maastricht Treaty had fuelled divisions within the Conservatives on Europe. From 1993

onwards the internal division centred on Britain's participation in the single currency. The Euro-sceptics argued that the single currency would increase the Union's federal elements and ultimately lead to the creation of a centralised superstate directed from Brussels. The pro-Europeans claimed that by staying outside the single currency Britain would become increasingly marginalised in EU decision-making.

The campaign for the European Parliament elections in the summer of 1994 demonstrated the extent to which the Conservative Party was divided across policies ranging from EMU to JHA (Williams 1995). In order to find middle ground Prime Minister John Major began advocating a more flexible Union (Major 1994a). In a speech in Ellesmere Port in May 1994 Major had already argued that he "never believed that Europe must invariably act as one on every issue. Trying to make every country conform to every plan" (Major 1994a, p.2). He insisted that allowing member states the freedom to integrate in their own way and at their own speed did not necessarily threaten the dynamics of integration. Major's speech at Ellesmere Port was an attempt to unite the party before the European elections. This was a clear example of the way in which flexibility could be used as a "fig leaf" for real policy making. That is to say, flexibility, in all of its different connotations, could be used to the advantage of both opponents and proponents of integration. For the opponents it was a way to opt-out and for the proponents it was a way to leave others behind and deepen the integration process.

At the annual Conservative Party Conference on 12 October 1994 a group of Euro-sceptics explicitly attacked the Schäuble and Lamers ideas of a federal core. Lord Tebbit, William Cash and Norman Lamont used Major's Leiden speech (1994b) as a mandate to call for an opt-out on progress towards political union or what they regarded as "creeping federalism". Lamont, for example, referring to France and Germany argued that "the European Union has been and will continue to be created in their image and not in ours. All Britain can do is slow down the pace or mitigate the direct consequences that European integration might have on Britain" (*Independent* 12.10.1994). The British government, however, had outlined its vision in Major's Leiden speech: there was strong opposition to a hard core, but a subtle acceptance of flexibility in general (Major 1994b). Foreign Secretary Douglas Hurd, speaking at the *Institut des Relations Internationales* in France, said that he was strongly opposed to the concept of a hard core of countries which "by exclusive

decision place themselves in a different category from their partners" (AE 13.1.1995).

Britain felt that it was being squeezed and threatened by proposals from both France and Germany. In the post-Maastricht era the British were faced with an awkward dilemma. On the one hand they had come out in favour of flexibility in a broad sense because of the opt-outs that they had obtained at Maastricht. On the other hand they soon realised that the ideas behind the German and French reflections on flexibility were rather different from the British ones. It was increasingly clear to the British that by promoting flexibility France and Germany wanted to create an instrument which they could use to surpass the awkward member states in regular Community business. Since the United Kingdom was not going to be part of the third stage of EMU, nor was it willing to pursue further integration in justice and home affairs or defence, the British government became alarmed about the possibility of being excluded from some of the future core policies in the Union. Britain had to start rethinking and rephrasing the ideas that had been presented in Major's Leiden speech. Britain's post-Maastricht position and its subsequent response to the publication of the Schäuble and Lamers paper mirrored a long standing contradiction. The United Kingdom wanted to play a central role in the EU, but it was insistent upon maintaining national control and sovereignty, particularly with regard EMU, CFSP and JHA (George 1996, Young 1993).

2.2.2.2. *Italy*

Italy, a founding member state, has always taken a consistent pro-European stance. Throughout the 1980s and into the 1990s Italy sought to take on new international responsibilities and play a central role in the EMU-process (Bonvicini 1996). However, by the end of 1992 Italy's international re-positioning looked doubtful as Italy found itself in the middle of the ERM crisis and was forced to devalue the Lira. Italy found itself in a vicious circle where the crisis was mostly determined by internal factors relating to an unstable government and worsened by the international situation in the post-Communist era. EMU convergence criteria and a government in disarray put a further strain on Italian domestic politics. The forthcoming IGC and with it the ideas on increased flexibility were seen as only

marginal items on the broader agenda which was, in the Italian case, dominated by the single currency (Fagiolo 1996). Italy's flexibility position must be viewed in this context.

As the only founding member state to be excluded from the hard core, the Italian government expressed the strongest reservations to the Schäuble and Lamers proposal (ER 7.9.1994). Prime Minister Silvio Berlusconi released a press statement in which he said that ideas about a core "potentially risk breaking down the European integration process and are incompatible with the Maastricht Treaty" (AE 5-6.9.1994). His Foreign Minister Martino noted that flexibility could only concern future member states not the present ones (AE 15.10.1994). Moreover he argued that the suggestions "do not conform to the spirit which, in 1996, will have to guide the treaty's revision, revision which will have to be agreed through unanimity" (AE 15.10.1994). The main fear of the Italian government seemed to relate to EMU. The Italians were afraid that they would be excluded from the third stage of EMU and, consequently, that if the next IGC was to institutionalise flexibility, Italy would be excluded from even more Community decision-making. Their reactions were naturally fuelled by the fact that the Schäuble and Lamers paper had excluded Italy from the hard core of member states. Italy itself was willing to participate in both EMU and defence cooperation, but some member states had doubts about Italy's ability to meet the convergence criteria.

2.2.2.3. Ireland

Irish membership in the European Community was mainly based on economic considerations and an aim to gain a higher degree of autonomy from the United Kingdom (Wijnbergen 1992). Economically, the early gains were harvested from the CAP. Politically, membership added a multilateral dimension to Ireland's relationship with the United Kingdom. Throughout the 1980s and the 1990s Ireland has had a pragmatic approach to European integration. Public opinion has been largely favourable towards membership and indeed the Maastricht Treaty was accepted in a referendum by an overwhelming majority. The domestic debate about meeting the convergence criteria was not as fierce as its equivalents in France and Germany. Despite suspicions voiced by other member states, Ireland always believed that it would meet the convergence criteria and join the single currency.

Irish reactions to the Schäuble and Lamers paper were therefore very negative. Irish Foreign Secretary Dick Spring considered it fundamental that "participation in the development of the Union should be open to all member states" and that "it is no accident that the option of a multi-speed Europe, though sometimes contemplated, has not found favour" (AE 14.10.1994). Spring expected member states "to enter into the 1996 IGC seeking only a single-speed outcome that reconciles the wishes of all member states" (AE 14.10.1994). Much along the same lines, Ireland's Minister of Foreign Affairs, Tom Kitt, remarked that Ireland was not interested in being in any "slow lane or outer circle or lower tier". According to him, Ireland had "grave reservations about elevating regrettable exceptions to the status of orthodoxy and adopting as Union policy the suggestion that multi-speed Europe is the only way of advancing integration" (RECR 6.10.1994). The Irish reactions stemmed from a fear of being excluded from future cooperation based on flexibility. The Irish were not worried about meeting the convergence criteria for EMU. But Ireland's concerns were increased by the fact that they were not members of Schengen and as a neutral country they were not full members of NATO or WEU. Any flexibility provisions would mean that the Irish would be increasingly marginalised in the second and third pillars.

2.2.2.4. Spain

Spain's desire to become a fully fledged member of an increasingly integrated Europe represents the backbone of the country's foreign policy (Barbé 1996, Powell 1995, Almarca Barbado 1993). Membership has also provided Spain with the necessary means to achieve economic stability and economic growth. Accordingly, there is a deep consensus between political parties, business, media and society at large in favour of integration. However, this has led to a paradox within Spanish EU policy (Rodrigo 1996). Although domestically there is a widespread and strong pro-integration consensus, Spain is also satisfied with the status quo within the Union, taking a defensive approach to any far reaching or fundamental change, especially change associated with enlargement. Opposition to flexibility thus stemmed partly from the argument that any process that speeds up enlargement and compensates for economic and structural idiosyncrasies increases the likelihood of destabilising what Spain regards as an equitable status quo, thus threatening the benefits the Spanish have received from the EU (Jacobsen 1997). But more importantly when

the Schäuble and Lamers paper was launched it was by no means clear whether Spain was going to be able to participate in the third stage of EMU. A core Europe, especially in the monetary field, would enhance the economic power of the EMU countries and lead to an increased marginalisation of the non-members. The result would be a split into first and second class membership, which would in turn lower public support for the EU and set back the cause of European integration. For Spain, the key to any flexible arrangement was to be involved as a fully fledged member (interview).

In 1994-95 there was serious pressure to prevent the Spanish domestic political agenda from overshadowing the IGC debate. The socialist government of Felipe Gonzales was living in the shadow of scandals ranging from personal corruption of government officials to problems with Basque terrorists. The government's position was further weakened because it depended on representatives from Catalonia for its majority. On the international arena fishing disputes with Canada and the United Kingdom left other EU member states with the impression that Spain was becoming an eccentric member state with a particularist agenda. Added to this was increasing discomfort with the effects of following the strict convergence criteria. The Spanish reactions to the Schäuble and Lamers paper should be seen in this context.

Most of the Spanish comments on the Schäuble and Lamers paper were negative. Javier Solana, Spain's Foreign Minister, confirmed that Madrid "totally rejects the idea that some countries can impose the path to follow on the others" (AE 14.10.1994). In addition he pointed out that though the document "doesn't help in the debate on European construction, it must nevertheless be admitted that a multi-speed Europe is already a reality with for example the Schengen Agreement and the Eurocorps" (AE 14.10.1994). Speaking before the Joint Committee for European Issues of the Spanish Senate, Solana reiterated his position and pointed out that "it is disturbing to see the appearance of those values which are gaining momentum, like variable geometry, flexibility, different speeds, and so forth ... In 1996 we shall need to revive values such as the federal vocation, *acquis communautaire*, and single institutional framework" (AE 15.10.1994). He continued by saying that once again Europe was faced with a dilemma: to choose between solidarity or disintegration. For him, variable geometry or multi-speed would lead to disintegration. Spain's Prime Minister Felipe Gonzales was more reserved in his comments - he was "in principle" opposed to the concept of a multi-speed Europe

with a hard core. In an interview in *Le Figaro* Gonzales pointed out that one must be realistic: the speeds already existed. Furthermore he stressed that economic disparities of all the applicant countries obliged the Union to take account of the necessity of different speeds (*Le Figaro* 19.10.1994).

2.2.2.5. Denmark

Danish membership in the European Union should be seen through the lens of public opinion. More so than in any member state, public opinion steers the Danish government's EU policy. The underlying difficulty with Danish EU-membership is that the political elite wants to play a central role in the integration process, but is constrained by a hostile public (interview). When Denmark joined the European Community in 1973 the political elite had emphasised the economic benefits of membership (Laursen 1992, Petersen 1978). Leading politicians argued that there was no need to worry about political union, the EC should be seen as a customs union including some common policies in the economic area (Petersen and Elklit 1973, Pedersen 1996). The Danish public accepted membership in a referendum in 1972 on the basis of a minimalist interpretation of the Treaty of Rome. This meant that the Danish government has had a limited mandate to be engaged in the EU process in general. Domestic groups against membership have constantly been engaged in an active public debate, reminding the government of the limits of Danish engagement (Laursen 1992). Thus domestic politics has put strict limits on the manoeuvrability of successive Danish governments.

Public influence culminated in the June 1992 referendum in which the Danes rejected the Maastricht Treaty. A solution to the dilemma was found at the European Council of Edinburgh where Denmark was granted opt-outs in EMU, citizenship, police cooperation and defence. The Danish public accepted the TEU with the opt-outs. Danish reactions to the Schäuble and Lamers paper were driven by a fear of further marginalisation in the EU. The Edinburgh opt-outs had already marginalised Denmark in the first, second and third pillars. The Schäuble and Lamers paper came only ten months after the Maastricht Treaty had been ratified. The paper was mainly directed towards France and the United Kingdom, but also towards Denmark and its inability to participate fully in the European construction. For the Danish political elite the Schäuble and Lamers paper was a slap in the face.

And against this background it should come as no surprise that the Danish Minister for Foreign Affairs, Niels Helveg Petersen, was of the opinion that it would be "unrealistic to begin negotiations on a revision of the Maastricht Treaty by agreeing that five member states are better than the others, [this would] lead up to a result which would not be the same for everyone" (AE 5.10.1994).

2.2.2.6. Greece

Greece has benefited from membership in the European Community both economically and politically (Clogg 1979). But, whereas Danish membership in the Community was driven by economics, Greek membership was primarily political – it tried to consolidate Greece's frail democracy in the 1970s and 1980s (den Hartog 1992). In the 1980s and the early 1990s Greece's European policy was driven by the socialist party (PASOK) lead by Prime Minister Papandreu. During the 1980s the Papandreu government acted as a brake for further integration especially in relation to the Solemn Declaration on European union in 1983 and the Report of the Dooge Committee in 1985, conferring upon Greece the status of footnote country (den Hartog 1992, Tsakaloyannis 1996). Throughout the 1990s, however, the Greek government has tried to pursue a more constructive strategy in the European Union. PASOK's conversion to the status of "good Europeans" reflected Greece's perennial security concerns which had culminated in 1987 when Greece was at the brink of armed conflict with Turkey, changes in East-West relations in the post-Communist era and increased economic benefits from Brussels (Tsakaloyannis 1996). The transfer of money from Brussels to Athens, in particular, found expression in public opinion in Greece. From 1981 to 1991 those in favour of membership rose from 38 percent to 73 percent (den Hartog 1992).

The Greek political elite was strongly opposed to the ideas presented by Schäuble and Lamers. By 1994 it was becoming increasingly clear that Greece would not meet the convergence criteria required for entry to the third stage of EMU, despite relentless efforts by the government to reduce public spending and keep inflation under control. In addition Greece wanted to make sure that the cohesion funds would not become subject to flexible arrangements. The rhetoric of the CDU/CSU paper was not explicitly directed towards Greek foreign policy, but it was clear that Schäuble and Lamers were hinting at some of the problems in the second pillar

which had been caused by Greece's awkward relationship with Turkey. This notion of marginalisation in both EMU and CFSP raised Greek fears of exclusion. This sentiment was echoed by the Greek Secretary of State, Yannos Kranidiotis, who called the German proposal "unacceptable" (AE 5.10.1994).

2.2.2.7. Portugal

Portuguese foreign policy in the 1980s and 1990s has been driven by the dual concept of integration and development, which assumes that one can not occur without the other (de Meirrelles 1992). Much like Greek membership, Portuguese membership assumed that EU-cooperation would bring a solid framework for economic development and continuity to the Portugal's development towards democracy. Portugal has benefited from EU membership. Economic growth in Portugal has prompted structural changes and the country's economy growth has been above the EU average in the past ten years. As a consequence public opinion towards the EU has been very positive. One of the central features of Portuguese EU membership has been the government's aim to participate fully in EU policy-making – both economic and political. In 1993-94 the domestic debate focused on whether Portugal was going to be able to meet the convergence criteria of EMU. Much like other Mediterranean countries the government had put a straightjacket on spending. Fiscal frugality did not, however, lead to divisions in public opinion, which remained evenly favourable towards further integration. Portugal has also sought to play a central role in the development of the Union's common foreign and security policy (de Vasconcelos 1996).

Against this background Portugal has always been strongly opposed to the creation of a hard core of member states which would drive the integration process forward (de Vasconcelos 1996). In 1994 Portugal belonged to the group of member states which wanted to pursue further integration in all pillars, but was having difficulty persuading others that it would be able to do so in relation to EMU. For this reason Portuguese rejection of the Schäuble and Lamers paper was fierce. Foreign Minister José Durão Barasso stressed that Portugal did not want "institutionalised dis-union" nor did it want to see the creation of an exclusive hard core (AE 5.10.1994). However, Portuguese Prime Minister Cavaco Silva, said that he saw the EU expanding to 25 or even 30 members, and thus could envision some form of

flexibility. In this situation Silva believed that it would be "inevitable to talk about a Europe of two, three or even four speeds" (*RECR* 15.12.1994).

2.2.2.8. Sweden

Much as in Denmark, Swedish EU-policy has been held hostage by a sceptical public opinion. Sweden joined the Union on 1 January 1995 after a narrow victory in a referendum on 13 November 1994. The most important issues in the referendum debate revolved around the economic disadvantages of staying outside the Union, the consequences of membership on national sovereignty, Sweden's role in the security structure of Europe, control of alcohol sales and the cost of EU membership for Sweden (Lindahl 1996, Widfeldt 1996). Two months before the referendum Swedish voters had elected a socialist government, replacing a minority centre-right coalition led by Carl Bildt. The election campaigns of the major parties focused on domestic issues – EU discussions were postponed until the referendum debate. A majority of the parties advocated EU membership, but most party leaders were conservative in their comments because they faced substantial opposition to their EU ideas among the party rank and file. Public opinion on EU membership has been in steady decline since Swedish accession.

The Swedish dilemma concerning the flexibility debate in 1994 related more to the second pillar than to EMU or the third pillar. Unlike Denmark, Sweden had little objection to deeper cooperation in justice and home affairs. The EMU question had not yet become subject to heated debate and in 1994-95 most member states assumed that Sweden would meet the convergence criteria and join the third stage of EMU. As mentioned above, CFSP had been a focus in the referendum debate. Opponents to Sweden's membership had argued that second pillar obligations would render Swedish military non-alliance obsolete. Against this background the Schäuble and Lamers paper was considered, much as in the United Kingdom, as relief from future defence pressures. Even if a select number of member states wanted to pursue deeper integration in defence matters Sweden could decide to stay outside the structure. Though there has been active discussion in Sweden about EU affairs since accession, the Schäuble and Lamers paper did not stir up much debate. Sweden's then Prime Minister, Carl Bildt, surprised some observers by saying that he was in favour of flexible integration (*AE* 9.9.1994). Retrospectively

it was ironic that Bildt said that "Sweden would be willing to join the first circle on monetary matters, but would keep its distance regarding defence questions" (AE 9.9.1994).

2.2.2.9. *Finland*

Finland also joined the Union on 1 January 1995 after a clear victory in a referendum on 16 October 1994. Unlike Swedish and Danish EU strategy, Finnish participation in European decision-making has not been constrained by public opinion. The most important issues in the referendum debate were loss of sovereignty, CFSP, CAP and the economic benefits of membership (Tiilikainen 1996, Arter 1995). Much to the surprise of many observers Finland has turned out to be an integrationist member state in the EU (Stubb 1996a). This progressive approach has been based on strong leadership by Finland's pro-European Prime Minister Paavo Lipponen. Unlike its Nordic partners, Finland will participate in the single currency.

The Schäuble and Lamers paper did not prompt much debate in Finland. It was published some six weeks before the Finnish referendum and hence newspapers, interest groups, politicians and academics were focused on the domestic debate instead. More recently, however, it has become apparent that Finnish government officials were not pleased with the timing of the paper, particularly in view of the ideas it contained about a hard core leading the way in defence matters (interview). One of the main arguments for membership was that Finland would be able to participate in European decision-making on an equal basis. The Schäuble and Lamers paper, with its hard core connotations, was not a welcome addition to the debate as the government was trying to convince the public about the benefits of membership. In the fall of 1994 Finland had not yet established a clear position on flexibility, but there was a clear rejection of a core Europe among the political elite. Nevertheless the logic of the argumentation behind Finnish membership did indicate that Finland would most probably want to participate in most of the future arrangements on flexibility, even in the second pillar – they did not want to be excluded from the decision-making of the organisation they were about to join. Herein lies the difference of approach between Sweden and Finland. Sweden

assumed that flexibility provided an opportunity to stay outside the cooperation and Finland saw flexibility as a chance to participate.

2.2.2.10. Austria

Austria joined the Union on 1 January 1995 after an overwhelming victory in a referendum on 12 June 1994. Austrian membership of the EU was motivated primarily by economic considerations (Schneider 1990). EU membership was to provide the necessary external pressure to cushion the political, social and economic effects of deregulation (Kaiser 1995). In addition accession to the Union would provide a better competitive position to exports heading for the common market (2/3 of Austrian exports went to the EC market). Security considerations began to feature more prominently in the Austrian debate after the collapse of the Soviet Union and the beginning of war in the former Yugoslavia (Kaiser 1995). Throughout the referendum debate the Austrian government, much like its Finnish counterpart, emphasised that the EEA agreement was not enough to secure Austrian interests and that it was important for the country to participate fully in EU decision-making.

The timing of the Schäuble and Lamers paper was not as problematic for Austria as it was to Finland and Sweden. Austria had already had its referendum and the government was able to debate issues, such as core Europe, more openly. Austrian reactions to the paper were therefore more positive than those of the two other membership candidates. On policy issues Austria took a similar line to Finland in that it assumed full participation in the first and third pillars, including EMU. There was still a question mark over second pillar cooperation, but the Austrian government saw no problems in allowing some member states to pursue deeper cooperation in defence matters. Austrian Foreign Minister Alois Mock felt that the debate was an incentive for the political deepening of the EU. For him it was preferable that all member states should move forward "at the same pace", but if there was only a small group of member states which wanted deepening, "they should not be prevented" (AE 7.9.1994). Remarking on a hard core, Mock pointed out that Austria would do everything not to be relegated to second rank (AE 7.9.1994).

2.2.2.11. *Summary of the periphery*

In summary, the reactions of the non-core countries were, for the most part, hesitant or outright negative. There were two main reasons for these reactions. Firstly, the debate surrounding the Schäuble and Lamers paper was more about which countries belonged to the core than which areas would form the core of cooperation. This did not necessarily reflect the content of the paper because Schäuble and Lamers actually dealt in great detail with issues such as defence and EMU. Many of the negative reactions stemmed from suggestions that the hard core should include only France, Germany and the Benelux countries. Consequently the rest of the member states were alarmed at the prospect of being excluded. The second reason for the negative reactions of the non-core countries related to their willingness and ability to participate in, for example, EMU and defence. There were those member states which had the will, but perhaps not the ability (it was assumed at that time) to participate in the single currency – notably Italy, Greece, Portugal and Spain. And there were those countries which were hesitant about participating in a European defence structure – Denmark, the United Kingdom, Austria, Sweden and Finland. The fear was that exclusion (whether voluntary or otherwise) from one area of cooperation would automatically lead to exclusion in others. Nevertheless, despite these reservations, the Schäuble and Lamers paper should be seen as an important yardstick for the non-core countries as well – it forced them to start thinking about flexibility in particular and their role in the European integration process in general.

2.2.3. **Counter proposals and summary – in search of responses**

After the Schäuble and Lamers paper, Major's speech and Balladur's proposal it took two months before some counter proposals were issued. The Dutch government released an important early contribution to the flexibility debate in November 1994 in which it argued that flexibility should be temporary (Netherlands 1994)². The Dutch paper was important in that it introduced the first set of conditions for flexibility. The Schäuble and Lamers paper had taken the political

² The Dutch paper on flexibility was actually written before the release of the Schäuble and Lamers paper. Its publication was delayed due to the stir that the Schäuble and Lamers paper caused (interview).

pressure off the Dutch document. So the Dutch document's main contribution was technical. The Spanish government elaborated on these conditions in a paper on the IGC in March 1995. This document introduced the idea of non-exclusion in relation to flexibility: it argued that no member state should be excluded from closer cooperation. More importantly the document provided the second set of conditions on flexibility, which reappeared in the report of the Reflection Group, chaired by Carlos Westendorp of Spain (see below). The language of the Spanish document clearly showed that Spain took a defensive stance towards flexibility. It recommended that decisions should be taken unanimously and that cohesion should be safeguarded. Had both of the Dutch and Spanish documents been released before the Schäuble and Lamers paper, the whole debate on flexibility could have been very different because the other member states might not have been as defensive about flexible integration. It is also interesting to note that no other member states had come out with position papers on the IGC at this stage. The Dutch and the Spanish most probably issued their paper(s) because they were anticipating their Presidencies during the Reflection Group and the actual IGC. Other member states had not yet started working on the Conference with much conviction.

As argued in chapter 2 much of the credit for the resurgence of the flexibility debate can be given to the differentiated arrangements established in the Maastricht Treaty in the areas of EMU, CFSP and JHA. Nevertheless, it was Schäuble and Lamers, helped by Major and Balladur, who kicked off the flexibility debate before the 1996-97 IGC. The debate became saturated with different terminology and ideas (see chapter 2). Indeed it was very clear that flexibility meant different things to different people. For Schäuble and Lamers it was about creating a core with a magnetic effect on the rest of the member states. For Major it was about member states being allowed to opt-out from some aspects of EU policy. And for Balladur it was about creating different classes of membership. The criticism of the Schäuble and Lamers document was fierce, but it played a valuable role in initiating debate on the IGC in general and on flexibility in particular. It is also interesting to note that the fiercest opposition to the Schäuble and Lamers paper came from those member states which were not sure that they would be able or willing to be part of the third stage of EMU from the beginning – namely the United Kingdom, Italy, Denmark, Spain, Portugal and Greece. These reactions were a direct consequence of the fact

that the Schäuble and Lamers paper had not only named the core group but also made consistent reference to EMU being the core to any future integration.

It is important to note that the negative reactions to the Schäuble and Lamers document often stemmed from grave misinterpretations. The most significant misunderstanding concerned the notion of a hard core. Contrary to what most commentators thought, the hard core - though defined as Germany, France and the Benelux - was not exclusive. On the contrary, the core was open to all countries "able and willing". Lamers (1994, p.2) clarified this in a speech a few weeks later by noting that "every member of the Union may join the hard core if it participates in all policy fields and, furthermore, if it shows initiative and commitment in pursuing further integration". Of course the criticism of this is that some members are unable to participate in all policy fields, while others do not want to do so. This is a counter argument put by Lamers himself. The main reason for the defensive approach of the periphery was that Schäuble and Lamers had named the hard core. Naming the hard core, however, proved to be a smart tactical move. The document would not have prompted such an intense debate had no member state been specifically mentioned. The misinterpretations of the Schäuble-Lamers paper were an indication that the complex subject of flexibility would be a difficult issue to negotiate in the IGC itself.

3. FROM ROME (JUNE 1995) TO MADRID (DECEMBER 1995) - THE REFLECTION GROUP

The European Council of Corfu established "a Reflection Group to prepare for the 1996 Intergovernmental Conference" and asked it to begin its work during the Spanish Presidency (European Council of Corfu 1994, p.15). The European Council further invited the institutions of the Union to submit reports on the functioning of the Maastricht Treaty by the spring of 1995, before the work of the Reflection Group was to begin (Council 1995, European Parliament 1995b, Commission 1995a, Court of Justice 1995, Court of First Instance 1995, Court of Auditors 1995, Economic and Social Committee 1995, Committee of the Regions 1995). The Reflection Group's mandate did not make a direct reference to the examination of flexibility. Nevertheless, the group was urged to examine measures "deemed necessary to

facilitate the work of the institutions and guarantee their effective operation in the perspective of enlargement" (European Council of Corfu 1994, p.16).

This section of the chapter looks at the internal dynamics of the flexibility negotiations during the work of the Reflection Group. The first part examines the reports of the institutions, the second part pays close attention to the flexibility discussions in the Reflection Group and the third part outlines the state of the flexibility debate at the end of the Spanish Presidency in December 1995. The aim of this section is to analyse three key elements of the 1996-97 IGC negotiations: the *environment*, the *process* and the *negotiating styles* of the participants. This analysis will involve trying to answer questions such as: at what level did negotiations take place during the agenda-setting stage? What was the scope of the negotiations? Who were the main actors involved and what was the relationship between them? What motivated or constrained the negotiators? Were there any coalitions? Were the actors rational? What was the main contribution of the Reflection Group? Answering these questions will help to explain the dynamics of multilateral IGC negotiations, and why and how flexibility emerged on the IGC agenda.

3.1. The reports of the institutions – the first verdict

Although there had been extensive debate on the issue of flexibility since the publication of the Schäuble-Lamers paper on 1 September 1994, only two of the eight reports submitted by the institutions to the Reflection Group contained specific references to the notion of flexible integration. The Commission's report suggested that further enlargement would force the Union "to look more closely at the possibility of different speeds of integration" (Commission 1995a, p.6). The Commission emphasised that the single institutional framework should be preserved and that any form of flexibility should aim to achieve the Community's common objectives. Indeed the report made clear that the Commission was "utterly opposed" to any form of à la carte integration which would allow the member states to pick and choose areas of policy preference.

The European Parliament had clarified its thinking on flexibility since its somewhat confusing "Resolution on a multi-speed Europe" of 28 September 1994. In its report

to the Reflection Group the Parliament noted that the increase in diversity might well require flexible arrangements in the future. Along similar lines to the Commission, the European Parliament said that flexibility should not lead to a Europe à la carte and should not undermine the principle of equality of all states and citizens of the Union. In specifying strict conditions of flexibility the Parliament emphasised that flexibility "should not undermine the single institutional framework, the *acquis communautaire* or the principles of solidarity and social cohesion throughout the European Union" (European Parliament 1995a, p.8).

At first glance it seems somewhat surprising that the Council's report made no mention of flexible integration. After all, at a later stage it was the Council Secretariat which provided the impetus for the institutionalisation of flexibility as a treaty principle (see chapter 5). Surely the Council must have played an important part in the early setting of the Conference agenda? The reason for omitting flexibility becomes apparent on closer examination of the report. The Council report differed from that of the Commission and the European Parliament in as much as it had no political preface. It focused on the experiences relating to the implementation of the Maastricht Treaty whereas the reports of the Commission and the European Parliament were policy papers with a clear political agenda and vision which sought to influence the debate in the Reflection Group. And in any case, a group of civil servants from the Council Secretariat had published two articles under the pseudonyms of Charlemagne (1994) and Justus Lipsius (1995) which dealt in part with flexibility. These papers were to have an indirect impact on the flexibility debate in the Reflection Group³.

The reports of the Commission and the European Parliament were important for the flexibility work of the Reflection Group. In late 1994 and early 1995 there had been an "unofficial" debate about flexible integration in relation to the 1996-97 IGC. Now, through the Commission and the European Parliament, the Reflection Group received the "green light" to put flexibility on the agenda. It is most probable that flexibility would have been on the agenda anyway, but the reports gave the negotiators an institutional mandate to debate the issue.

³ Indeed this trend continued when a civil servant from the Council Secretariat published his assessment of the new flexibility clauses under the pseudonym of Helmut Kortenberg (1998).

3.2. The work of the Reflection Group⁴

Against this background the Reflection Group was set up in Messina on 2 June 1995. The group was composed of personal representatives of the Foreign Affairs Ministers, a representative from the Commission and two representatives from the European Parliament. The members of the group came from the civil service, politics and academia, with a politician, Carlos Westendorp (ESP) in the chair. The other members of the group were Franklin Dehousse (B), an academic; Niels Ersbøll (DK), Stephanos Stathatos (GR), Gay Mitchell (IRL), Silvio Fagiolo (I), Joseph Weyland (LUX), Manfred Scheich (AUS), Marcelino Oreja (COM), Gunnar Lund (S) and André Gonçalves Pereira (POR), who were civil servants; and Werner Hoyer (D), Michel Barnier (F), Michel Patijn (NL), Ingvar S. Melin (FIN), David Davis (UK), Elmar Brok and Elisabeth Guigou (EP), who were the politicians of the group. Each member was usually assisted by 2-3 civil servants. At this stage in the negotiations the two higher levels, Foreign Ministers and Heads of State or Government, were not involved in the debate. The representatives were given virtually a free hand to come up with an agenda for the 1996-97 IGC.

The atmosphere within the group was informal. Many of the members knew each other from political circles (for example, Guigou, Brok, Barnier, Westendorp, Melin and Hoyer) or other EU related fora (for example Dehousse, Lund, Ersbøll, Weyland and Scheich). This did not, however, mean that the group was cohesive. At times the heterogeneity of the group was a hindrance to the debate: the academic member Dehousse, for instance, was eager to reflect on the issues, the politicians wanted score political points on the home front (for example Barnier and Hoyer) and the civil servants (for example Lund and Scheich) were mostly concerned with bringing forth early national positions.

From 3 June to 5 December 1995 the group met fourteen times. The meetings were usually structured around a set of questions which had been sent out to members of the group in advance by Westendorp and the Council Secretariat. Representatives then reflected on those questions at the meeting. The notion of flexible integration was discussed not as a separate topic but mostly under the heading of challenges,

⁴ This section draws on participant observation which has been cross-referenced with interviews and publicly available Conference documentation.

principles and objectives. Flexibility became a separate topic only when the IGC began. The main topics of discussion of the Reflection Group were:

- (1) challenges, principles and objectives
- (2) the institutional system
- (3) the citizen and the Union
- (4) the Union's external and security policy
- (5) the instruments at the Union's disposal (SN 2468/1/95 REV 1 1995).

3.2.1. First discussion on flexibility – June 1995 – a careful start

The notion of flexible integration was discussed ten times. The first working session of the Reflection Group was held in Messina, after the formal opening ceremony, on 3 June 1995. Chairman Carlos Westendorp had issued a set of questions which were to be the basis of discussion in the first meeting (SN 2470/1/95 REV 1 1995). Westendorp based his questionnaire on discussions he had conducted with all the members of the group on a tour of the capitals. The flexibility questionnaire pointed out that enlargement leads to diversity and that greater diversity seems to require more differentiation. Consequently the chairman asked the group to answer the following set of questions:

- How far can flexibility be taken whilst still leaving it possible to manage diversity in a process of integration and without disintegration being a result?
- Should we conceive flexible formulae allowing member states to modulate their participation in certain activities of the Union and, if so, in which activities?
- What should be the approach: different speeds, variable geometry, à la carte, hard core, circles, etc.?
- In the light of the Union's principles and objectives, should we retain the single institutional framework?
- Should we retain and develop the *acquis communautaire* and reaffirm the validity of our Community based on the rule of law?

Only five of the members of the group answered the questions on flexibility in their opening statements (interview). The only concrete answers to the questions were given by Pereira (POR) who was of the opinion that one of the central questions for

the IGC was to determine the scope of flexibility in the Union. He contended that flexibility was plausible as long as the institutional framework remained intact. Differentiated participation should be allowed as long as it was based on objective, not political, criteria. Furthermore he argued that the decision on flexibility should be taken unanimously, all flexible arrangements should be temporary and solidarity between ins and outs should be maintained (interview). This view was in line with Portugal's later position on flexibility, as outlined in its government document and its position paper on flexibility in November 1996 (CONF 3999 1996). As mentioned above, the Portuguese position had its genesis in fear of exclusion from EMU so the Portuguese Foreign Office had done its research carefully. It was especially important for Portugal that any future flexibility was decided by unanimity.

Guigou (EP) made reference to flexibility by linking it to enlargement and her colleague Brok (EP) added that problems relating to enlargement should be solved with temporary transition periods rather than opt-outs (interview). The representatives of the European Parliament followed the approach of the latest EP contribution and emphasised that the notion of flexibility should be linked primarily to enlargement – the Union of 15 member states did not, according to the EP delegation, need flexible arrangements. The British member of the group, Davis, said that the United Kingdom opposed *à la carte* but believed that some form of flexibility could be a virtue in a Union of 20 members (interview). This position was interesting, particularly since the United Kingdom had negotiated opt-outs for itself from Social Policy and EMU at Maastricht. The United Kingdom still seemed to be trying to find a way in which it could oppose the "core Europe" ideas of flexibility altogether. Commissioner Oreja was the last member to speak about flexibility in the first meeting of the Reflection Group (AE 6-7.6.1995). His view was that flexibility could be used as long as the objectives of the Union remained intact (interview). Here we can begin to detect the difficulties that the Commission was to have in establishing its position on flexibility. There were internal difficulties in the preparation of the subject (interview). Some members of the Commission's IGC Task Force were in favour of flexible arrangements, others opposed. Those in favour argued that it was important to allow willing and able member states to pursue deeper integration. Those opposed claimed that institutionalising flexibility could endanger the *acquis communautaire*. As will be shown in the next two chapters the Commission found it difficult throughout the Conference to reconcile these opposing views.

Given the state of the flexibility debate when Westendorp issued his questionnaire, the questions he posed were very sophisticated; they went on to form the central plank of the flexibility debate throughout the Conference. Westendorp's questions signalled that he knew that the flexibility issue would be difficult and consequently he wanted to get the debate off the ground as soon as possible. In addition it should be pointed out that Westendorp's thinking on flexibility had been influenced by a CEPS report (Ludlow 1995) published in early 1995 (interview), especially in relation to the application of strict conditions in any flexibility arrangement. The notions of maintaining the single institutional framework and preserving the *acquis communautaire* certainly became part of the permanent jargon of the flexibility negotiations. They were repeated by virtually every member state at some stage in the debate. And indeed they can be seen in the provisions of the Amsterdam Treaty as underlying conditions for flexibility. One should also keep in mind that the questionnaire was prepared by both the Presidency and the Council Secretariat, indicating the central role of both, even in the early agenda-setting phase.

Since very few members of the group addressed the questions relating to flexibility at this early stage, no clear positions or preferences had emerged in the respective capitals. The ideas were there, but little interest was voiced. None of the representatives of the group clarified, for example, the terminology of flexibility. Even though the questionnaire asked for preferences from à la carte to variable geometry, nobody really addressed the question of what kind of flexibility was needed. The fact that the issue of defining the terminology was never addressed was an indication that most delegations, if not all, had a difficult time coming to grips with the concept of flexibility in general and the terminology in particular. In ideal models, negotiators define their terms first. But in real world models negotiators only define what they have to before they start and they develop and clarify the terms as they go along.

3.2.2. Second discussion on flexibility – July 1995 – references to defence

Flexibility was indirectly addressed for the second time in the fourth discussion of the Reflection Group on 10-11 July 1995 in Strasbourg. The topic of discussion was the Union's external relations, including CFSP and defence. Questionnaires 6 and 7 (SN 505/95 - REFLEX 6 1995) did not make explicit reference to the notion of

flexibility. Nevertheless some of the representatives addressed the issue during the discussions. Most of the references, however, touched more on effective decision-making in the second pillar than on flexibility. A number of the delegations supported qualified majority voting in matters relating directly to CFSP (I, D) (interview). Others argued that qualified majority voting was not necessary as long as no member states could block a collective decision (DK, EP) (interview). Yet others wanted to define the notion of political solidarity more clearly (AUS, GR) (interview). The term "constructive abstention", coined by Guigou (EP), was also used for the first time at this meeting, particularly in relation to CFSP (interview). Barnier (F), had argued earlier that "as a general rule, we should keep unanimity but add some flexibility to it. The countries wishing to go further must be able to do so without the others stopping them" (AE 10-11.7.1995). The debate about flexibility in the second pillar had not yet taken off at this stage. This was surprising because many commentators had pointed out that the second pillar was most suited to flexibility, yet the representatives of the group seemed reluctant to bring the issue to the fore. Retrospectively this was an early indication that, despite all the rhetoric, the member states were not prioritising CFSP or defence.

3.2.3. Third discussion on flexibility - July 1995 – the silence continues

Flexibility was on the agenda for the third time in Brussels on 24-25 July 1995 in the fifth meeting of the Reflection Group. The issue was brought up in a cover letter of questionnaire 8 where Carlos Westendorp noted that flexibility had not been sufficiently addressed at Messina (SN 507/95 - REFLEX 8 1995). Westendorp wanted the members of the Reflection Group to address a broader question on flexibility. He asked the following: "Should the matter of flexibility and consistency of the enlarged Union be dealt with at the end of the Conference or should we rather raise the issue now and examine the content and limits of such flexibility?" (SN 507/95 - REFLEX 8 1995).

The question was supposed to be discussed over lunch. Only a few members of the group, however, touched on the issue. Scheich (AUS) stressed the importance of flexibility in light of enlargement (interview). Lund (S), warned of the use of the word flexibility and Ersbøll (DK) warned that excessive flexibility could divide the Union (interview). Nevertheless, Westendorp's question about the timing of the flexibility

debate was important because it suggested that flexibility was an issue which could be dealt with at the end of the Conference, after an assessment of the progress made in the IGC. His question captures the essence of thinking on flexibility at that time: differentiation was seen as a last resort after all other options had been exhausted. The negotiators, however, rejected this idea and decided to discuss flexibility throughout the Conference and indeed, as will be shown in chapter 6, flexibility was so well prepared that it became a non-issue at the European Council of Amsterdam in June 1997.

However, in July 1995, debate on flexibility was still fairly minimal for two reasons. Firstly, some delegations still seemed to think that flexibility would not be a central topic on the IGC agenda. This was the case with Finland, for example. The second reason was that many capitals had not formed a concrete flexibility position at this stage. The subject still seemed rather academic for many of the delegations and, in addition, there was little consensus about what flexibility actually meant.

3.2.4. Progress report of the Reflection Group – August 1995 – the Spanish position (fourth and fifth discussion on flexibility)

When flexibility was addressed for the fourth and fifth time members of the Reflection Group, as before, either did not address the questions posed in the questionnaires directly or, as in most cases, chose not to answer the questions at all (interview). The debate was unfocused. Perhaps for this reason the nature of the work of the group changed in the sixth discussion held in Brussels on 4-5 September 1995 (see below). Instead of general statements the members began introducing more concrete changes. This new approach was partly facilitated by the fact that the chairman of the group had provided a progress report of the work on 24 August 1995 (SN 509/95 REFLEX 10 1995). In this progress report he made a clear plea for the members of the group to focus more closely on the questions that had been addressed along the way. Flexibility was addressed as a broader strategic issue as well as an issue pertaining to both the second and the third pillars⁵.

⁵ In a section labelled "Flexibility and the coherence of the Union" the report stated that "the prospect of enlargement, combined with the fact that the Union already operates differentiated integration arrangements in those areas where this is allowed, prompts the question whether, and to what extent, any flexibility is possible, a question that will also affect the outcome of the Conference and the approach to be adopted to enlargement" (SN 509/95 REFLEX 10 1995, p.5). The report referred to the

Here it is interesting to note that the conditions above - contrary to claims in the report - had not actually been mentioned in the discussions in the group. Instead these conditions can be found, almost word for word, in the Spanish position paper on the IGC (Spain 1995). This document had been prepared by Westendorp and his team at the Spanish Ministry for Foreign Affairs as early as 2 March 1995 (Rodrigo 1996)⁶. The similarities between the Spanish paper and the progress report are striking. This is an indication of the important contribution of the Presidency to any set of negotiations. Indeed it was the Spanish Presidency which outlined the first conditions for flexibility and hence set the tone for the rest of the debate⁷.

fact that some members wanted the Reflection Group to give an unequivocal answer to the question "What do we want to accomplish together?". That answer would clarify what the reform was expected to achieve. And indeed it was argued that it should not be possible for those who wanted and even needed to progress to be held back by those who did not wish to do so. "At the same time, however, it will be necessary to consider what should be the limits to the flexibility that will make it possible to manage diversity without jeopardising the *acquis* and the common objectives" (SN 509/95 REFLEX 10 1995, p.5). Having stated some underlying issues behind flexibility the chairman's progress report asked the group to reflect on flexibility and its limits and examine some of the possible arrangements. The report noted that the following conditions had been outlined within the group:

- flexibility should be introduced when all other solutions have been exhausted
- no one who so desires and fulfils the conditions previously adopted unanimously should be excluded from involvement in a given action or common policy
- provisions should be made for accompanying measures for those who want to but are temporarily unable to take part in a given action or policy
- the entire *acquis* should be maintained and a minimum common basis should be preserved to prevent any sort of retreat from common principles and objectives
- there should be a single institutional framework (SN 509/95 REFLEX 10 1995, p.5).

⁶ For a discussion on the similarities between the Spanish document and the report of the Reflection Group see Rodrigo (1996).

⁷ The Spanish document stated that flexibility could be allowed, but only with clear limits:

- flexibility should be used as a last resort, on a case-by-case basis, only when it helps the Union to achieve common objectives
- the differences between member states should be temporary
- no country should be excluded from participating in any common policy or action, if it wishes to do so and it fulfils all the previously established criteria
- *ad hoc* measures should be set up for those member states which wish to participate in a common policy or action but are temporarily unable to do so
- the decision authorising flexibility should not be undertaken in contravention of the maintenance of the single institutional framework or the *acquis communautaire*.

Flexibility was also addressed in the progress report of the Reflection Group in the sections dealing with CFSP and defence. However, reference was made more directly to forms of decision-making, particularly to constructive abstention which was called "consensus bar one" or "positive abstention" at the time (SN 509/95 REFLEX 10 1995, p.27). Intermediate solutions were also discussed in relation to the incorporation of WEU into the EU. The report suggested that some member states could have a temporary derogation or an "opt-in" for a pre-established period. In the light of these reflections the report asked the members of the group to look at:

- solutions for EU decision-making in security and defence matters: the need to reconcile respect for consensus with the Union's ability to act. Positive abstention? Different arrangements for solidarity, in light of internal limitations?
- the Union's lack of symmetry in security and defence matters. A variable arrangement in this field? Where must flexibility stop if it is to be compatible with collective security and the consistency of the European design?" (SN 509/95 REFLEX 10 1995, p.27).

Finally flexibility was addressed in the section which dealt with third pillar matters. The report asked the group to consider "whether to bring Schengen into the *acquis communautaire* by means of a variable geometry arrangement, of the opting-in kind". (SN 509/95 REFLEX 10 1995, p.24).

These broad statements in the progress report and the underlying questions on flexibility lead to the following five observations about the state of the debate at the end of August 1995. Firstly, the notion of flexibility was clearly tied in with enlargement, the outcome of the Conference and the necessity to bypass awkward member states. Many of the representatives argued that the need for flexibility was increasing because the Union would soon expand to over twenty member states. The reference to the awkward member states was more tacit and thus only implied in some of the early positions. Secondly, flexibility, much like subsidiarity, emerged precisely because the Union had not been able to answer the question: "What do we want to accomplish together?". Had this question been answered earlier, flexibility would have never emerged on the agenda. Thirdly, some of the parameters for flexibility had begun to take form. Limits such as last resort, non-exclusion, maintaining the *acquis* and a single institutional framework can all be found in the final conditions for flexibility. This was an indication that the debate was going forward and different options and possibilities were beginning to be aired. And, as mentioned above, this was also an indication of the important contribution of the Spanish Presidency. Fourthly, the chairman was clearly pushing hard to get the members of the group to respond to the questions on flexibility. The early debate had been so unfocused that the chairman decided to delimit the scope of the debate by providing a more specific set of questions. This is usual practice in a set of "negotiations", especially when one is dealing with a difficult issue such as flexibility. First the issue has to be contemplated in national capitals; only then can the ideas be aired at the Union level. Finally, the group was slowly trying to come to terms with flexibility in the second pillar. This stemmed from the fact that the three newest member states were militarily non-aligned and hence there was fear that they would be awkward partners in CFSP matters and would need to be bypassed. One way was to make the decision-making structure more flexible; the other was to create mechanisms for enhanced cooperation in defence matters.

3.2.5. Sixth discussion on flexibility – September 1995 – finally the debate gets going

The plea of the chairman for a more focused debate on flexibility was accepted by the group. Flexibility was addressed for the sixth time at the seventh meeting of the Reflection Group in Brussels on 11-12 September 1995. During this discussion the group had a long debate about flexibility and its limits (interview). Everyone rejected

an à la carte Europe and emphasised the importance of the single institutional framework and the common objectives of the Union. Most of the members of the group thought that some flexibility would be necessary but that it should be temporary in nature (interview), adopting Westendorp's ideas from the progress report. At this stage the debate seemed to be leaning towards multi-speed, whereby the common objectives would be sought at different times. An emphasis was also put on the cohesiveness of the first pillar, whereas the second and the third pillars were considered to have more scope for flexibility. A few of the members of the group saw flexibility as a way forward (FIN, D, B, LUX, NL, I) – these were mainly the member states that were both willing and able to pursue deeper integration (interview).

There was only one member of the group, Mitchell (IRL), who opposed flexibility all together because he thought that it would inevitably lead to a pick and choose system (interview). This demonstrated that Dublin was concerned about the side-effects of a flexible arrangement. As analysis of the decision-shaping stage will show, the Irish Presidency was reluctant to bring flexibility onto the agenda. The main reason was that even during their Presidency the Irish did not think that the flexibility debate was ripe enough for a draft article (interview). But more importantly, it seemed as if the Irish were not very keen on the whole idea of flexible integration. Ireland was not a member of WEU; nor was it party to the Schengen agreement. For the Irish, flexibility meant exclusion. Their dislike of flexibility was also demonstrated during the final stages of the negotiations when Prime Minister Bruton launched a fierce attack on flexibility at the informal European Council at Noordwijk in May 1997. The Irish were concerned about both the effects of flexibility on the Community and the direct threat it represented to Irish interests.

In the meeting Hoyer (D), moreover, stressed that flexibility should be allowed only as a last resort and if no other option was viable (interview). His view was that a situation whereby one member state would oppose the others should be avoided. Stathatos (GR) was of the opinion that the decision on flexibility should be made unanimously and that any flexible arrangement should be temporary (interview). Scheich (AUS) also stressed the temporary nature of flexibility (interview). Barnier (F) thought that flexibility was inevitable but that it could take place only if certain criteria were met (interview). He did not at that stage specify particular criteria. Niels Ersbøll (DK) emphasised that it would be important to establish the areas in which

flexibility was really needed (interview). Much as in the first discussion of the Reflection Group, Pereira (POR) stressed the importance of maintaining the single institutional framework. Brok (EP) thought that opt-outs should not be excluded, especially in matters involving defence. Brok, however, emphasised that the role of the institutions should not be blurred if flexible solutions were sought (interview). Patijn (NL) raised the importance of flexible solutions relating to the third pillar, especially the incorporation of the Schengen agreement (interview).

The above statements of the members of the group were an indication of the immense impact that the progress report, and with it the Spanish ideas, had on the flexibility debate. The representatives became more focused in their statements and indeed many of the conditions that had been mentioned in the progress report became accepted jargon in the flexibility debate (interview). The representatives began stressing the importance of non-exclusion, the single institutional framework, the *acquis communautaire* and the temporary nature of flexibility.

3.2.6. Seventh flexibility discussion – September 1995 – Schengen comes into play

Flexibility was discussed for the seventh time at the eighth meeting of the Reflection Group which was held in Brussels on 25-26 September 1995. However, flexibility was only discussed in the context of the incorporation of the Schengen agreement. The use of flexible mechanisms was seen as the only way in which the Schengen agreement could be incorporated into the treaties. This underlines the fact that flexibility comes to the fore when the Union tries to find solutions relating to justice and home affairs in general and the exclusion of some member states which do not wish to participate in JHA matters. Nevertheless the incorporation of Schengen had not become a real issue at this stage as the Spanish seemed reluctant to push the issue. The same low profile for Schengen matters was the rule during the Italian and Irish Presidencies and it was only during the Dutch Presidency that Schengen became one of the main topics of debate, mainly because the Dutch representative, Patijn, was an avid advocate and specialist of Schengen.

3.2.7. Eighth flexibility discussion – October 1995 – raising some doubts

The ninth meeting of the group (the eighth on flexibility), held in Luxembourg on 3 October 1995, once again only touched on flexibility, this time in relation to the second pillar. A number of representatives stressed the importance of opt-out mechanisms and constructive abstention when joint actions or common decisions were adopted unanimously. Hoyer (D), in particular, highlighted the issue of effectiveness in relation to constructive abstention (interview). Lund (S), on the other hand, could not accept that a Swedish position could be overruled in the second pillar (interview). Nevertheless in referring to enlargement he was willing to look at all viable options (interview). Davis (UK) was of the opinion that constructive abstention would cause problems if, for example, a member state was holding the Presidency but decided to abstain from a decision (interview). Guigou (EP) thought that constructive abstention would be problematic, especially in relation to financing the second pillar which, she maintained, with the support of Weyland (LUX), should be paid by all (interview).

Discussion focused primarily on external representation and finance in the second pillar. Once again, representatives did not talk specifically about flexibility in relation to defence, instead the focus was on constructive abstention. Nevertheless, the discussion in Luxembourg was the first occasion on which some of the problems of flexibility were raised. This indicated that representatives were beginning to look beyond the basic concept and concentrate on possible complications that would result from any flexible arrangement. This line of discussion was to become even more prominent during the drafting stage when member states began raising doubts about specific aspects of flexibility.

3.2.8. Ninth flexibility discussion – November 1995 – moving towards negotiations

Flexibility was addressed for the ninth time during the eleventh meeting of the group in Brussels on 14 November 1995. This discussion was the first overview of the first draft of the final report of the Reflection Group. The commentary was general in nature because Westendorp had asked the members of the group to submit detailed comments in writing by 16 November 1995. Nevertheless a number of

representatives commented specifically on the drafts relating to flexibility. Davis (UK), for example, criticised the use of the word "temporary" in the draft. He was of the opinion that the British opt-out from the Social Protocol was of a permanent nature (interview). This was a rather surprising comment since one would have assumed that the United Kingdom did not want to be permanently excluded from new legislation based on a possible flexibility clause. Scheich (AUS) thought that the flexibility text was in many ways contradictory (interview). Mitchell (IRL) expressed his worries about the limits of flexibility and suggested that the conditions should include reference to the fact that flexibility should be done on a case-by-case basis and only when absolutely necessary (interview).

3.2.9. The final discussions of the Reflection Group - negotiations

The twelfth meeting of the group (the tenth on flexibility) was held in Brussels on 20-21 November 1995. The work was organised so that the members of the group dealt with the first, more general part of the final report and their assistants focused on the second, more detailed part. Flexibility was not addressed. The thirteenth meeting of the group was held in Madrid on 26 November 1995. Only stylistic changes to the draft were admitted. The final meeting of the group, held in Brussels on 5 December 1995, was preceded by a marathon session of the assistants of the group the previous night. It was clear when the drafting stage of the report began that the work of the Reflection Group was becoming more like regular Community negotiations. The members of the group suggested specific changes to the report and the language of the debate became much more aggressive. The reflection had ended and the first steps of the negotiations had begun.

It is important to emphasise that Westendorp, the Spanish Presidency and the Council Secretariat had the monopoly on any changes made to the document. The representatives were given a dead-line by which they were to submit any comments. The Finnish preparation team, for instance, suggested some twenty detailed changes to the document in general. As with the suggestions from other delegations, only a few of the changes were taken on board. This is indicative of any drafting process. The key to influence lies with those who submit the original draft. Not only are they able to control the agenda and the content of the document but they can also include or exclude any suggestions from the other parties. The

party suggesting changes is often content simply to see that some of the changes have been incorporated. But one must keep in mind that even after such changes, over 90 percent of the document has been drafted by the original source. As will be shown below this is the main reason why the part of the final document of the Reflection Group which deals with flexibility is very much along the lines of Spanish thinking about the subject.

3.2.10. The final report of the Reflection Group – December 1995 – putting flexibility on the IGC agenda

The final report of the Reflection Group was submitted to the European Council of Madrid in December 1995 (SN 520/95 REFLEX 21 1995). The report was divided into two sections: political and technical. The first part, "A Strategy for Europe", addressed flexibility in general terms. Flexibility emerged more specifically in the second broad area – "An Annotated Agenda". The report pointed out that the next enlargement will witness the incorporation of countries with an unprecedented political, economic and social heterogeneity. In discussing "flexibility, its rationale and its limits", the report stated that the Union must be based on common principles which inspire a common core characterising the Community as an entity based on the rule of law (SN 520/95 REFLEX 21 1995, p.6). The group rejected any form of à la carte integration and suggested that flexibility should be managed according to the following conditions:

- flexibility should be allowed only when it serves the Union's objectives, if all other solutions have been ruled out and on a case-by-case basis
- difference in the degree of integration should be temporary
- no-one who so decides and fulfils the criteria and the necessary conditions previously adopted by all can be excluded from full participation in a given action or common policy
- provisions should be made for *ad hoc* measures to assist those who want to take part in a given action or policy but are temporarily unable to do so
- when allowing flexibility the necessary adjustments should be made to maintain the *acquis*, and a common basis should be preserved to prevent any sort of retreat from common principles and objectives

- a single institutional framework should be respected, irrespective of the structure of the treaty.

Interestingly, the report suggested that most members thought that flexible arrangements should be agreed by all, as in the past. In other words, at this stage of the negotiations, according to the report, a majority of the participants believed that the trigger mechanism for flexibility should be unanimity. In addition, some members began suggesting that not all flexible arrangements needed to be temporary. Permanent flexibility could be allowed in those areas which did not concern core disciplines of the Community. It is also important to mention that the Reflection Group pointed out that the degree of flexibility varied both between the pillars and between the current and future members of the Union⁸.

The report made direct reference to flexibility in the second and third pillars. As far as the second pillar was concerned the report suggested that the Conference should examine constructive abstention. Constructive abstention was pegged to the idea of political and financial solidarity. Moreover, "it should be commonly agreed whether, and if so, how to provide for the possibility of flexible formulae which will not prevent those who feel it necessary to" go forward (SN 520/95 REFLEX 21 1995, p.42). In defence matters the report suggested that in the event that no changes were made to the decision-making mechanisms it seemed appropriate to introduce flexibility. To this end it was suggested that "while no one can be obliged to take part in military action by the Union, neither should anyone prevent such action by a majority group of member states, and this without prejudice to the required political solidarity and adequate financial burden sharing" (SN 520/95 REFLEX 21 1995, p.42). In the third pillar reference was made to the fact that incorporation of the Schengen agreement should be achieved using flexibility (SN 520/95 REFLEX 21 1995, p.18).

⁸ The report stated that: (1) whereas derogations must not be allowed in the Community pillar if they jeopardise the internal market and create discriminatory conditions for competitiveness, CFSP and some Justice and Home Affairs issues enable greater degree of flexibility to be used, and (2) the formulae applicable to the acceding countries should in principle be transitional arrangements based on consideration of their specific circumstances and can only be more closely defined when their respective accessions are negotiated. Nevertheless, a "critical mass" of *acquis*, essential for accession, has to be preserved in spite of any flexible arrangement (SN 520/95 REFLEX 21 1995).

3.3. The state of the flexibility debate in December 1995 – environment, process and style

The debate on flexibility had come a long way from the European Council of Corfu in June 1994. The ideas of Schäuble and Lamers, Major and Balladur, albeit in a quite different way from that which they had envisaged, had now found their way into the Conference documentation. Looking at the debate in December 1995 the following observations can be made. Firstly, the notion of temporary flexibility was still a part of the debate though it was being linked increasingly to flexible arrangements for the next enlargement. Secondly, the preferred trigger mechanism for flexibility seemed to be unanimity. No one had specifically said that all flexible arrangements should be triggered unanimously, but the reference to decisions by all implied that the members of group were leaning in this direction. This observation in the final report of the Reflection Group was influenced by Spanish thinking on the subject. Thirdly, the focus of the flexibility debate was on the second and third pillars and the general principles of flexibility. First pillar flexibility was not considered a viable option at this stage. Fourthly, the Spanish Presidency and the Council Secretariat were instrumental in establishing the rules of the game for flexibility. As indicated above, many of the ideas from the Spanish policy document had found their way into the final report of the Reflection Group. It is interesting to note that the original flexibility ideas of a hard core driving the process forward had been successfully blocked by the Spanish. The key issue was not how the willing and able member states could go ahead, but how the unwilling or unable member states could control flexibility. This is an important observation because ideas from the final report can clearly be seen in the final provisions on flexibility in the Amsterdam Treaty. The final observation is that very few member states produced policy papers on the IGC before or during the Reflection Group. This indicated that a learning process was taking place and member states wanted to use the time between the end of the work of the Reflection Group and the beginning of the IGC to craft their positions. After the publication of the report it became clear that the institutionalisation of flexibility would become a permanent item on the IGC agenda. In response to this the EU capitals began thinking about flexibility more carefully.

When looking at the negotiating *environment* it should be pointed out that discussions in the Reflection Group did not penetrate the higher levels, i.e. the

Foreign Ministers or Heads of State or Government. High ranking politicians were briefed but their personal input was not strong at this stage. Debate within ministries was also limited at this stage. In most member states it was the Foreign Ministry, either with or without the Permanent Representation in Brussels, that crafted the ideas presented to the Reflection Group. The final report of the Reflection Group was criticised in the media for a lack of unity. This criticism missed the point because the aim of the Reflection Group exercise was not to present the European Council of Madrid with a unitary report, rather it was to outline a set of ideas and options for the agenda of the 1996-97 IGC. For this reason it is interesting to note that in numerous places the report states that "one member state is of a different opinion" – most of the time this referred to a position taken by the United Kingdom. The main point is that the Reflection Group was under no pressure to achieve agreement and this is reflected in the outcome of the final report.

When looking at the negotiating process it is important to recognise the effect of the wide scope of the negotiations on the flexibility debate. Discussion in the Reflection Group demonstrated that flexibility was considered a background issue, a "last resort", as long as improvements in, for example, the second and third pillars were being considered. During the Reflection Group there was no debate about legal detail as delegations were still struggling to come to grips with what flexibility actually meant. The group was under no pressure to find a compromise or consensus in which areas flexibility would be most beneficial. Hence there was no need to establish coalitions with other delegations. Equally, there was no need to make or accept side-payments or concessions on other issues which were linked with flexibility. The work of the Reflection Group only began to resemble true IGC negotiations in the last two meetings when the dead-line for completing the report approached.

4. FROM MADRID (DECEMBER 1995) TO TURIN (MARCH 1996) – THE REPORTS OF THE MEMBER STATES

During the time between the end of the work of the Reflection Group and the beginning of the IGC on 29 March 1996 the governments of the member states prepared many of their IGC reports⁹. As a result of the ongoing debate about flexibility the member states and the institutions of the EU set out their positions on flexibility in a number of these papers before the beginning of the IGC. This section of the chapter looks at the position papers on flexibility.

4.1. The political impulse – the Franco-German push

The political impulse for the flexibility debate was established in two Franco-German documents which were published before the start of the IGC. The first was a letter by Chancellor Helmut Kohl and President Jacques Chirac on 7 December 1995, born out of the Franco-German summit in Baden Baden. The underlying idea about flexibility was that the willing and able member states should not be prevented from closer cooperation as long as that cooperation stayed within the institutional framework and was open to all members of the Union. The second document was also a joint paper, issued by Foreign Ministers Klaus Kinkel and Hervé de Charette, stemming from a Franco-German seminar held in Freiburg on 27 February 1996. The document made reference to the Kohl-Chirac letter and added that a possibility for opt-outs should be linked to the new proposed flexibility clause so as to prevent any member states being forced into a particular area of cooperation. However, these documents added nothing new to the practical debate; their importance was purely political, in as much as they came from the President, Chancellor and Foreign Ministers of France and Germany.

⁹ Not all of the policy papers were issued between January and March in 1996; some of them were published before and others after this period.

Some observers (Ehlermann 1997, Deubner 1998) have argued that the two Franco-German papers were the key documents in the early flexibility debate. This claim is partially true because any time France and Germany come out with a common proposal other member states tend to listen. From the Schäuble and Lamers paper and the Balladur proposal it was clear that the institutionalisation of flexible integration, in one form or another, was one of the priorities of France and Germany. The proposals by Kohl and Chirac and Kinkel and de Charette only stressed this further. It should be pointed out that flexibility was to be the only subject on which France and Germany would launch a common paper. The irony of Franco-German cooperation in the early stages of the debate and indeed throughout the 1996-97 IGC was that the issue that was designed to divide the Union ended up unifying France and Germany.

But, as argued throughout the thesis, one of the main problems with the debate was that flexibility meant different things to different people. Part of the blame for the confusing debate can be put on France and Germany (and the United Kingdom) because they launched the flexibility debate without defining the concept and without suggesting a concrete way in which flexibility could be applied in the new treaty. Not only was there little clarity about how to incorporate flexibility in the treaty, but there was also disagreement between France and Germany on the *finalité* of flexibility. In the beginning the French suggested a multitude of cores (Balladur) and in the end argued for one core around EMU and defence (see chapters 5 and 6). At the beginning of the debate the Germans advocated a core around France, Germany and the Benelux countries (Schäuble and Lamers) and in the end the core they suggested was much more open ended, encompassing all willing and able member states (see chapters 5 and 6).

4.2. Categories of member states' willingness and ability

Against the background of the work of the reflection Group and the Franco-German proposals member state governments began to outline their positions on flexibility. In order to be able to follow the nuanced flexibility positions of the member states throughout the Conference it is helpful to categorise their general approach according to will and ability in all three pillars during the three stages of the flexibility debate (see also chapter 2). These categorisations are not exact and do not

necessarily fit neatly into boxes, but they should be seen as general guidelines for the member state approaches and interests in 1996. The assumed positions are based on an analysis of the member states' IGC reports and interviews conducted for this thesis. It should also be stressed that the position of a member state is not taken by a unitary actor, but rather by the government in power and mediated through ministers or representatives. The ministries within a particular member state often differ more about the position than the actors on the ministerial or the representative level in Brussels. Nevertheless, these simplified categories do help to shed light on the complex policy developments which took place during the IGC. These general approaches will be followed throughout the Conference. The four categories are:

- willing and able
- not willing but able
- willing but not able
- not willing and not able

Table 4 indicates these groupings in each pillar. With respect to the first pillar the main focus is on EMU and assumptions about meeting the convergence criteria in 1995. In the second pillar the main concern revolves around ability to participate in defence cooperation. As far as the third pillar is concerned, the main focus is on transfer of competence from the third to the first pillar, and the Schengen agreement.

In broad terms the *willing and able* member states expected to participate in most flexible arrangements in a given pillar. The aim was to allow the willing and able member states to pursue deeper integration. This did not, however, mean that they thought certain conditions to flexibility would not apply. Tables 5 and 6 (see below) indicate that the willing and able member states advocated certain basic conditions in order to guarantee an adequate management of flexibility. The *able but not willing* and the *not willing and not able* member states wanted to put the brakes on flexibility in a given pillar because they knew they would not want to participate in all the proposed areas of closer cooperation. It is somewhat surprising that only a few of the reports of the *not willing but able* member states mention strict conditions for flexibility. This was perhaps because these member states did not include long

sections dealing with flexibility in their reports. The *willing but not able* member states aimed to limit flexibility because they knew they would have difficulty in participating in every flexible measure proposed. These member states strongly criticised flexibility because they believed that it could lead to second class membership of the Union.

Table 4 – Categorisation of member states in early 1996

Willingness and Ability	Pillar I	Pillar II	Pillar III
Willing and able	D, F, B, LUX, NL, AUS, IRL, FIN	F, D, B, I, LUX, NL, ES, POR, GR	D, F, I, B, LUX, NL, FIN, S, AUS, POR, ES, GR
Not willing but able	UK, DK	UK, DK, IRL, FIN, S, AUS	DK
Willing but not able	GR, ES, POR, I		IRL
Not able and not willing	S		UK

These four categories correspond to the early position papers of the member states in respective pillars. The willing and able member states had a generally positive view about institutionalising flexibility. The Kohl-Chirac and Kinkel-de Charette letters indicated that France and Germany were in favour of flexibility. The Benelux paper (1996) also indicated that flexibility was inevitable and indeed desirable as long as certain criteria were fulfilled. The Finnish (1996), Italian (1996) and Austrian (1995) position papers also stressed the need for flexibility, as long as strict conditions were met. The not willing but able and the not willing and not able member states did not favour flexibility, but could sympathise with those that did. They stressed that flexible arrangements should always be open to those member states which did not participate from the beginning (United Kingdom 1996, Ireland 1996, Sweden 1995, Denmark 1995). The willing but unable member states were more or less opposed to flexibility (Spain 1995, Greece 1996, Portugal 1996). The fiercest opposition to flexibility came from those member states that were either not willing but able or willing but not able to participate in flexible arrangements. This

economic division stemmed from the member states' assumptions about participation or non-participation in the single currency.

Table 5 outlines some general observations on the content of the member states' reports, looking at broad descriptions of member states' positions on flexibility as they appeared in the reports. The first five categories are self-explanatory. The sixth and the seventh categories indicate those policy papers which pegged flexibility to enlargement or to the slowest member state; in other words member states thought that flexibility was necessary in order to accommodate enlargement and/or to prevent the slowest member state from blocking progress towards further integration. Observation eight shows that a total of ten reports rejected *à la carte* integration outright. The ninth category shows that none of the reports advocated *à la carte* as a viable solution. Observation number ten is that only the policy papers of Luxembourg and the Netherlands mentioned the notion of constructive abstention. Observation eleven notes that the Commission and France mentioned that the key aim of flexibility was to allow the willing and the able member states to pursue further integration. The twelfth observation is dealt with more specifically in table 6 which shows that most of the reports explicitly outlined conditions, i.e. rules and regulations for flexibility. The final observation is that there were still some early documents which did not talk about conditions for flexibility.

Table 5 - Observations about the member states' IGC reports

ISSUE	MEMBER STATE
(1) Mentions flexibility	Commission 1995b, 1996, Belgium 1995, Benelux 1996, Denmark 1995a, European Parliament 1995c, Germany 1996b, Greece 1995, 1996, Spain 1995, 1996, France 1996, Ireland 1996, Italy 1995a, 1995b, 1996, Luxembourg 1995, Netherlands 1994, 1995a, 1995c, 1996, 1995, Austria 1995, 1996, Portugal 1996, Finland 1995, 1996, Sweden 1995a, 1995b, United Kingdom 1995, 1996
(2) Does not mention flexibility	European Parliament 1996b, Denmark 1995b, Netherlands 1995b
(3) Is generally progressive about flexibility	Commission 1996, Belgium 1995, Benelux 1996, Germany 1996, Spain 1995, 1996, France 1996, Ireland 1996, Italy 1995, 1996, Luxembourg 1995, Netherlands 1994, 1995a, 1995c, 1994, Austria 1995, Austria 1996, Finland 1995, 1996
(4) Is generally open about flexibility	Sweden 1995a, 1995a, United Kingdom 1995, 1996
(5) Is generally hesitant about flexibility	Denmark 1995a, Greece 1995a, 1995b, 1996, Portugal 1996
(6) Pegs flexibility to enlargement	Commission 1996, Spain 1995, 1996, Italy 1995, Netherlands 1994, 1995c, Austria 1995, Finland 1996
(7) Pegs flexibility to the slowest member state	Commission 1996, Belgium 1995, Spain 1995, Austria 1996
(8) Rejects à la carte as a viable option	Commission 1996, Belgium 1995, Benelux 1996, Spain 1996, Luxembourg 1995, Netherlands 1994, 1995c, Finland 1996, Sweden 1995a, 1995b
(9) Supports à la carte	No one
(10) Mentions constructive abstention	Luxembourg 1995, Netherlands 1994, 1995a
(11) Mentions the willing and the able	Commission 1996, France 1996
(12) Lists conditions and principles	Commission 1996, Belgium 1995, Benelux 1996, Spain 1995, 1996, Italy 1995, 1996, Netherlands 1994, Austria 1995, 1996, Finland 1996, Sweden 1995a, 1995b, United Kingdom 1996
(13) Does not list conditions and principles	Denmark 1995a, Germany 1996, France 1996, Ireland 1996, Netherlands 1995c, 1996, Finland 1995, Sweden 1995, United Kingdom 1995

Table 6 outlines what the member states and the institutions said about the conditions of flexibility in their reports (for a specific discussion on the conditions see chapter 3).

Table 6 –Conditions on flexible integration suggested by member states

CONDITION	MEMBER STATE
(1) Flexibility as a last resort	Commission 1996, Belgium 1995, Benelux 1996, Spain 1995, Spain 1996, Austria 1995, Austria 1996, Finland 1996
(2) Maintaining the single institutional framework	Commission 1996, Benelux 1996, Spain 1996, Italy 1995, Italy 1996, Austria 1995, Finland 1996, Sweden 1995a, Sweden 1995b
(3) Compatibility with the objectives of the Treaty	Benelux 1996, Netherlands 1994, Finland 1996
(4) Open to all member states	Commission 1996, Belgium 1995, Benelux 1996, Spain 1995, Spain 1996, Italy 1995, Italy 1996, Netherlands 1994, Austria 1995, Austria 1996, Finland 1996, United Kingdom 1996
(5) Safeguarding the single market	Commission 1996, Belgium 1995, Benelux 1996, Spain 1995, Spain 1996, Italy 1996, Netherlands 1994
(6) Safeguarding the <i>acquis communautaire</i>	Benelux 1996, Spain 1995, Spain 1996, Italy 1995, Italy 1996, Netherlands 1994, Finland 1996
(7) Control by the European Court of Justice	Commission 1996
(8) Trigger other than by unanimity	Belgium 1995, Netherlands 1994
(9) Key role for the Commission	Belgium 1995, Benelux 1996
(10) Supporting measures for outsiders	Spain 1995, Spain 1996, Finland 1996
(11) Flexibility should be temporary	Spain 1996, Austria 1996, Finland 1996
(12) Flexibility judged on a case-by-case basis	Spain 1996
(13) Flexibility should not distort competition	Austria 1995

The following conclusions can be drawn from the aforementioned reports and conditions. Firstly, by the end of March, just before the beginning of the IGC, it had become clear that flexibility would be on the agenda. All member states mentioned

the subject in their reports. Secondly, all member states and institutions seemed to reject the notion of an à la carte Union, or at least no government advocated a pick-and-choose form of flexibility. There were still some member states who preferred the multi-speed option (IRL, S, ES, FIN), hoping that all flexible arrangements would be temporary. However, the momentum did seem slowly to be gathering in favour of variable geometry with tight conditions, the aim being to allow the willing and able member states to pursue further integration. Thirdly, a group of able but unwilling member states was emerging. This group included Sweden, the United Kingdom (both of whom were open to flexibility but did not advocate it), and Denmark. Somewhat surprisingly Spain saw itself as a core country and seemed to support the institutionalisation of flexibility, but with the firm conviction that strict conditions had to apply. Fourthly, it is also interesting to note that while many governments seemed to support the notion of flexibility, almost all of them suggested tight conditions for its application. This was a clear indication that though flexibility was desirable it should be managed in such a way that it would not get out of hand.

CONCLUSION

Chapter 4 has given an overview of the flexibility debate from the European Council of Corfu in June 1994 to the beginning of the IGC in Turin in March 1996. It has provided an analysis of the political context of the debate, the reactions to the Schäuble and Lamers paper (1994), the work of the Reflection Group and the early position papers of the member states. The conclusion assesses the state of the debate on the eve of the 1996-97 IGC.

Chapter 3 examined the new flexibility provisions of the Amsterdam Treaty – i.e. what happened. This chapter has examined the agenda-setting phase and taken the first steps in answering how and why flexibility became a part of the new treaty. The agenda-setting stage of the 1996-97 IGC was important because it outlined the early ideas for the rest of the flexibility debate – many of the ideas that are articulated in the final report of the Reflection Group can be found in the Amsterdam Treaty. The basic observation is that flexibility emerged on the agenda because of debates about EMU, defence, justice and home affairs, enlargement and the recalcitrant member states. The initial push came from the Schäuble and Lamers

paper, Major's speech and the Balladur proposal, but a number of other players, such as think-tanks, policy-makers and academics, were also involved in the debate (see chapter 2). The early stages of the flexibility debate were characterised by a high degree of complexity. Observers and governments alike were trying to get to grips with confusing terminology and a subject which cut across a multiplicity of policy arenas both inside and outside the EU framework and hence concerned a large number of actors and complex preferences and approaches.

The agenda-setting phase of the 1996-97 IGC demonstrates that although all member states, large and small, play an important role in the IGC process, the most influential actors in an IGC are the civil servants of the Presidency and the Council Secretariat. The similarities between the Spanish white paper on the IGC and the progress and final reports of the Reflection Group, for example, are striking, whereas the report of the group did not necessarily reflect what was said in the meeting room. The influence of the Council Secretariat was important, though not as crucial as in the next stage. As will be argued in the next chapter, much of the role of the Council Secretariat depended on the strength, imagination and initiative of the Presidency. The more the Presidency was involved, the less the Council Secretariat could influence the documentation and *vice versa*. The Spanish Presidency was greatly concerned about flexibility and hence the Council Secretariat was not able to influence the debate as much as during the Italian and Irish Presidencies.

The agenda-setting stage also indicated that member states' approaches to flexible integration varied according to their general integration preferences and interests, and their assumptions of inclusion or exclusion from the proposed cooperation. This was especially apparent in their reactions to the Schäuble and Lamers paper. The countries that were mentioned in the core – Germany, France and the Benelux – were generally in favour of institutionalising flexibility. The countries that were marginalised were by and large opposed to the ideas outlined by Schäuble and Lamers. The Reflection Group and the early position papers of the member states saw a marginal shift in governments' positions. Slowly those member states which were generally in favour of deeper integration (e.g. Italy) began supporting some of the underlying ideas behind flexibility. The key observation is that those member states which assumed they would not be part of future flexible arrangements – be they in the fields of EMU, CFSP or JHA – were opposed to flexibility. The opposite

was true for those member states which assumed they had a seat around the core table.

During the agenda-setting stage, three main forms of flexibility were discussed. The willing and able member states appeared to support ideas relating to variable geometry. They wanted the possibility to pursue deeper integration, without all member states participating. The unwilling or unable member states opposed flexibility in general, but most of them noted that if any flexibility clauses were incorporated into the new treaty then they should be temporary in nature - i.e. they could tolerate multi-speed. No government advocated *à la carte*. The trigger mechanism for flexibility had not yet become a real issue during the agenda-setting phase. Nevertheless it was clear that the "hesitant" member states favoured unanimity as the trigger for flexible measures. It is interesting to note that virtually all governments seemed to advocate strict conditions for the management of flexibility. The early push came from the Spanish Presidency but soon everyone agreed that if any flexible arrangements were introduced then it would be important that the single institutional framework and the *acquis communautaire*, among other things, remained intact. The greatest surprise was that these conditions were outlined primarily in the reports of the member states which favoured flexibility and not in the reports of the reluctant member states. The main explanation for this was that the non-core countries wanted to avoid discussing flexible options all together. Instead of setting conditions for flexibility they were simply content to outline their opposition to the whole idea. The Spanish were proactive in the sense that they were quick to note that if flexibility was institutionalised then strict conditions would have to apply.

The work of the Reflection Group was the first stage in a long learning process. The negotiators bounced ideas off each other and reacted to each others proposals. As has been noted, IGCs are a set of time-bound negotiations with a multiplicity of issues and actors. Time is a significant factor in that long negotiations allow positions to evolve and negotiators to consult with capitals and to reconsider their objectives. Short negotiations impose pressure. Each actor holds more or less well-defined negotiating objectives which change throughout the span of the negotiations. The debate in the Reflection Group had only some of the characteristics of general negotiations: there was some issue-linkage but limited elements of compromise, coalition building and side-payments included in the debate. The process itself moved from the complex and unknown towards some

clarity. In the beginning flexibility meant different things to different people but by the end of the work of the Reflection Group there was a better, though by no means complete, understanding of what flexibility meant. The key contribution of the Reflection Group was that it established clear conditions for the management of flexibility.

Chapter 5 examines what happened next, i.e. the actual decision-shaping stage, from the beginning of the IGC in March to the end of the Irish Presidency in December 1996.

Chapter 5

THE DECISION-SHAPING STAGE: FROM TURIN (MARCH 1996) TO DUBLIN II (DECEMBER 1996)

INTRODUCTION

On 29 March 1996 the European Council of Turin asked the Intergovernmental Conference to examine the institutionalisation of the principle of flexible integration. Flexibility was now officially on the IGC agenda. This chapter provides an analysis of the flexibility negotiations during the decision-shaping stage of the 1996-97 IGC. The decision-shaping stage began with the Conference in Turin and ended with the European Council of Dublin on 13-14 December 1996. The focus of the analysis is on the internal dynamics of the negotiations – i.e. the debate around the negotiating table. This combined with an examination of domestic constraints and external events influencing the debate should paint a picture of the cumbersome evolution of the flexibility debate in the early stages of the 1996-97 IGC.

During the decision-shaping stage the flexibility debate became more focused and member states began grappling with the question of how to institutionalise the principle of flexibility – there was a shift from academic to practical models of flexibility. During the first three months of the IGC member states reiterated their positions on flexibility and few new ideas were put on the table. The first in-depth flexibility debate took place at the beginning of the Irish Presidency in July 1996. Thereafter the first draft article on flexibility was issued by the Presidency, with a little help from the Council Secretariat, in September 1996. The Heads of State or Government were not directly involved in the evolution of the flexibility debate and Foreign Ministers dealt mostly with broad guidelines for flexibility. It was the representatives who were the “makers and shakers” of the debate. The Irish Presidency, despite arguing that the flexibility debate was not ripe for an article draft in September 1996, should be given credit for keeping the issue alive. In long

negotiations, such as an IGC, the decision-shaping stage is usually the most difficult time because most of the member states are still crafting their positions for the end game and no concrete results are possible.

This chapter argues that the nature of the negotiations changed once the IGC began. During the Reflection Group the participants had been more open to outside influence. The European Parliament, for example, had had an impact on the flexibility debate (see chapter 4). Moreover, interest groups, think-tanks and academics had managed to be heard by member state delegations. The members of the Reflection Group were also aware of the political context in which the IGC agenda was being set. Once the actual IGC was launched in March 1996 the doors to the negotiating room began to close. The European Parliament was only allowed into the negotiations to voice their opinion once a month. Suddenly the papers of interest groups, think-tanks and academics became less relevant. And the political context of the negotiations began to give way to more detailed textual proposals from the Presidency and the Council Secretariat. The negotiations took on an internal dynamic of their own with the aim of guiding the IGC on a path which would lead to agreement in Amsterdam in 1997.

The decision-shaping stage highlighted a trend visible during the agenda-setting stage, namely that there was a high level of repetition, uncertainty and unpredictability about the flexibility debate. What did flexibility actually mean? Which pillars were suitable for flexibility? What form of flexibility should be incorporated into the treaties? Which member states were most likely to participate in flexible cooperation? The decision-shaping debate could be characterised as a loose collection of ideas which slowly gained clarity as the main issues began to slot into place. The debate was not very coherent and the negotiators appeared to be discovering preferences through action. The political leadership in the flexibility debate was taken by France and Germany. One of the main problems with the flexibility debate, however, was that the Franco-German tandem was not able to convert the political visions of flexible integration into legal reality. This meant that in relation to the flexibility negotiations the IGC became a learning process without proper supervision. The French and German delegations were not able to articulate what they actually wanted with flexible arrangements and where they would apply.

The three different negotiating angles – *environment, process and style* – played an important role in the flow of the negotiations. The negotiating *environment* in the representatives' group was amiable and the representatives were the pivot around which the negotiations turned. In the beginning there had been much talk about the professional level of the group, but the choice was rightly left to the member states. Finally, when the individuals were nominated, the mixture of Ministers of State, Permanent Representatives and others worked smoothly (see below). The group brought together an effective mix of technical expertise and political understanding. Indeed, “the Ministers demonstrated a grasp of a level of detail which is usually left to the officials, and the officials were capable of being every bit as political as the Ministers” (McDonagh 1998, p.46).

The decision-shaping stage continued to demonstrate that the 1996-97 IGC process was multi-faceted. Sometimes it was repetitive and boring; at other times it was innovative and interesting, an interactive learning process where negotiators bounced ideas off each other and reacted to each others' proposals. The substance of the negotiations was often about interests, as has been demonstrated by the categorisation of member states according to their general integration preferences in each pillar (see chapter 4). The process itself was always about reaching a compromise on these interests and it was often a painstaking, complex and difficult exercise. Perhaps the most revealing element of the process during the decision-shaping stage was the notion of repetition. This chapter will demonstrate that negotiations are not academic exercises with stimulating exchanges of ideas. Instead they are a long process of repeating positions and trying to find solutions to divergent positions – and sometimes negotiations are all about keeping an issue alive, as was the case with flexibility during the Irish Presidency.

During the decision-shaping stage some of the similarities in negotiating *styles* began to emerge. It has been pointed out that “seen from the inside, an IGC is about people – their abilities, their humour and their foibles. The Amsterdam Treaty is as much a result of myriad snap personal judgements and instinctive interventions as a coherent coming together of best-laid plans” (McDonagh 1998, p.6). In an IGC much therefore depends on the “human factor” or the negotiating style of the representative. Is he hard, soft or principled? Many of the ideas and positions that an EU negotiator brings to the table have been prepared in the home capitals, but more often than not the negotiator has a tendency to mould the

position to suit his own integration preference. The articulation of the position also depends on the general mood of the negotiations. Sometimes a negotiator might have a hard position on an issue but decides not to bring it forward because he realises that the time is not right. During the decision-shaping stage of the 1996-97 IGC, it was clear that all of the representatives were principled negotiators. During this phase there was no point being a hard negotiator since the final decisions were going to be taken at a later stage.

The chapter tries to answer four questions:

- (1) What was the political context of the debate?
- (2) What were the characteristics of the flexibility debate in the early stages of the IGC?
- (3) How did the flexibility debate evolve during the decision-shaping stage?
- (4) What were the positions of the member states and what were the reasons for those positions?

In order to answer these questions the chapter is divided into four parts:

- (1) The political context
- (2) From Turin (March 1996) to Florence (June 1996) – early stages of the IGC
- (3) From Florence to Dublin I (October 1996) – first draft article on flexibility
- (4) From Dublin I to Dublin II (December 1996) – a second wave of ideas.

The first part outlines some of the underlying issues of the Italian and Irish Presidencies and looks at the political context in which the flexibility debate was brewing. The second part examines the flexibility debate around the negotiating table during the first three months of the Conference. The third section looks at the deepening of the debate from an important representatives meeting in Cork on 5-7 July 1996 to the informal European Council of Dublin on 5 October 1996. This period was essential because it was during these three months that the first flexibility draft article was introduced, the debate began to have a clear focus and some of the early positions began to change. The last part of the chapter analyses the flexibility debate during the run up to the European Council of Dublin in and the Irish draft treaty of December 1996. During this period member states began to be

more concrete and more adamant about their flexibility positions. The conclusion assesses the state of the debate in December 1996.

1. THE POLITICAL CONTEXT – THE ITALIAN AND IRISH PRESIDENCIES

Most of the decision-shaping stage was dominated by EMU, the IGC itself and difficulties between the United Kingdom and its partners (Laffan 1997). All of these issues had an impact on the flexibility debate. The member states had to reveal whether they were willing and able to participate in EMU. As mentioned earlier the single currency was one of the main reasons for the emergence of the flexibility debate. The sooner there was clarity about which member states were going to participate in the third stage of EMU, the easier it would be for the negotiators to discuss practical arrangements relating to the institutionalisation of flexibility. In addition, member governments had to begin to articulate their positions on the IGC in general and, more particularly, their positions on flexible integration. The IGC was by definition linked to the flexibility debate: if little progress was made in the first, second and third pillars, some member states would be tempted to incorporate flexibility into the treaties as loosely as possible, without strict conditions. The key problem with the United Kingdom was its policy of non-cooperation in relation to the "mad-cow" disease. British recalcitrance in the BSE question influenced the flexibility debate because for some member states (Germany, France and the Benelux countries) it highlighted the need for a core group of member states to pursue further integration without all member states participating.

There were three national elections in 1996 – Spain, Italy and Greece. The first of these elections took place in Spain in February. As a consequence Felipe González, who had been the socialist Prime Minister of Spain for thirteen years, gave way to José María Aznar of the right-wing Popular Party (Amodia 1996). This had little effect on Spanish EU or IGC policy. Aznar was as determined as his predecessor to make sure that Spain would meet the convergence criteria and participate as a full member in as many areas of cooperation as possible. The Italian election, the third in four years, only marginally affected the IGC despite the fact that Italy was holding the Presidency (see below). Italy called elections in April

1996. The result was a victory for the Olive Tree Alliance, lead by Romano Prodi, which meant that the left gained power in Italy for the first time since 1946 (Laffan 1997, Donavan 1996). The EU-policy of the new government continued to be integrationist and the aim was to meet the convergence criteria for EMU at all cost. The third national election in 1996 took place in Greece where, after the resignation of Prime Minister Andreas Papandreou, his successor Costas Simitis called an election in September. He maintained the PASOK majority and continued to try to rid the legacy of Greek EU recalcitrance by playing a more constructive role, especially in the IGC.

The most significant member state development in relation to flexibility was the further weakening of the British government. During the decision-shaping stage Prime Minister John Major suffered a number of by-election losses and defections which left him with a thin majority in the House of Commons for much of the year. This majority was lost in a Labour by-election win in December. The Conservative Party seemed as divided as ever on European policy and the IGC. The political scene in Britain was a constant factor in the flexibility debate in the IGC. There was a general consensus amongst the negotiators that few major decisions could be taken before the British elections which were to be held in May 1997 at the latest. This did not mean that big decisions were delayed on purpose, but it meant that the participants were not under severe time pressure to conclude the IGC.

For the flexibility debate the British situation was a blessing in disguise. The complexity of the questions relating to differentiation meant that flexibility was the issue which needed, more than any other issue in the IGC, an enormous amount of careful consideration by all parties involved. The longer the IGC dragged on, the longer the flexibility debate had to mature. In addition it should be pointed out that the frail political situation of the Conservative government was the main reason for not including a draft article on flexibility in the Irish draft treaty in December 1996 (see below). The British government had indicated that if the draft treaty contained flexibility clauses which were integrationist in character, they would make the European Council of Dublin difficult for all the member states (interview). Against this background the Irish Presidency decided to take a more minimalist approach on flexibility in Dublin and thus exclude any flexibility articles.

The Italians had problems managing the regular Presidency agenda, but were able to conduct the IGC discussions without any major difficulties. The Italian Presidency was under some criticism during the first three months of the Presidency on weak organisation and stalling some issues on the regular Council agenda. The problems arose because Italy did not have a government during the first three months of their Presidency. In December 1995, Lamberto Dini had resigned as Prime Minister although he continued as caretaker when the Presidency opened. However, it is important to highlight that the lack of government and political leadership had little effect on the way in which the Italian Presidency handled the first three months of the IGC. The early stages of the IGC were essentially about organising the structure of the meetings and dossiers and getting the first positions of the member governments. This task was left to Italian officials, who managed the tasks well. From the start the Italians maintained a fast pace by having weekly meetings at the representative level and monthly meetings of Foreign Ministers (see below). This demonstrates that the early stages of IGCs are often managed and directed without much political involvement. The all important ground work is done by civil servants, not politicians. IGCs are a “bottom-up” process where politicians become seriously involved only in the final stages of the negotiations. The Irish Presidency, by way of contrast, took place during a period of domestic political stability which allowed the government to concentrate on the task of the Presidency (Laffan 1997). This was in stark contrast to the previous Presidencies – Spain and Italy – which had been hampered by elections and political instability. In this political context the task of the Italian Presidency was to map out the early positions of the member states and the task of the Irish Presidency was to move the IGC from the early phase of discussion towards negotiations on more concrete treaty texts.

2. FROM TURIN (MARCH 1996) TO FLORENCE (JUNE 1996) – THE EARLY STAGES OF THE IGC

This section deals with the flexibility debate during the Italian Presidency¹. The European Council of Turin provided the mandate for examining flexibility in the IGC. From the beginning of the negotiations it was clear that flexibility would be one of

¹ This section is based on participant observation, cross-referenced with interviews and documents.

the most difficult and sensitive areas of discussion (Edwards and Philippart 1997, Shaw 1997, Stubb 1997a). In most other areas of negotiation, delegations needed only to indicate whether they agreed or disagreed with a given proposal. The flexibility negotiations were hindered by the fact that flexibility was not clearly defined.

The flexibility debate took place on three levels. After the opening in Turin, the highest level, i.e. the Heads of State or Government, discussed the IGC in general terms three times during the decision-shaping stage. However, they did not specifically deal with flexibility and their influence in the early IGC was minimal. The Heads of State or Government during the decision-shaping stage were: Jean-Luc Dehaene (B), Poul Nyrup Rasmussen (DK), Helmut Kohl (D), Costas Simitis (GR), José Maria Aznar (ES), President Jacques Chirac and Prime Minister Alain Juppé (F), John Bruton (IRL), Romano Prodi (I), Jean-Claude Juncker (LUX), Wim Kok (NL), Viktor Klima (AUS), Antonio Guterres (POR), President Martti Ahtisaari and Prime Minister Paavo Lipponen (FIN), Göran Persson (S) and John Major (UK).

The mid-level, i.e. the Foreign Ministers, discussed flexibility at three meetings. Their contribution to the early IGC debate was more substantial than that of their superiors – they gave the political impulse to the debate at the representatives level. The Foreign Ministers during the decision-shaping stage were: Erik Derycke (B), Niels Helleve Petersen (DK), Klaus Kinkel (D), Theodoros Pangalos (GR), Juan Abel Matutes (ES), Hervé de Charette (F), Dick Spring (IRL), Lamberto Dini (I), Jacques Poos (LUX), Hans van Mierlo (NL), Wolfgang Schlüssel (AUS), Jaime Gama (POR), Tarja Halonen (FIN), Lena Hjelm-Wallén (S) and Douglas Hurd (UK).

The lowest level, the representatives, debated flexibility five times. The group of representatives was diverse. Eight of the representatives of the Ministers of Foreign Affairs had also been members of the Reflection Group: State Secretary for Foreign Affairs Silvio Fagiolo (I), Minister for European Affairs Michel Barnier (F), State Secretary for Foreign Affairs Werner Hoyer (D), State Secretary for Foreign Affairs Gunnar Lund (S), State Secretary for Foreign Affairs Michiel Patijn (NL), former Secretary General of the Council Niels Ersbøll (DK), Commissioner Marcelino Oreja (Commission) and Permanent Representative Manfred Scheich (AUS). The other representatives included: Permanent Representative Philippe de Schoutheete de Tervarent (B), Former State Secretary for European Affairs Yannis Kranidiotis who

was later changed for Secretary General for European Affairs Stelios Perrakis (GR), Permanent Representative Javier Elorza Cavengt (ESP), former Secretary General of the Foreign Ministry Noel Dorr (IRL), Permanent Representative Jean-Jacque Kasel (L), State Secretary for European Affairs Francisco Seixas da Costa (POR), Permanent Representative Antti Satuli (FIN) and Permanent Representative Stephen Wall (UK). It is important to reiterate that a majority of the substantive debate took place on the representatives level and that all of the representatives knew each other from previous EU contacts (for example Coreper II).

The negotiating environment is a key factor shaping the outcome of the negotiations. During the decision-shaping stage the camaraderie between the representatives strengthened. This was facilitated by the increasing number of informal meetings and dinners that were scheduled, particularly by the Irish Presidency. It was clear that the smaller the group, the better the progress of the negotiations. Formal meetings comprised the representative plus at least three to four notetakers. The environment in these meetings was formal and it was difficult to advance in the negotiations. The informal meetings had a different, more relaxed atmosphere (for example Cork, see below) because there were only two negotiators present: the representative and one assistant. These meetings usually made good progress. The third format of meetings was the informal representatives' dinners which were usually hosted by one of the representatives and took place at his or her residence. These meetings were very helpful, frank and open, and produced the greatest results. The final type of meetings were the so-called "confessional", a bilateral meeting between Presidency and officials from the Council Secretariat, on the one hand, and the representative and his assistant on the other. These meetings were helpful in explaining the special interests of a member state to the Presidency. As this chapter will demonstrate, these informal meetings were often the key to progress in the negotiations.

2.1. Mapping out the early positions - first flexibility meeting with representatives in May 1996

After the opening of the Conference in March flexibility was discussed for the first time at the representatives level on 3 May 1996. The debate was based on

Conference document CONF/3821/96 which noted that the issue of flexibility must be seen against the backdrop of difficulties encountered in the second and the third pillar since the TEU had entered into force and against the prospect of enlargement of the Union to 25 or 30 member states. The main idea was that flexible clauses would transform the Union so as to "enable progress to be made when enough member states wish to move ahead" (CONF 3821 1996, p.1). The Conference document, however, stressed that if flexibility was to be pursued a set of strict rules should be applied. Against this background the document suggested five "imperative" conditions and three "other" conditions (CONF 3821 1996, p.4) which should be incorporated in the new treaty. The "imperative" conditions were similar to those outlined in the final report of the Reflection Group:

- compliance with the single institutional framework
- the participation of a minimum number of member states
- the flexibility measure should be open to all member states
- an absence of distortions in the functioning of the Union
- the principle of non-interference².

The "other" conditions had also been discussed in the Reflection Group:

- recourse to flexibility as a last resort
- common accord of the Council to authorise enhanced cooperation between certain member states
- limitation in time.

These conditions were a spillover from the Spanish White Paper (1995) and the report of the Reflection Group (1995) and provide ample proof that the flexibility debate in the actual IGC started by focusing on the conditions necessary to manage flexibility. The focus was immediately on what flexibility should not do as opposed to what flexibility should or could do. In this sense the document highlighted the underlying paradox of the whole flexibility debate – namely that while the aim was to allow willing and able member states to integrate further, the focus was on conditions which would restrict their ability to do so. The conditions listed above

² This condition meant that those outside a flexible arrangement would not interfere or hinder those inside, and vice versa.

were a running theme throughout the Conference. The key observation here is that CONF/3821/96 did not consider that flexibility was appropriate for the first pillar. The strict conditions and the focus on the second and third pillars illustrate that the Italian Presidency, and before that the Spanish Presidency, were concerned with the effects first pillar flexibility would have on their ability to participate in all the suggested cooperation. This highlights the importance of the Presidency – the focus of the first flexibility document in the IGC proper might have been different if for example Finland or Austria had been holding the Presidency. If that had been the case the key areas of flexibility would most probably had been the first and the third pillars, not the second.

Nevertheless, the more fundamental question of the first Conference document on flexibility was how flexibility should be written into the treaties. Should there be a general flexibility clause (enabling clause) or specific flexibility clauses (case-by-case flexibility)? General and specific flexibility clauses were not considered to be mutually exclusive. The idea behind the general clause was to allow willing and able member states to develop closer cooperation among themselves. The proposals would be submitted to the Council and once the Council adopted them they would be regarded as endorsed by the whole EU. It was notable that in the first flexibility document the Commission's role was not mentioned anywhere. This could be interpreted as either an indication that the debate was in its early stages and little thought had been given to the institutional arrangements of flexibility, or it could be seen as an attempt by the Council Secretariat, which cooperated with the Presidency on the drafting of the document, to try to ensure that all flexible arrangements were done on an intergovernmental basis in the Council. The document, however, raised the question of whether a general clause applying to all three pillars would really be practicable, since there were such clear differences between the first, second and third pillars. It was therefore suggested that the general flexibility clause should be supported by three specific clauses which took into account the differences in each pillar. The details aside, it is important to note that the document was trying to get the negotiators to focus on the practical implications of flexibility by suggesting concrete ways in which it could be institutionalised.

The reactions of the delegations were as varied as the flexible models themselves. The representatives were influenced by the parallel discussions on decision-making

and institutions. Holding the Presidency, Fagiolo (I) suggested that these issues together with flexibility were important and should be seen as a whole, one influencing the outcome of the other (interview). Moreover Commissioner Oreja stressed that it was important to reflect on the implications of flexibility but that it was an issue that would be solved only in the final stages of the negotiations (interview). Flexibility was considered to be a fundamental question relating to the future architecture of the Union. It is important to note that Germany and France were the first ones to speak on flexibility in the first meeting, where the subject was discussed. Both delegations referred to the Kohl-Chirac and Kinkel-de Charette letters and explained that they had worked together on the subject, indicating the importance they gave to flexibility. Werner Hoyer (D) listed seven conditions which should apply to any flexible arrangements (interview):

- no one should be excluded from a flexible arrangement
- no one should be able to block a number of member states from pursuing flexibility
- it should be open to everyone to join a flexible arrangement at a later stage
- Community obligations should continue to be binding on all member states
- as many members as possible should be included in flexibility
- a common base of legislation should stay intact
- flexibility should not be used in changes to the treaties.

This was the only concrete proposal presented by the Franco-German tandem in the first flexibility discussions. Despite statements that France and Germany had worked together on the issue, it was striking how little consideration they had given to the practical implications of flexibility. This was demonstrated by Michel Barnier (F) who in his opening statement, after making some general remarks about the fact that flexibility was not new in the work of the Union, said that he did not want to go into any detail about the way in which flexibility should be institutionalised into the treaty (interview).

The debate in the first flexibility meeting was very general. It was unclear, for example, in which pillars enabling clauses would be most appropriate and which pillars would benefit from case-by-case flexibility. Many representatives – Patijn (NL), Wall (UK), Dorr (IRL) and Satuli (FIN) – stressed that differences between the

pillars should be taken into account when talking about flexibility (interview). Some delegations spoke about enabling clauses in all three pillars (D, F, Benelux), others stressed that case-by-case flexibility was conceivable only in the second and third pillars (ES, POR), and yet others could foresee enabling clauses only in the first and third pillars (FIN, S) (interview). At this stage the British delegation argued that flexibility in the first pillar should be done on a case-by-case basis and that the second and third pillars did not necessarily need any flexible arrangements (interview). Basically, the British government came out against flexibility, even though they had earlier argued for a more flexible Europe (Major 1994a, 1994b). The common denominator in all of these statements was a high degree of confusion and misunderstanding. The negotiators were not necessarily making sense to each other because they saw flexibility in different ways.

However, when examining the member states' positions on 3 May 1996 it is interesting to note that all the delegations were adamant about the need for strict conditions on any flexible arrangements. The debate that followed the opening remarks by the German and French delegations proposed a further set of conditions:

- the institutional framework should remain intact
- the *acquis communautaire* should be preserved
- differences between the pillars should be taken into consideration
- decisions about flexibility should be subject to unanimity
- flexibility should be a last resort (interview).

Though many of the delegations argued that different pillars needed different flexible solutions, nobody pinpointed what those differences were. The second pillar in particular was seen as a special case. The most striking point in the member states' positions was the triggering mechanism. At this stage in the negotiations no delegation advocated qualified majority for the general flexibility clause. There are at least two reasons for this. Firstly, most delegations, if not all, were not exactly sure what a general flexibility clause would entail. Secondly, this was still a very early stage in the discussions about flexibility. Without a draft article it was difficult to be precise about positions.

It is also interesting to note that the interpretation of the debate varied according to the individual or member state. The Chairman of the group, Fagiolo (I), noted that during the discussion in the first meeting it came to light that a general clause would perhaps be more difficult to implement and that it would be more preferable to organise flexibility on a sector by sector basis (AE 4.5.1996). This was not the interpretation of some other participants, namely Satuli (FIN) and de Schoutheete (B), who were of the opinion that in the first debate on flexibility a majority of the member governments had argued for a general flexibility clause (interview). These varying interpretations highlight the problems that are raised by the highly informal way in which EU-negotiations are documented. Instead of one general record there are the reports of 15 member states, the Council Secretariat and the Commission, all of which might have come to a different conclusion of what was said. The complexity of the flexibility debate only exacerbated the problem. It will be interesting to compare member states' flexibility reports from the 1996-97 IGC negotiations when they are released to the public in 2027: it will be surprising if there are not differences in interpretation between the reports of the member states.

The aim of the first flexibility debate was to clarify some of the issues and models of flexibility for the representatives. The observations from the negotiating room lead us to believe that the effect was inverse. After the first meeting the delegations seemed even more confused than before about what flexibility actually meant and how it could be put into the treaties. But the blame should by no means be put on the representatives; on the contrary, they were working hard in trying to come to grips with the subject. The first meeting simply illustrated the enormous complexity of the subject. It was becoming increasingly clear that flexibility would be intellectually the most difficult subject to negotiate during the 1996-97 IGC.

A final observation about the first meeting and the first document on flexibility is that the terminology had changed from the more theoretical multi-speed, variable geometry and à la carte to the more practically oriented pre-defined flexibility, enabling clauses and case-by-case flexibility. It is also important to note that there was little reference to temporary flexibility (transitional clauses) in the first meeting. But much like with the debate that preceded the IGC the change in terminology did not mean that everyone had the same understanding of what the concepts actually meant.

2.2. “The Ten Commandments” – first flexibility meeting with Foreign Ministers in May 1996

The Foreign Ministers met to talk about flexibility for the first time on 13 May 1996. The discussion was based on the same Conference document (CONF 3821 1996) which had been debated by the representatives two weeks earlier. The member states repeated their previous views and ministers confirmed that flexibility in the “legislative” first pillar would be more difficult than flexibility in the “executive” second and third pillars (AE 16.5.1996). The most important contribution to the flexibility debate at the ministerial meeting was Finland’s presentation of the “Ten Commandments on Flexibility” (1996). These commandments comprised a number of rules intended to help govern the application of flexibility. In one way or another all of them play a part in the new treaty provisions. The commandments were that:

- all willing and able member states must be able to fully participate in any flexible arrangement
- all flexible arrangements must have an established number of participants
- the single institutional framework must be respected, irrespective of the structure of the treaty
- the *acquis communautaire* must be maintained
- flexibility must not cause distortions in the functioning of the Union
- flexibility should preferably be temporary
- flexibility must be used as a last resort
- flexibility must not pertain to treaty change
- decisions must be taken in concordance with all member states
- flexibility must be controlled.

These commandments were clearly a compilation of ideas that had been floated around previously in the negotiations and they continued to reflect the defensive tone of the flexibility discussions. It should also be noted that at this stage Finland, along with many member states such as Sweden, Ireland and Denmark, still thought that flexibility should be temporary and that the trigger mechanism for a general flexibility clause should be unanimity. These positions were to change soon. In the Finnish case the change came after further deliberation on the subject in Helsinki. Once it was realised that there were very few areas in which Finland would

not participate in a given flexible arrangement it was easy to agree that flexibility did not necessarily need to be temporary nor was it important that everyone had to agree on triggering flexibility. The Finnish case is an illustration of how member states' positions change in an IGC.

During the ministerial meeting French Foreign Minister Hervé de Charette circulated a working document on the second pillar (France 1996). The document made three basic points about flexibility. Firstly, it suggested that a form of constructive abstention should be adopted so as to allow non-willing member states to opt-out from a particular (non-specified) decision, without blocking the others. Secondly, the French suggested an opt-in, the inverse in a sense from the above, whereby a member state could suggest the application of WEU forces within the realm of a Union operation - in essence building further on a particular operation. Thirdly, a form of closer cooperation in defence matters was suggested. The idea was that the European Council could suggest, by common accord, that a particular number of member states should pursue a particular defence action in the name of the Union. The responsibility would rest with the participating member states. These three ideas were somewhat overlapping (especially the second and third). Nevertheless, it is important to note that two forms of flexibility in the second pillar were beginning to take form: constructive abstention and enabling clauses. The question was whether the Union should create a defence capability and if so how should it be done. If the idea was turned down then the second pillar could be made more effective by allowing for constructive abstention. It is interesting to note that France did not launch the paper about second pillar flexibility together with Germany, indicating that France and Germany were not necessarily agreed on how to pursue second pillar flexibility. France was trying to lean to a greater extent on European defence structures such as the WEU. Germany, on the other hand was not willing to take a clear position on flexibility in the second pillar at this early stage in the negotiations.

The atmosphere in the meeting room was positive, but clearly a bit confused (interview). The Foreign Ministers were trying to come to terms with the nuances of flexibility. But perceptions on the subject had changed in the eighteen months since it had been re-introduced by Schäuble and Lamers. Some of the Foreign Ministers who had ferociously opposed flexibility when the Schäuble and Lamers paper was introduced in September 1994 had now reversed their positions and began to outline rather more positive ways of making the Union more flexible. Klaus Kinkel

(D), for example, had spoken firmly against the Schäuble and Lamers paper in 1994. Now he was one of the most dedicated advocates of increased flexibility. By contrast, Douglas Hurd (UK) had spoken in favour of some form of flexibility in Paris in 1995 and now he came out against any form of flexibility in the second and third pillars, accepting flexibility only on a case-by-case basis in the first pillar. Overall, the first Foreign Ministers' meeting on flexibility might have been a bit chaotic, but it was useful in clarifying some of the issues relating to flexibility. It was very much a meeting in which the Foreign Ministers themselves began to understand some of the nuances of flexibility.

It has been noted that "the Ministerial level was somewhat sandwiched between the European Council level above it and the level of ... Representatives below it" (McDonagh 1998, p.20). This is an important observation: throughout the IGC the role of the Foreign Ministers was difficult - all the key decisions were taken at the top level and the vast bulk of the work took place in the representatives' group. Against this background there was often criticism of the quality of the debate at the Ministerial level. The criticism should not, however, be directed at the ministers themselves. It was more a result of the institutional set up of the IGC. In any case it was important to have a link between the bureaucrats and the Heads of States or Government in the IGC. The mid-level was not there to provide in-depth debate, rather it was there to give the political backing for the work of the representatives.

2.3. The repetition begins – second flexibility meeting with the representatives in May 1996

Flexibility was on the agenda again on 30 May 1996, this time with the representatives. The discussions were based on CONF/3849/96. The document noted that the discussions thus far indicated that "the Treaty should contain provisions specifying the conditions and procedures for forms of enhanced cooperation" (CONF 3849 1996, p.11). The aim was to have flexibility clauses which would both provide added value to the integration process (by preventing deadlock) and reconcile differences over enlargement. Virtually the same conditions and principles as in CONF/3821/96 were listed. But this time the earlier reference to

differences between pillars gave way to a new condition which stated that any form of flexibility should be in conformity with the objectives defined by the treaty.

In other respects, the debate on flexibility on this occasion was very short and member states referred back to what they had said in the first and the second meetings on flexibility. This was an example of the apparent repetition which so frustrated the media during the 15 months of negotiations and which led them to criticise the IGC for lack of progress. But this criticism missed the point: "the painstaking and at times repetitive process of refining the overall package, meeting by meeting, was *itself* the negotiation" (McDonagh 1998, p.27). This was especially the case with flexibility which had the steepest learning curve of all the issues that were discussed. The whole process - from idea to article - takes patience. Some observers seem to believe that negotiations are an exciting, intense and short exercise where the participants gather around the negotiating table, bargain on issues based on static state interests and come out with a lowest-common-denominator solution (Moravcsik 1991). This is not the case in IGCs which are a long and often rather boring process where the negotiators throw out ideas and counter ideas to which the other participants respond. The repetitive nature of the second representatives meeting on flexibility was a case in point.

2.4. The progress report of the Italian Presidency - Conclave and the European Council of Florence in June 1996

The Italian Presidency convened an additional meeting of Foreign Ministers, a so called "conclave", in Rome on 17 June 1996 to evaluate progress and to consider the best way of approaching the IGC at the European Council of Florence on 22-23 June. The conclave decided to submit a "progress report" (CONF 3860 1996) to the European Council. So as to avoid confrontation and misunderstanding it was decided that the report should be the responsibility of the Italian Presidency, with the primary intention of facilitating the work of the incoming Irish Presidency. An addendum to the report contained some draft articles of the issues that had been discussed. However, due to the relatively immature nature of the debate there was no draft article on flexibility.

The European Council of Florence on 22-23 June 1996 was in practice only a brief check-up on the progress of the Conference. Politically, however, the conclusions of the European Council were important in that the Heads of State or Government indicated that they expected their meeting in Dublin in December 1996 "to mark decisive progress" towards completing the Conference by mid-1997 (European Council of Florence 1996). More importantly, it mandated the Irish Presidency to prepare "a general outline for a draft revision of the Treaties" for the Dublin Summit (European Council of Florence 1996). The Heads of State or Government also asked the IGC to continue to examine the notion of flexibility.

The Italian progress report made an attempt to sum up the flexibility debate and, to a large extent, repeated what had been said in the two previous Conference papers on flexibility (CONF 3821 1996, CONF 3849 1996). Flexibility was dealt with in two parts: the first part examined the overall idea of flexibility in the treaty; the second part outlined the conditions and principles that had been discussed by member states and then raised questions about the institutional implications of flexibility³.

³ The first part of the Italian Conference document in particular illustrated the ongoing lack of clarity in the debate on flexibility. The document differentiated between a general enabling clause and pillar specific flexibility clauses. The argument was that some member states preferred a general flexibility clause which would allow them to develop closer cooperation amongst themselves within the single institutional framework; others preferred a specific clause for each pillar, the focus being on CFSP and JHA. It was somewhat surprising that the document suggested that the two forms of enabling clauses, general and specific, should be mutually exclusive. Around the negotiating table some member governments (D, F, Benelux) had proposed combining the two forms so as to have a general flexibility clause, supported by three specific enabling clauses, one for each pillar. The fact that the document failed to take this idea on board is a clear indication that there was still confusion as to what exactly the flexibility clauses should entail, where were they going to be inserted and what were they for. Nevertheless it is important to note that the Italian progress report did suggest that flexibility could take a number of different forms:

- an enabling clause applying to a given sector in the pillar but not specifying the purpose or the procedures spelt out
- an enabling clause with a purpose and procedure spelt out
- provisions complete with purpose and procedures (e.g. a Protocol) and operational as soon as the treaty entered into force.

It is difficult to fathom the first suggested form of flexibility. Was it an open cheque for any form of flexibility with any number of member states and no decision-making procedure? Perhaps this was to be the most loosely interpreted form of flexibility, with no principles and conditions. The second form of flexibility was clearer and was indeed the form of specific enabling clauses finally inserted into the first and the third pillars of the Amsterdam Treaty. The slight variation of the new enabling clause in the first pillar as set out in the Italian progress report was that it established a negative list of areas in which flexibility was not to apply. The third form of flexibility was a clear form of à la carte and had very little to do with the enabling clauses as such. The idea was that if the member states ended up in deadlock over a particular issue (e.g. the Social Agreement and Maastricht), progress could be made by establishing a pre-determined procedure through which a number of member states could go ahead whilst others opted out from the specified area in question. This form of flexibility became important in the Amsterdam Treaty, particularly in relation to the Schengen agreement and the new title IV on visas, asylum, immigration and other issues relating to the free movement of persons. The document also suggested that discussions about the trigger mechanism for flexibility were not yet relevant. First the Conference should establish which form of flexibility should be inserted into the treaties and then a trigger mechanism should be debated. The choice at this stage seemed obvious:

2.5. Setting the stage for the Irish Presidency – a summary of the early stages of the flexibility debate

The three Presidency documents presented during the Italian Presidency were by nature rather general - they asked questions rather than providing answers and the European Council of Florence on 22-23 June 1996 asked the IGC to continue to examine the notion of flexibility in more detail. At this stage it had become clear that most member states wanted to have strict rules regulating flexibility. Nevertheless, flexibility was still being discussed on a general level and few delegations seemed to have a clear set of answers to the questions posed by the Presidency documents. This can be linked to the position papers issued by the member states before the IGC began. They were abstract, not only because the member states did not want to reveal their positions, but also because they were not sure what their actual positions were. Despite the vagueness of the positions of the member governments, the main issues relating to flexibility had been highlighted. Issues of decision-making, form and control had been raised, but no answers had been provided.

During the last few months of the Italian Presidency most member governments were still developing their positions on flexibility and no actual decision-shaping or decision-taking took place. Though the Italian document was not specifically addressed at Florence it illustrated that the flexibility debate had made progress in the first three months of the IGC. Out of the suggestions made by the Reflection

qualified majority voting or unanimity. At this stage of the negotiations no-one talked about using qualified majority as a trigger and having an emergency brake.

The second part of the Presidency document, dealing with principles and conditions, was clearer than the first. The document was bold enough to state that "The Presidency finds that there is consensus that any recourse to closer cooperation, whatever its form, should be subject to compliance with pre-defined principles and conditions" (CONF 3860 1996, p.34). This was a clear indication that conditional flexibility was on the agenda to stay. The conditions mentioned were the same as those outlined in CONF/3849/96.

The third part of the Italian document raised a set of important questions about the institutional implications of flexibility:

- should the Commission retain all its responsibilities in the event of closer cooperation?
- should MEPs who are nationals of member states not participating in closer cooperation retain all their responsibilities in a given flexible arrangement?
- should non-participating member states be entitled to vote in relation to closer cooperation?
- what kind of budgetary adjustments should be established within flexibility?
- what should the relationship be between participants and non-participants?

In raising these questions, the Italian Presidency, together with the Council Secretariat, set the tone for the debate during the Irish Presidency. So, despite the somewhat abstract tone of the flexibility debate during the first three months of the IGC, the Italian Presidency did end up exerting considerable influence over the subsequent direction of the debate.

Group and the reports of member states certain conditions for the application of flexibility had developed. The debate was slowly moving from principle to practice. Or as a Commission official noted in June 1996: "The Conference itself has begun, but there have been no negotiations yet. So far, representatives have stated their positions, then restated them. I suspect this is normal process and not yet a pathological incapacity to produce results" (Petite 1996). The negotiators began to explore ways in which to insert flexibility into the treaty and ways in which to control its application. Institutional implications also began to emerge in the discussions. Should the institutions have their regular role according to the pillar in which flexibility would be applied? Or should other arrangements be established?

The Italian Presidency managed the flexibility debate well, but it was not able to push its own agenda (nor should a Presidency). The problem was twofold. Firstly, as mentioned above, Italy did not have a working government during the early stages of the Presidency. The Italian administration had to juggle between regular civil service tasks and politics, the latter usually being taken care of by elected politicians. The other dilemma was Italy's seemingly schizophrenic position on flexibility. On one hand the Italians wanted to create mechanisms by which a limited number of member states could pursue closer cooperation, but on the other they wanted to make sure that they would be a part of any flexible arrangement. In the spring of 1996 there were still doubts as to whether Italy would participate in the third stage of EMU. So although they managed to draw together the threads of the debate in their Presidency document, they found it difficult to bring forward a flexibility draft article. This task was handed over to the Irish Presidency in July 1996.

Table 7 illustrates the general flexibility positions of the member states at the end of the Italian Presidency. The categorisation is based on interviews and observations from the negotiations. It is a simplification of the complex and often nuanced positions (or lack of position) that the governments were holding at the time. Some of the positions were to change throughout the negotiations and some were conditional upon, for example, the decision-making mechanism chosen for any given pillar. But it is important to note the difference between tables 5 and 6 in the previous chapter and table 7 in this chapter. The issues dealt with in the different tables illustrate that the flexibility debate was moving from general considerations to more specific issues. When the Schäuble and Lamers paper was published in 1994

the member governments were reacting to flexibility in general. In 1995 and early 1996 when governments were crafting their initial flexibility positions the assumptions varied according to will and ability to integrate in a particular pillar. During the first three months of the IGC the delegations were asked to outline their views on two forms of flexibility: case-by-case and enabling clauses. For this reason the table below has been elaborated to take into consideration the nuances that were emerging.

Table 7 – Flexibility positions in June 1996

Form of Flexibility	Pillar I	Pillar II	Pillar III
Favoured Enabling clauses	D, F, LUX, B, I, FIN, S	D, F, LUX, NL, I, ES, B	D, F, LUX, B, I, FIN, S
Favoured Case-by-case	UK, ES	DK	DK
No flexibility wanted	POR, DK, GR	UK, POR, GR	UK, NL, POR, ES, GR
Accepted flexibility, but no position yet	AUS, NL, IRL	AUS, NL, IRL	AUS, IRL
No clear position		S, FIN	
Advocated strict conditions	all member states	all member states	all member states

Table 7 leads to the following observations. In the early stages of the negotiations a coalition of willing and able member states emerged. This coalition was composed of France, Germany, Italy, Belgium and Luxembourg. The common characteristic of this group was that they supported enabling clauses across the pillar structure. The governments of these five member states thought that they would be able to participate in flexible cooperation in all three pillars. This was an interesting assumption, especially since it was by no means sure that Italy was going to be able to participate in the single currency. The Netherlands was the only founding

member state which was sceptical about an enabling clause in the first pillar. There were two reasons for this. Firstly, the leading Dutch negotiator, Patijn, was a member of the Conservative Party, which had voiced concern about flexibility in relation to the single market. The second reason was disagreement between the Foreign Ministry and the Ministry of Economy in The Hague on the effects of first pillar flexibility. The Dutch Foreign Ministry argued that an enabling clause in the first pillar would clarify the relationship between ins and outs in EMU. The Ministry of Economy was afraid, much like the Conservative Party, that an enabling clause in the first pillar would have an adverse effect on the single market. Only at a later stage, when it was made clear that the single market would not be affected by any flexible arrangements, could the Dutch government support an enabling clause in the first pillar.

The Finnish and Swedish governments were prepared to support enabling clauses in the first and third pillars, but had not formed a clear position on flexibility in the second pillar. In Helsinki there was much talk about the effects of second pillar flexibility. Would it lead to a common defence? Would Finland be excluded from defence cooperation? The opinions varied between those who thought that enabling clauses in the second pillar would enable Finland to integrate closer to European defence structures before making a full commitment to NATO and the WEU, and those who argued that there was an inherent contradiction between Finnish military non-alliance and second pillar flexibility. Against this background the Finnish delegation had not yet outlined its position in the IGC negotiations in relation to enabling clauses in the second pillar. Stockholm was going through a similar thinking process (interview). The third new member state, Austria, was still in the process of formulating a more concrete position on flexibility in all three pillars. The Irish government was also looking at various options and pushing other member states to define what they meant by flexibility. The government was raising important questions about flexibility and the Irish were to play a central role in the flexibility debate during Ireland's Presidency.

The Spanish government had the most complex flexibility position in the early stages of the decision-shaping stage. Spain was in favour of some form of case-by-case flexibility in the first pillar, an enabling clause in the second pillar and no flexibility in the third pillar. Spain's position was based on assumptions about willingness and ability to participate. In the first pillar the Spanish government was

not sure whether it would be able to fulfil the convergence criteria. In the second pillar Spain was ready to play a central role in defence matters and in the third pillar the Spanish position was more complex and depended on whether the Schengen agreement would be included in the new treaty. The Portuguese and Greek governments were opposed to any form of flexibility. Their position had not changed from their early reactions to the Schäuble and Lamers paper and they still assumed that the whole flexibility debate was about participation in EMU. This hard position towards flexibility would begin to soften at a later stage in the negotiations.

Finally, the British government was increasingly sceptical about flexibility. In the second and third pillars the British did not see any need for flexibility. In the first pillar the British government was willing to discuss flexibility on a case-by-case basis. This position was in line with the opt-outs from the Social Protocol and EMU, which the United Kingdom received at Maastricht. Much like the Irish, the Danish delegation raised many questions about the applicability of flexibility. By the European Council at Florence the Danish government had indicated that they were willing to discuss some case-by-case flexibility in the second and third pillars, but would prefer not to have any permanent flexibility in the first pillar.

It is important to note the influence of the negotiations on the flexibility positions of some of the EU governments. Finland and Sweden, for instance, had been rather sceptical about flexible integration in 1994 and 1995, but once the negotiations began they seemed to be more open to some form of flexible arrangements. There had also been a clear change in the British position (see above) since Major's Leiden speech, which had advocated a high degree of flexibility across the pillar structure. In the early months of the negotiations the British government began to oppose flexibility in all but some limited areas in the first pillar. Italy and Spain were two further examples of member state governments which opposed flexibility outright during the agenda-setting stage, but began to warm up to the idea as the negotiations proceeded. Moreover, during its Presidency the Italian government began advocating flexibility in all three pillars. The Spanish government was more careful by signalling willingness to explore an enabling clause in the second pillar and some case-by-case flexibility in the first pillar. Against this background of moving positions and a somewhat complex and undefined flexibility debate, the Irish took over the Presidency on 1 July 1996 and with it the management of the 1996-97 IGC.

3. FROM FLORENCE (JUNE 1996) TO DUBLIN I (OCTOBER 1996) – FIRST ARTICLE ON FLEXIBILITY

3.1. The concrete issues begin to take form – the third flexibility meeting with representatives in Cork in July 1996

The Irish Presidency might have inherited an IGC that had done substantial groundwork in sketching the early positions of the member states, but this did not diminish the amount of work that had to be done⁴. The main aim of the Presidency was to try to fulfil the mandate given by the European Council of Florence, namely to produce a “general outline for a draft revision of the treaties” (European Council of Florence 1996). The Presidency was happy with the ambiguity of the conclusions because it knew that it would be easier to produce a “general outline” than a “draft treaty” (McDonagh 1998). The challenge of the Presidency was to produce a text that could be unanimously endorsed by the 15 member states, yet at the same time keep a sufficient level of dynamism in the negotiations so as to prepare for the grand finale that was to take place during the Dutch Presidency. To meet the challenge the Irish approached their Presidency with “the upper end of realism” (McDonagh 1998, p.72). This meant that the Irish went for a maximalist interpretation of their mandate, aimed to advance the negotiations as a whole, tried to maintain a high level of ambition, strove to be fair and decided to be as open as possible (interview).

The Irish took the advice of the European Council of Florence and put flexibility on the agenda at an *informal* meeting of the representatives in Cork on 5-7 July 1996 (AE 10.7.1996). Cork was the first time the Presidency used an informal setting. As mentioned above an informal meeting meant that each member state was allowed only two representatives around the negotiating table: usually the representative (chief negotiator) and an additional civil servant (assistant). The aim of the informal meeting in Cork was to introduce the Irish agenda to the delegations and, above all, offer an opportunity for a more informal exchange of views. The Cork meeting was hence designed to take the discussions beyond the formalised statements of

⁴ This section is based on participant observation which has been cross-referenced with interviews and publicly available Conference documents.

position as had become custom in the *tour de table* of the formal meetings in Brussels. An Irish negotiator later noted that “we saw Cork as an opportunity to convey a sense that the negotiations were moving into a new phase” (McDonagh 1998, p.74).

The chairman, Noel Dorr (IRL), was of the opinion that the Conference had not sufficiently addressed institutional issues relating to flexibility (interview). In order to make the debate more concrete he issued an Irish non-paper on flexibility (1996). The non-paper aimed to force the negotiators to look at flexibility in more depth by addressing fundamental questions relating to the practical application of differentiation⁵.

⁵ The paper was divided into three parts. The first part dealt with arguments for and against flexibility. Delegations were asked to consider ten questions, the first five of which were directed at those who favoured old forms of flexibility and the next five at those who favoured institutionalising flexibility in a new way:

- (1) Can unanimity really work in an enlarged Union of twenty or thirty member states?
- (2) How can the objectives of the treaty be fully advanced if one member state is capable of blocking an initiative in pursuit of those objectives?
- (3) How can the non-institutionalisation of flexibility be justified when the current uncontrolled and non-institutionalised approach can result in blockages or ultimately total “opt-outs” detrimental to the Union?
- (4) Specifically, how can the Union pursue the objective of a common foreign and security policy, which is an area often requiring rapid reaction, if decision-making does not become more flexible?
- (5) Are member states willing to accept that in refusing to accept institutionalised flexibility, they are possibly giving the go-ahead for non-treaty based co-operation?
- (6) How can the coherence of the Union be preserved if flexibility becomes institutionalised or widespread?
- (7) Do you envisage enhanced flexibility potentially applying to the first pillar? If so can that view be reconciled with the need to respect the single market and all its related policies?
- (8) As regards the second pillar, can the standing of the Union retain credibility *vis-à-vis* third countries if not all member states in the Union support a particular policy or action? How could the policy avoid becoming a confusing patchwork with different groupings of member states supporting different policies? Could any member state which opposes a particular policy or action in a very sensitive area of foreign policy be expected to show solidarity with a policy to which their public opinion was fundamentally opposed?
- (9) In the third pillar, is there a large measure of support already at the IGC for improving the functioning of the third pillar? Is there not a case for concentrating on improving the functioning of the third pillar on a Community-wide basis rather than accepting the “inevitability” of institutionalised flexibility? What are the practical advantages of making new provisions for flexibility under the third pillar?
- (10) Do you agree that any premature decisions at the IGC on flexibility would undermine our attempts to move forward together in different areas?

The second part of the non-paper focused on principles and conditions. In relation to this it asked four questions:

- (1) Are the principles and conditions set out in the Italian Presidency progress report generally considered an appropriate basis for any approach to flexibility?
- (2) Is that catalogue of principles and conditions complete or should it be supplemented with additional elements?
- (3) Is it generally accepted that a general clause containing such principles and conditions is not a method or a mechanism in itself but rather it would be a provision of a general nature to appear in the common provisions of the treaty with any methods or mechanisms set out elsewhere in the treaty?
- (4) Most importantly, should the application of flexibility provisions require unanimity or could a more supple decision-making procedure be arranged? Could different decision-making procedures depending on the subject matter be arranged?

The debate that followed at the Cork meeting did not address many of the specific questions that had been posed. This is a characteristic of EU IGC negotiations in general: participants do not necessarily see the problems in the same way and thus choose to address issues other than those raised by the Presidency. Nevertheless the discussions that were based on the non-paper of the Presidency were more sophisticated than any of the previous flexibility debates. This had been the aim of the Irish Presidency in introducing the more informal style of debate. The effect of the Irish non-paper and the Italian progress report was the same as that of the progress report of the Reflection Group in 1994 – they focused the debate.

It is interesting to note that Commissioner Oreja was the first one to speak about flexibility at Cork. He stressed that it was important for the member states to conduct a long and profound debate about flexibility before they started to draw any conclusions (interview). This was very characteristic of the role of the Commission in the flexibility debate. The Commission, as the guardian of the treaties, did not want to be seen as an avid advocate of differentiation. At the same time it wanted to make sure that if flexibility was institutionalised in the new treaty, it would be done in such a way that it would not damage the institutional structure of the Union or the *acquis communautaire*. In contrast to the Maastricht negotiations, the role of the Commission in the 1996-97 IGC was that of a “neutral” broker trying to make sure that the interests of the Union remained intact. This role, however, changed during the decision-making stage, when the Commission began to advocate flexible integration (see chapter 6).

At the Cork meeting it was clear that the French and German governments were trying to put pressure on some of the more sceptical member states by arguing that if flexibility was not permitted within the Union it would happen outside, without rules (interview). This was one of the most powerful arguments used by those member states which saw themselves participating in most flexible arrangements. Some of the smaller states (FIN, LUX, B), in particular, welcomed the opportunity to create Community rules for flexible arrangements that would otherwise take place outside

The third part of the non-paper dealt with methods and instruments of flexibility. The main methodological question was whether the delegations wanted to go for pre-defined, case-by-case flexibility or enabling clauses. If enabling clauses were chosen the Presidency asked the member states to say whether the clauses would apply to a given sector or to a specific action. As far as instruments were concerned the Presidency noted that in due course the IGC would have to examine the role of the Commission in initiating legislation, the composition of the Council, the role of the European Parliament and the role of the European Court of Justice.

the treaty framework, and most probably directed by the larger member states (interview). For the first time in the negotiations, the German delegation suggested that a negative list could be drawn up of areas/articles in which flexibility would not apply in the first pillar. Satuli (FIN) and de Schoutheete (B) also suggested that a positive list should be established of areas in which flexibility could apply in the Community pillar (interview). Nevertheless, all member states stressed again that it would be important to establish conditions with which to manage flexibility (interview).

There continued to be fundamental differences among the delegations as to what kind of flexibility – pre-defined, case-by-case or enabling clauses - should be established in each pillar and what this would actually mean to the work of the Union. Some of delegations argued that enabling clauses could be problematic in the first pillar (NL, DK); others saw enabling clauses as a viable option in all the pillars (F, D, I, B). Yet others argued that perhaps constructive abstention (case-by-case) would be a better solution than enabling clauses in the second pillar (AUS, LUX, NL); others claimed that the second pillar definitely needed an enabling clause (F, D). However, a majority of member state governments (not the UK, IRL, ES and DK) argued that an enabling clause would be necessary in the third pillar (interview).

At Cork, an important element in the flexibility discussions emerged for the first time – a debate about which decision-making mechanisms should trigger a flexible arrangement. The debate was still in its early stages and the aim of the Presidency was not to get the delegations to spell out their preferences. Few capitals, if any, had thought about how decisions on flexibility should be established – unanimity, qualified majority or some other form of decision-making? The question about decision-making was brought up by Elorza (ES) who noted that if an enabling clause was established in the first pillar it would be imperative that any decisions to move towards a flexible solution should be taken by all (interview). This would mean that, whether or not a member state decided to participate in future flexible arrangements, they would have a say in whether or not such arrangements should actually be established. Elorza's intervention was not so much an objection to deeper integration as a fear of being excluded from cooperation. Along the same lines, Wall (UK), da Costa (POR) and Kranidiotis (GR) argued that any decisions based on a possible enabling clause should be subject to unanimity (interview).

Bringing the decision-making mechanism to the fore as early as July 1996 was an important development – the trigger mechanism was an issue which was to take centre stage throughout the rest of the flexibility negotiations in the 1996-97 IGC.

After Cork there was a sense that the flexibility debate had taken a leap forward – some institutional issues had been raised and the question of decision-making had been put on the table. There were also rumours about a possible Franco-German proposal, which would, some thought, clarify what the French and German governments actually wanted from flexible integration. A few further observations emerged from the flexibility debate in Cork. The Swedish government began slowly to take distance from the enabling clauses and realised that it would not necessarily participate in all flexible arrangements. The Swedish public was highly sceptical of EMU and the possibility that Sweden would not participate in the third stage of EMU was becoming more probable. Consequently the Swedes wanted to start putting brakes on any flexible arrangements. Sweden joined the more sceptical member states, such as the United Kingdom, Ireland and Denmark. They were all member states which, due to different circumstances, were able but unwilling to pursue various forms of flexibility. Their aim in the flexibility debate therefore was to make sure that they would not be systematically excluded from flexible arrangements. By contrast another group of sceptical member states, Portugal, Spain and Greece, were willing but not necessarily able to participate in all future flexible arrangements, particularly those relating to the first pillar. So they focused on setting stricter conditions for triggering flexibility and excluding some areas from flexibility. At the Cork meeting, the Irish Presidency had met the challenge of raising the level of the flexibility debate, but it was not until the next meeting of the representatives in Brussels – when the first draft article on flexibility was introduced – that the debate became concrete⁶.

3.2. The first draft article – fourth flexibility meeting with representatives in September 1996

The summer break in August meant that it was not until late September that flexibility was discussed again at the representatives level. On 24 September 1996

⁶ The Foreign Ministers briefly touched on flexibility in a meeting on 15 July, but the focus was mainly on defence issues, not flexibility as such.

the first draft article on flexibility was introduced (CONF 3914 1996), the introduction of which was intended to force delegations to start looking at flexibility in detail. Internally, the Irish Presidency was very sceptical about issuing an article draft on flexibility as early as September (interview). Most of the Irish negotiating team did not think that the flexibility debate was mature enough for a draft article. However, pushed by other delegations, namely France and Germany, and aided by the enthusiastic lawyers of the Council Secretariat, a draft article for flexibility was produced. The Conference document was discussed in Luxembourg on 30 September by the representatives⁷.

The document still strongly reflected the assumption that flexibility was needed because of enlargement. It was only implicit that flexibility was a tool which could be used to avoid stagnation in the Union. It was also clear that the conditions for the establishment of flexibility, especially in the first pillar, continued to be the focal point of debate. This, to a certain extent proves that some members were afraid of exclusion. If strict conditions were applied then the risk for exclusion would be minimised. And it is interesting to note that according to the document delegations were unanimous in agreeing that flexibility was needed more in the second and third pillars than in the first. As the document states, several delegations argued that

⁷ The introduction to the document noted that flexibility was one of the most important and sensitive issues under discussion at the IGC and that the positions of the delegations on the flexibility were still at a relatively formative stage. The document also noted that "the IGC may not be in a position to make a final detailed assessment of the need for and nature of any new flexibility provisions in the Treaty until a later stage in the negotiations" (CONF 3914 1996, p.1). The document outlined a set of points relating to flexibility which had been largely agreed by this stage in the negotiations:

- (a) The prospect of further enlargement made it all the more important to reflect on appropriate forms of flexibility.
- (b) Closer cooperation, whatever form it took, had to comply with principles and conditions designed to preserve the very nature, coherence and unity of the European integration process and must safeguard the *acquis communautaire*.
- (c) To the extent that it was agreed to incorporate new flexibility provisions, a proper balance would have to be struck between (1) preserving the cohesion and coherence of the Union and safeguarding the prerogatives of all its members, and (2) allowing some member states to go ahead when they so wished, subject to compliance with certain principles and conditions.
- (d) It seemed that any general framework for flexibility would have to be defined by common accord. There was a difference of view as to whether, if such a framework were in place, unanimity would be required to make use of the flexibility mechanisms at all stages of the implementation process. Some argued strongly that such unanimity would be inconsistent with the very concept of flexibility.
- (e) The need for flexibility varied from pillar to pillar as would the conditions for applying it, so any "general clause" allowing for open-ended flexibility could not be regarded as a method in itself. Any provisions for closer cooperation would have to entail both: (1) a provision of a general nature, possibly in the common provisions of the treaty, setting out the main conditions for closer cooperation, and (2) provisions applicable to closer cooperation in specific areas (e.g. CFSP, JHA).
- (f) The need to preserve the *acquis communautaire* meant that the scope for making use of flexibility mechanisms was certainly much more limited under pillar one than in the CFSP or JHA areas.

"any new flexibility arrangements should not apply to the first pillar at all" (CONF 3914 1996, p.3). However, an examination of the positions of the member states demonstrates that the governments were not as unanimously opposed to first pillar flexibility as the Conference document would lead us to believe (see table 7). It actually appears that only three governments – Portugal, Denmark and Greece – were opposed to any form of flexibility in the first pillar. The British and Spanish governments were willing to consider case-by-case flexibility in the first pillar. And Austrian, Dutch and Irish governments were still formulating their positions on first pillar flexibility in the late summer of 1996. The Presidency interpretation of the flexibility debate in the first pillar indicates the difficulty of determining exactly which position a member government holds on a complex issue. The difficulty was that the Presidency and indeed the delegations were not distinguishing clearly between enabling clauses, pre-defined flexibility and case-by-case differentiation. Often a delegation would say that it was against flexibility in the first pillar unless a number of conditions were fulfilled. The negotiator rarely specified what kind of flexibility he was taking about or indeed what the conditions would be.

Because this thesis aims to demonstrate that the flexibility negotiations were a learning process, moving from general considerations (i.e. Schäuble and Lamers) to detailed negotiations (i.e. article drafts), it is important to look at four main issues arising from the text of the first draft article on flexibility:

- (1) Model of flexibility
- (2) Conditions
- (3) Negative or positive list
- (4) Decision-making.

(1) *Model*. The first draft of the flexibility article attempted to include a number of highly political ideas in a legal text. The Council Secretariat and the Presidency tried to take into consideration the positions which had been articulated by the delegations. The structure of the article was such that a general flexibility clause was supported by three specific flexibility clauses which set out the conditions for flexibility in each pillar. As before, it was suggested that pre-defined forms of closer

Several delegations had argued that any new flexibility arrangements should not apply to the first pillar at all (CONF 3914 1996).

cooperation should cover a specific field (for instance, defence or immigration). Flexibility would be pre-defined in full in a protocol, describing both the objectives and the scope of the arrangements involved. The protocol would be applicable as soon as the treaty entered into force. The negotiations had not reached the stage where member states were demanding opt-outs from a specific area. This stage was to come in the final weeks of the negotiations when Denmark, Ireland and the United Kingdom were given pre-defined opt-outs from the Schengen agreement and issues relating to the free movement of people. The enabling clauses could also apply to a specific field (for instance, police cooperation), the difference being that the details would be defined by the participating member states at a later stage. It was this approach which was exemplified in the draft article. Case-by-case flexibility "could apply to individual acts or decisions under a policy, enabling member states willing to move ahead to do so subject to whatever decision-mechanism may be agreed" (CONF 3914 1996, p. 5). The idea of constructive abstention was seen as closely related to this form of flexibility. The document also reproduced the conditions and principles relating to flexibility from the Italian Presidency's report.

(2) *Conditions.* When looking at the general enabling clause it is interesting to note that the article was somewhat open ended - it did not provide any restrictive conditions, unlike later drafts. The draft article was also somewhat contradictory in suggesting that in the specific enabling clause of the first pillar there should be at least eight or ten participating member states. The Council Secretariat and the Presidency were clearly trying to accommodate the positions of all member states. In essence it is an example of the difficulty of trying to put abstract political ideas and positions into concrete legal text. It is also important to point out that the first draft article stressed that any closer cooperation had to be consistent with the *acquis communautaire*. In addition it was emphasised that flexibility should not discriminate between member states or cause distortion in competition. The clause also exemplified some of the Franco-German core thinking in that it allowed "closer cooperation between two or more Member States" (CONF 3914 1996 ANNEX 2, p.1). The second pillar flexibility clause was different in that it required a minimum of either three quarters or four fifths of the member states and, in addition, at least three quarters or four fifths of the population of the member states of the Union. Using the population criteria in the decision-making of second pillar flexibility was somewhat odd because it was an idea which had never been discussed among

member states in relation to flexibility. It seems to have been the personal preference of the author of the draft article in the Council Secretariat. Indeed this was the last time such a double majority was discussed in a draft article about flexibility. There were no real conditions involved in the second pillar, but the article suggested that the outsiders should not impede the others from pursuing a flexible format.

(3) *Positive or negative list.* The first pillar flexibility clause had the first framework of a so-called positive list - i.e. areas in which flexibility could be applied in the first pillar. It was suggested that flexibility could relate to the following areas: education, vocational training, youth, culture, public health, tourism, energy, civil protection, Trans-European networks, industry, research and technological development and combating social exclusion. This list had been expanded from the first flexibility document (CONF 3821 1996) which contained only half of the areas now mentioned. It is important to note that all issues relating directly to the internal market (the four freedoms, commercial policy, etc.) were excluded from the list. This reflected the wish of the delegations that the internal market should be out of bounds for flexible arrangements. The second and the third pillar flexibility clauses did not have a positive or a negative list - the assumption was that anything was possible.

(4) *Decision-making.* The decision-making mechanism for flexibility in the first pillar was not characteristic of the usual procedure, but it did follow basic Community philosophy. The trigger was to be based on a Council decision, taken in accordance with the following procedure: the Commission was to give an opinion on the basis of a request by the member states whether or not flexibility could be used in a particular case. If the Commission's opinion was favourable then the initiative would be considered to be approved by the Council, unless the Council decided otherwise by qualified majority. The Commission's opinion would be regarded as rejected by the Council unless it decided otherwise by qualified majority. In practice this meant that once the request had been made to the Commission the member states had very little to say about it. The Council could not make an actual decision, but member states constituting a qualified majority could object to the Commission opinion. In essence this system was more far reaching than an actual decision based on a qualified majority - because in practice it would be possible for eight to ten member states to trigger closer cooperation, and the only institution that could

block it would be the Commission. The draft article suggested that the trigger mechanism in the second pillar enabling clause should be unanimity. The Commission would not be involved. The third pillar mechanism was even more confusing. According to the clause, a minimum of eight to ten member states, three quarters or four fifths of them would be sufficient to trigger flexibility. Interestingly the population requirement, which was outlined in the second pillar, was not in the third. The actual trigger was to be unanimity, but in contrast to the second pillar, the Council was to consult the Commission before taking the unanimous decision.

The general tone of the debate on flexibility at the representatives level on 30 September was as before: there was a concern that flexibility would be one of the most important issues for the future of the Union. The delegations were equally agreed that decisions of flexibility would most probably be made very late in the IGC and at the highest possible level. Nevertheless it was clear that there were still more questions than answers and thus further discussions on flexibility had to be arranged as soon as possible. The discussion was based on the above mentioned document - CONF/3914/96. The interesting thing was that Chairman Dorr (IRL) had repeatedly to say to the delegations that the article draft was not a proposition by the Presidency, but a draft by the Council Secretariat which only suggested ways in which flexibility could be articulated into the treaties. The debate itself was not very focused - the delegations were still presenting general statements about the concept of flexibility (interview).

One of the problems with issuing a flexibility article and asking delegations to comment on it at short notice is that a substantive debate can rarely result. This was the case in the representatives meeting in Luxembourg. It takes a long time to prepare positions in an IGC and the more complex the issue, the longer it takes. In Finland, for instance, the flexibility draft was dealt with in five different bodies before it came to the negotiating table. The draft position was established in a working group with representatives from the Ministry for Foreign Affairs, the Prime Ministers' Office, the Ministry of Interior and the Ministry of Justice. Thereafter the Finnish flexibility position was debated in a group composed of the highest ranking civil servants in all the ministries. After the civil servants had dealt with the position it was debated in a group of the advisers to key government ministers. The fourth step was a meeting among ministers and finally the draft position was taken to the Parliament. Only after this long procedure and the involvement of a multitude of

different players, could the Finnish negotiator present a position around the negotiating table. To say that all the parties involved were of the same opinion about the draft article would be a gross overstatement. Against this background it should come as no surprise that none of the member governments had concrete positions on the first draft article on flexibility which was dealt with at the representatives meeting in Luxembourg on 30 September.

The most noticeable point about the negotiations on the first draft article on flexibility was that they were nowhere near the standard of the deliberations that had taken place in Cork almost three months earlier. Two reasons for the poor quality of the debate can be highlighted. Firstly, the setting of the Luxembourg meeting was formal. The room was packed with notetakers from all the delegations and the representatives did not seem to be able to discuss the issue as frankly as they could at Cork. Secondly, the delegations were simply not ready to come out with clear positions on a very complex draft article.

Another characteristic of the debate in Luxembourg was that delegations continued to repeat themselves. Many arguments were being recycled - a normal trend during the decision-shaping stage of a set of negotiations. Often the governments outline their basic positions and reiterate what they have said before. When a draft article was introduced, the delegations wanted to study it more carefully before they came out with absolute positions. The pace of meetings in the IGC was such that the delegations and their supporting teams in respective ministries had very little time to prepare their positions. The basic positions were often crafted in the capitals overnight so as to allow time to get them through the machinery before a position had to be given around the negotiating table. It was also difficult for high-ranking civil servants and government ministers to follow the detailed ideas that were presented in all the draft articles. Largely for this reason the member states often outlined only general positions when a draft article was introduced for the first time.

It is important to note that the Council Secretariat played an important role in the first draft article. It was the Presidency which approved all the Conference documents, but the Council Secretariat, backed by its institutional memory and legal expertise, drafted over 90 percent of the proposals, including the first flexibility article. Nevertheless much of the Council Secretariat's influence depended on the Presidency and the issue that was being negotiated. If the Presidency was not

interested in a particular subject or if it did not have the resources to deal with it, then the level of influence of the Council Secretariat increased. The Irish Presidency was trying to delay a draft article on flexibility because it did not think that the IGC was ripe for it. Therefore, the Council Secretariat drafted the first flexibility article. By way of contrast, the Dutch Presidency (see chapter 6) was very much involved in the development of the flexibility articles subsequently submitted for discussion during the decision-taking stage and the Council Secretariat's role then diminished.

Finally, it should be pointed out that individuals play a key role in the negotiations. Individuals in delegations can influence the debate through two basic channels. Firstly an individual can influence the thinking of other delegations by good oratorical skills and sound argumentation. All of the representatives in the IGC negotiations were seasoned negotiators and skilled orators who knew the powers of persuasion. Some of the representatives made long and elaborate interventions – for example Scheich (AUS), Kasel (LUX), de Boissieu (F), Ersbøll (DK) and Elorza (ES) - others presented their case more concisely Dorr (IRL), Satuli (FIN), Wall (UK), Lund (S) and de Costa (POR). Both methods worked well. The second channel of influence is the Presidency and the Council Secretariat. Through informal contacts an individual can present a case to either the Presidency and the Council Secretariat or both. The Luxembourg meeting and the first draft article indicated that some individuals or delegations were able to convince both the Irish Presidency and the Council Secretariat that the time was ripe for a draft article on flexibility.

4. FROM DUBLIN I TO DUBLIN II (DECEMBER 1996) – A SECOND WAVE OF IDEAS

4.1. The Franco-German push - fifth flexibility meeting with representatives in October 1996

The European Council of Florence in June 1996 had agreed that the Irish should organise an informal summit meeting during their Presidency. The aim of Dublin I in October 1996 was to inject some political adrenaline into the work of the

Conference. The Presidency wanted to avoid a situation in which the Heads of State or Government came to the summit meeting with fixed positions. There were two options for handling this. The first was to outline a broad agenda which would allow member states generally to reflect on the issues that had been dealt with in the Conference. The second was to define a narrow agenda of limited issues for discussion. The Irish opted for the former strategy. Prime Minister John Bruton sent out a letter to his colleagues outlining what was to be discussed and how it was going to be handled. Although there was no formal conclusion from the meeting, Dublin I seems to have served five purposes (McDonagh 1998): it gave a certain impetus to the work of the IGC, it provided an opportunity for the members of the European Council to familiarise themselves with the issues of the IGC, it enabled the Heads of State or Government to return to their respective capitals with fresh ideas about their national positions, it provided the Irish Presidency with an insight into the priorities of the different delegations and it highlighted the importance virtually all member states gave to issues relating to JHA.

After the informal European Council of Dublin on 5 October 1996 the general flexibility positions of the governments began to change. In the spring of 1996 nine member states had advocated a general flexibility clause and six member states had supported a case-by-case approach to flexibility. By October 1996 flexibility was seen as a necessity by most of the governments. Everyone accepted that general and specific flexibility clauses would be inserted into the new treaty. The differences in opinion now related more to the instrument than the principle. The question was about how, not if, flexibility should be incorporated into the treaty. However, the problem was that few governments seemed to have the answer.

The political impulse for flexibility was further strengthened by the third Franco-German memorandum of 17 October 1996 (CONF 3955 1996). The memorandum grew out of a joint seminar on 2 October 1996 and informal and formal discussions about the issue with other member states. The document was forwarded to the Presidency with a cover letter signed by Foreign Ministers de Charette and Kinkel and it was entitled "Closer cooperation with a view to increased European integration"; indicating that throughout the Conference France and Germany saw flexibility as a way forward towards deeper integration⁸.

⁸ See also Agence Europe 19.10.1996 and 23.10.1996.

The basic argument of the document was that enlargement creates pressure for flexible arrangements which should allow willing and able member states to "press ahead towards fuller European integration more quickly than others" (CONF 3955 1996 ANNEX, p.1). In addition the document referred back to the Kohl-Chirac letter of 6 December 1995 which had hinted that flexibility might also provide a way in which to get around awkward member states: "passing difficulties experienced by any of the partners in keeping up with the pace of progress should not impede the Union's ability to act and to move forward" (CONF 3955 1996 ANNEX, p.1). Against this background the document suggested that flexibility should be institutionalised with a general flexibility clause, supported by three specific flexibility clauses.

The basic idea of Franco-German thinking on flexibility was captured by a paragraph which read: "Introduction of a [flexibility clause] must enable the process of European integration to move on; it must performe be geared towards the future, even though initially only some of the member states will be ready to press ahead. The flexibility clause must also enable closer forms of cooperation which could otherwise take place only outside the Treaty framework to be kept under the Treaty umbrella" (CONF 3955 1996 ANNEX, p.1). There were two basic ideas behind the Franco-German thinking: firstly, the notion of driving the process forward by excluding the awkward; and secondly, arguing that if flexibility was not institutionalised within the treaty, it would take place outside, without Community rules or regulations. This approach was repeated time and again in the French and German papers in general, and in the statements made in the negotiations in particular.

The document itself did not provide a draft article but it suggested that the general flexibility clause and the specific flexibility clauses should have the simplest possible procedures, based on existing structure and machinery. This was a clear counter-reaction to the complicated procedures drawn up in the first draft article on flexibility a few weeks earlier. The general clause contained a set of fundamental rules which were conditions that Germany had presented in earlier discussions. The document stated that the general flexibility clause should also contain provisions on the single institutional framework. The argument was that the single institutional framework should remain intact under all forms of closer cooperation. As far as the Council was concerned the French and German governments suggested that appropriate trigger mechanisms should be chosen for each pillar, but that it was important that

no member state should have a right of veto. This formulation was a very interesting innovation. Instead of saying that they wanted qualified majority voting, France and Germany were arguing that no one should be able to block a decision. Their proposed general clause also confirmed the principle that regardless of which countries participated in a given flexibility arrangement, the Commission should act as a college. Appropriate participation by the European Parliament would also have to be agreed. The European Court of Justice would have its normal role in areas of closer cooperation. It was also stressed that any non-participating member state should be able to join an area of closer cooperation on the same terms as the founder member states.

The impact of the Franco-German document was twofold. Firstly, it strengthened the political impulse for the flexibility debate. And secondly, some of the more specific, but fundamental ideas were taken into the actual negotiations. The Franco-German paper was discussed over dinner at the representatives level in Luxembourg on 29 October. The discussion was opened by Hoyer (D) and Barnier (F) who introduced the proposal (interview). They stressed that the proposal was directly related to enlargement and that this IGC was the last chance before enlargement to incorporate flexible arrangements into the treaty since later changes would not be possible (interview). Many of the questions were left open in the proposal so as to allow for a more frank debate. Nevertheless it was also evident that the proposal was intended to show a way forward which could circumvent awkward member states. All the delegations knew that the British government would not accept transfers from the third to the first pillar and the Danish government had already stated that it would have constitutional problems should anything be changed in the third pillar.

One of the central arguments of this thesis is that France and Germany did not provide the necessary leadership in the flexibility debate. Differentiation was an idea which was launched in the autumn of 1994 mainly by politicians in France and Germany (and the United Kingdom). Thereafter France and Germany issued three joint papers on the subject – one in 1995 and two in 1996 - none of which were able to spell out in detail how flexible arrangements would work in practice. Nowhere else was this demonstrated better than during the representatives dinner on 29 October when both Hoyer (D) and Barnier (F) were pushed to clarify the points that they had presented in their paper, but were unable to do so (interview). The

frustration of the other representatives was exacerbated when the French negotiator had to leave in the middle of the flexibility discussions in order to be able to catch the evening plane to Paris (interview). This inability of the French and German governments to articulate how they wanted flexibility to work was one of the main sources of confusion throughout the IGC.

The reason for the French and German difficulties was the same as for other member states: flexibility meant different things to different governments. And despite assurances otherwise, there did appear to be a difference between French and German thinking on flexibility. For the Germans, flexibility meant proceeding faster in the integration process with, eventually, most if not all member states joining in. For the French, flexibility meant creating a permanent hard core of a small number of states which would drive the integration process forward. At the representatives' dinner, it was clear that most member states shared Germany's vision of flexibility.

4.2. Strengthening the political impulse – second flexibility meeting with Ministers in November 1996

After France and Germany had tabled their flexibility paper in late October the member state governments had a month to develop further ideas about flexibility. Flexibility was dealt with at the ministerial level on 25 November 1996. Discussions were not based on a draft article; instead ministers were asked to discuss a set of questions (CONF 3985 1996). Article drafting is seldom done at a ministerial level, at least not in the early or mid-stages of the negotiations. If it takes place at all it is usually in the very final stages of negotiations⁹.

⁹ The flexibility document which was presented to the Ministers noted that there had been common ground in the following areas:

- (a) flexibility could be a useful tool for enlargement
- (b) flexibility should not be considered to be an alternative to the regular decision-making procedures of the Union
- (c) flexibility should be applied only under strict conditions
- (d) flexibility should be open to all member states
- (e) the need for flexibility varied according to the subject matter concerned.

In addition the document posed eight questions relating to the general framework of flexibility and specific flexibility clauses in each pillar:

- (1) Should the model of flexibility be based on a general flexibility clause, supported by specific flexibility clauses?

Once again it is important to stress that the questions that were raised in the Presidency document had been put to the ministers and representatives before. It is also interesting to note that the document did not talk about an enabling clause in the second pillar. This should, however, come as no surprise since the document was prepared by the Irish Presidency which was clearly sceptical about flexibility in general and an enabling clause in the second pillar in particular.

Flexibility had been debated at the representatives level five times in the previous eight months. However, the Brussels meeting was only the second time that the Foreign Ministers had debated flexible integration since the beginning of the IGC. As such, it became the first substantive flexibility discussion for the ministers. And it was clear that all governments were now making clear distinctions between the pillars. In the first pillar discussions revolved around which areas were suitable for flexibility and which were not – i.e. negative and positive lists. In the second pillar the issue was whether an enabling clause was required or whether the current problems could be solved through constructive abstention or some form of pre-defined flexibility. In the third pillar the debate focused primarily on areas in which enabling clauses could be used. In all three pillars there was some talk about decision-making mechanisms, the role of the Commission and budgetary arrangements relating to flexibility.

- (2) If first pillar flexibility is accepted, should it be pre-defined or should it be incorporated in the form of a general flexibility clause?
- (3) If an enabling clause is accepted, should the areas be defined in advance? Should some areas be excluded in advance? What should be the trigger mechanism? What should the Commission's role be in this regard? Should the decision be subject to unanimity or qualified majority voting?
- (4) Is constructive abstention enough for the second pillar? What about flexible implementation?
- (5) Should other forms of flexibility (such as a pre-defined protocol) be envisaged, and if so, in which specific areas?
- (6) Could the flexible implementation of conventions in the third pillar provide a satisfactory answer to third pillar flexibility?
- (7) Do you prefer detailed provisions for closer cooperation in specific areas such as Schengen? Do you prefer enabling clauses to be applicable to all areas under the third pillar or to specific fields (i.e. police cooperation)?
- (8) If some issues are transferred from the third to the first pillar, could the first pillar flexibility clauses apply?

Table 8 – Flexibility positions in November 1996

Form and mechanism	Pillar I	Pillar II	Pillar III
Favoured Enabling clauses	B, NL, LUX, FIN, I, F, D, AUS	B, NL, LUX, FIN, I, F, D, ES	B, NL, LUX, FIN, I, F, D, AUS
Favoured Case-by-case	POR	UK, POR, AUS, IRL	POR
Favoured Pre-defined flexibility	ES, IRL	GR	ES, GR, IRL
No flexibility wanted	UK, DK, GR		UK
No clear position on flexibility	S	DK, S	DK, S
Favoured Negative list	B, NL, LUX, POR, F, D, ES	Not relevant	Not relevant
Favoured Positive list		Not relevant	Not relevant
No position on negative or positive list	UK, FIN, DK, I, GR, S, IRL, AUS	Not relevant	Not relevant
Preferred Unanimity	UK, ES, GR, S, IRL	UK, ES, GR, S, IRL	UK, ES, GR, S, IRL
Preferred QMV	I	I, F, D	I
No position on decision-making	B, NL, LUX, FIN, DK, AUS	B, NL, LUX, FIN, DK, AUS	B, NL, LUX, FIN, DK, AUS

Form and mechanism	Pillar I	Pillar II	Pillar III
Favoured a Strong Commission	B, NL, LUX, POR, I, F, D, IRL, AUS	B, NL, LUX, POR, I, F, D, IRL, AUS	B, NL, LUX, POR, I, F, D, IRL, AUS
Favoured a Weak Commission			
No position on Commission	UK, FIN, DK, ES, GR, S	UK, FIN, DK, ES, GR, S	UK, FIN, DK, ES, GR, S
Community finance			
Participants finance	UK	UK	UK
Community finance administrative expenses, participants pay for operative expenses	POR, F, D	POR, F, D	POR, F, D
No position on finance	B, NL, LUX, DK, FIN, I, ES, GR, S, IRL, AUS	B, NL, LUX, DK, FIN, I, ES, GR, S, IRL, AUS	B, NL, LUX, DK, FIN, I, ES, GR, S, IRL, AUS
Strict conditions	All member states	UK	UK
Loose conditions	No member state	F, I	F
No position on conditions	No member state	B, NL, LUX, FIN, POR, DK, D, ES, GR, S, IRL, AUS	B, NL, LUX, FIN, POR, I, DK, D, ES, GR, S, IRL, AUS

Table 8 illustrates the general positions of the governments on the flexibility issues that had been dealt with throughout the Irish Presidency. The expanded table demonstrates that the issues relating to flexibility were multiplying as the negotiations proceeded (compare with tables 3, 4 and 7). Inevitably the actual positions were more complex than the tables can suggest. For instance, when the table indicates that a given government does not have a position on flexibility, a

negative or positive list, the decision-making mechanism, the role of the Commission, budgetary questions or conditions in the second and third pillar, this does not mean that they have not thought about the question at hand. On the contrary, the government could be in the process of formulating a position or simply not have revealed the position at a particular stage in the negotiations. Nevertheless the table provides a way in which to bring some clarity into the complex flexibility negotiations. The member state governments have been categorised on the basis of positions articulated or submitted in both ministerial and representative meetings throughout the IGC. The focus, however, is on the ministerial meeting of 25 November.

The above broad government positions lead to a multitude of observations. The first is that though all delegations had by now accepted that some form of flexibility would be institutionalised in the new treaty, there was no agreement on where and how this would be done. Governments differed on the form of flexibility across the pillar structure. The Benelux, French, German, Finnish (see below for second pillar) and Italian governments, for instance, were pushing for enabling clauses in all three pillars. All the other member state governments rejected enabling clauses in favour of case-by-case or pre-defined flexibility. Indeed some governments – the United Kingdom, Denmark and Greece in the first pillar and the United Kingdom in the third pillar – rejected any form of flexibility.

The second observation is that some of the governments' positions on flexibility varied from pillar to pillar. The Irish government, for instance, agreed that some form of pre-defined flexibility could be established in the first and third pillars, but the second pillar was best suited to case-by-case differentiation. Moreover, the Greek government was against any form of flexibility in the first pillar, but could envisage pre-defined flexibility in the second and third pillars. The diversion in these positions was based on assumptions about exclusion and inclusion. The Irish, for example, assumed that they would not participate in flexibility in the second pillar which would be based on enabling clauses and could possibly lead to defence cooperation. Thus the Irish government supported constructive abstention which did not have anything to do with defence cooperation.

The third observation is that there had been substantial movement in the positions of some governments not only from 1994 when the Schäuble and Lamers paper

was issued, but also since the beginning of the Irish Presidency in July 1996 (see table 7). During the Italian Presidency the Swedish government, for instance, had supported enabling clauses in the first and third pillars, but by November 1996 they had retreated to contemplate flexibility anew. The reason for the retreat was that there had been an internal Foreign Ministry memo circulated among the negotiators (interview). This memo was sceptical about any form of flexibility (especially the enabling clauses) because it started from the basic assumption that Sweden would stay outside most of the cooperation proposed under the flexible arrangements (interview). Another radical shift had taken place with the Finnish position in the second pillar. By the end of the Irish Presidency the Finnish government began to advocate an enabling clause in the second pillar. This shift did not necessarily mean a shift in Finnish foreign policy which was still based on military non-alliance and independent defence, but it was an indication that the Finnish government, much as it had outlined in its accession treaty, was not going to hinder other willing and able member states to pursue deeper integration in the second pillar.

The British government was still sceptical about flexibility in general. From June 1996 it had shifted from supporting case-by-case flexibility in the first pillar to opposing any differentiation in Community matters. However, in the second pillar the British government could now, in contrast to an earlier position it had held in the spring of 1996, envisage case-by-case flexibility. It would seem that the British government was still having great difficulties in determining what form of flexibility it wanted, if any at all. The primary concern of the British position was outlined by Foreign Minister Hurd in the November meeting when he noted that flexibility should not be an "open cheque" for differentiation and decisions on any flexible arrangements must be taken unanimously (interview). The Austrian position had also changed in the previous five months. In June 1996 the Austrian government had supported flexibility in a broad sense, but had not articulated a clear preference. By the end of the Irish Presidency Foreign Minister Schlüssel was able to confirm that the Austrian government supported enabling clauses in the first and third pillars and constructive abstention in the second pillar. A comparison of tables 7 and 8 reveals, furthermore, that the Danish government had changed positions in relation to second and third pillar flexibility; the Portuguese government, which had opposed flexibility outright, was now willing to consider case-by-case flexibility in all three pillars; and the Irish government had also shifted its position towards a general acceptance of some pre-defined flexibility in the first and third pillars and case-by-

case flexibility in the second. Moreover the Dutch and the Spanish governments had shifted their flexibility positions in the first pillar – the former from pre-defined to case-by-case and the latter from a non-position to enabling clauses.

These changes, and others which can be seen from tables 7 and 8, are characteristic of an IGC process. Positions change as new ideas are launched and further thought to a specific issue is given in respective capitals and around the negotiating table. Sometimes there is a clear reason for the change – in the British case, for instance, there was a fear that the institutionalisation of flexibility would legitimise a hard core of member states which would drive the integration process forward against the will of the United Kingdom. At other times a change takes place when a particular issue is clarified – the Dutch, for instance, began supporting an enabling clause in the first pillar only after they had made sure that it would not affect the single market. In other cases there is not necessarily a reason behind the change - the change just happens as part of the process. Moreover change takes place when the issues around the subject, such as flexibility, are multiplied. When the IGC debate started in 1994 governments were voicing their opinions about core Europe and thus the answer was a simple yes or no to flexible integration. In November 1996, after the first article draft on flexibility had been issued, the governments had to outline their positions on tens of issues related to different forms of flexibility in different pillars. Sometimes they had a clear position, sometimes they did not and at other times they simply decided not articulate their position. The bottom line is that there is a tremendous amount of movement, broad and detailed, in member state governments' positions during an IGC.

A fourth observation is that the governments were still in the process of working out many of the more detailed flexibility positions. The British, Finnish, Danish, Italian, Greek, Swedish, Irish and Austrian governments, for instance, had not articulated their positions on whether they preferred a negative or positive list of areas in the first pillar, in which flexibility either would, or would not be appropriate. Moreover, only nine governments had indicated a preference as to decision-making mechanisms for flexibility or the role of the Commission in triggering a flexible arrangement. And eleven governments had yet to indicate a preference about the financial arrangements of flexible integration. Respective capitals were involved in a long learning process where new issues kept on cropping up on the agenda. Most

of the time governments simply had to react to a proposal from the Presidency, the Council Secretariat or another member state¹⁰.

4.3. No article in the Irish Draft Document - December 1996

The mandate of the Irish Presidency was to produce "a general outline for a draft revision of the treaties" (European Council of Florence 1996, p. 5). The aim had been to produce a document that resembled a draft treaty as closely as possible rather than a mere outline of issues for discussion and by this stage the Irish Presidency felt sufficiently confident of the progress that had been made to start speaking of an "Outline Draft Treaty" (McDonagh 1998). To this end the Presidency staff, some members of the Council Secretariat and a few Commission officials gathered for a four-day think-tank at Kilkea Castle Hotel in Kildare, Ireland, to prepare the "Outline Draft Treaty"¹¹. The task of the think-tank was practical, rather than academic. The aim was not to produce a perfect draft treaty, rather it was to "take new raw material of the negotiations – the concerns and priorities of each member state, the emerging trends in the discussion, the treaty texts which were beginning to take shape – and to give that material a coherence and shape which

¹⁰ At the ministerial meeting on 25 November 1996, Portugal announced that it would submit a draft article on flexibility: this was the first actual article on flexibility to be submitted by a member state. The draft article was released on 29 November 1996 (CONF 3999 1996). Its structure differed somewhat from previous drafts. It provided for the Commission to have the right of initiative and any flexible arrangement to include at least two thirds of the member states. Interestingly, the document did not suggest an actual trigger mechanism for flexibility - i.e. it left open the question of whether flexibility should be triggered by unanimity or qualified majority. Instead it raised, for the first time, the issue of decision-making within the framework of flexibility - that is the adoption of legislation inside the flexible arrangement. The suggestion was that all decisions should be adopted by a modified qualified majority vote, according to which the decision would be deemed taken when at least 70 percent of the total of the weighted votes of the member states participating in the enhanced cooperation had backed the decision. This decision-making mechanism would apply across the pillars.

References to the budgetary implications of flexibility indicated that the Portuguese were concerned that the use of flexibility would have an unfavourable financial effect on them. The document not only suggested that administrative expenditure resulting from the operation of the institutions in enhanced cooperation measures should be borne by the Community budget, it also proposed that "the accompanying measures considered necessary in order to prevent distortions and ensure that the harmonious development of the Union as a whole is not compromised will also be borne by the Community budget" (CONF 3999 1996, p.3). In other words Portugal wanted to ensure that it would not be at a financial disadvantage as a result of flexibility. However, the article was defensive in character and was never really discussed at the ministerial or representative level (CONF 3999 1996). The fact that the Portuguese document was not debated amongst the member states is indicative of the fact that non-Presidency papers rarely become the basis of negotiation. They usually function as a useful tool for the domestic agenda but add little to the actual IGC.

¹¹ In addition to the Presidency staff the Council Secretariat was represented by Secretary General Jürgen Trumpf, his *chef de cabinet*, Eckart Cuntz, Jacques Keller-Noellet, Giorgio Maganza and Jean Claude Piris. The Commission made its presence felt through the then Deputy Secretary General Carlo Trojan and the *chef de cabinet* of President Jacques Santer, Jim Cloos (McDonagh 1998, p.104).

would address effectively the principal challenges and, at the same time, be acceptable to all delegations as a basis for the final phase of the Conference" (McDonagh 1998, p.105). For this reason the most contentious issues, such as the number of Commissioners and the reweighting of votes and flexibility were not included as draft articles. The document did, however, contain a section which addressed some of the issues that had been brought forward in the flexibility debate – such as conditions and institutional questions. The Irish Presidency did not think that the time was ripe for a draft article on flexibility. "The crux was that no delegation could get everything it wanted; yet each delegation would have to 'find itself' sufficiently in the document to accept it as a basis for further work" (McDonagh 1998, p.126).

Some so-called "confessionals" took place in the run-up to Dublin II. The "confessionals" were meetings - held opposite room 50.4 in the Justus Lipsius building – in which the representative, accompanied by an adviser, "confessed their deepest concerns" to a few Presidency and Council Secretariat officials. These private sessions enabled the staff preparing the "Outline Draft Treaty" to determine the general wishes and concerns of each member state. These confessionals, much like the informal meetings (ex. Cork) were very helpful in ironing out specific concerns of member governments. In the run-up to the European Council of Dublin, flexibility was not specifically addressed. The Foreign Ministers discussed the Irish Draft Document at a ministerial conclave on 6 December 1996. The Ministers were generally of the opinion that the Dublin document would provide a good basis for continued discussions. There were only three member governments that considered the document problematic. The British government, for domestic political reasons (see above) said that the document went too far in questions relating to the third pillar and references to the extension of qualified majority voting. The French government thought that the paper was not ambitious enough, especially on the issues the French had advocated - public services and the institutions. The Spanish government also considered that the draft treaty failed to give sufficient consideration to some of its concerns (interview).

It was also clear from the conclave discussions that Dublin would not be an IGC summit – the main topic was EMU. Nevertheless there seemed to be a consensus that everyone should work hard in order to conclude the IGC at the European Council of Amsterdam in June 1997. By the end of the Irish Presidency three issues

had emerged more clearly. Firstly, third pillar issues such as the fight against international crime, terrorism and drugs had taken centre stage. This should have come as no surprise since this had been an aim of the Irish Presidency. Secondly, it was clear that the main institutional questions, such as the number of Commissioners, the reweighting of votes and the increase in qualified majority voting would be dealt with at the final stages of the IGC. Thirdly, flexibility had emerged as one of the more difficult issues of debate.

The legacy of the Irish Presidency was a "A General Outline for a Draft Revision of the Treaties" published in December 1996 (CONF 2500 1996)¹². The draft treaty did not propose a draft article on flexibility. Instead it outlined a number of issues where a degree of common agreement seemed to have emerged: flexibility should not be regarded as an alternative to the normal decision-making process; flexibility should only be used subject to precisely defined conditions; it should be open to all member states; and the rights of non-participating member states should be respected. Nevertheless, the Irish Presidency had done very important groundwork for the final stage of the negotiations. The parameters and models of flexibility had been defined in earlier draft articles at the representative level. Retrospectively one could argue that flexibility was a less sensitive issue to negotiate than many had been led to believe. When looking at the articles on flexibility before the Irish draft treaty it becomes clear that they do not differ much from those that were negotiated in the final stages of the Conference. The timid approach of participants can, however, be explained by the fact that none of the five "hidden agendas" of the flexibility negotiations – EMU, CFSP, JHA, awkward member states and enlargement - had been resolved at the time of the European Council of Dublin on 13-14 December 1996.

CONCLUSION

This chapter has given an overview of the flexibility debate from the European Council of Turin in March 1996 to the end of the Irish Presidency in December 1996. It has provided an analysis of the dynamics of the flexibility debate during the

first nine months of the IGC negotiations, an overview of the progress report issued by the Italian Presidency in June 1996, an examination of the first draft article on flexibility and the first "Outline for a Draft Treaty" issued at the end of the Irish Presidency. The conclusion assesses the state of the flexibility debate at the end of the Irish Presidency.

Chapter 3 examined the new flexibility provisions of the Amsterdam Treaty. This chapter, together with chapter 4, has examined the agenda-setting and decision-shaping stages of the 1996-97 IGC and taken some steps in answering how and why flexibility was institutionalised. The decision-shaping stage was important because it was during this time that the debate began to take focus. The three first months of the decision-shaping stage, i.e. the Italian Presidency, did not differ much from the debate of the Reflection Group – the delegations were mapping out their starting positions. But during the Irish Presidency, the first draft article on flexibility was introduced. Despite being hesitant about the notion of flexibility, the Irish Presidency conducted the flexibility debate sensibly. The principles were debated at the ministerial level and the draft articles were discussed by the representatives. It was equally wise to insist that the outcome of the flexibility clauses in the new treaty should depend on how much progress was made in the IGC in general. This approach kept up the pressure for reform in other areas and took into consideration the sensitivities of all the member states. If the Irish Presidency had been aggressive about flexibility and included a draft article on closer cooperation in the outline draft treaty, it would have been difficult to reconcile the positions of all the member states at later stages. Flexibility was not ready to be included in a major document in December 1996.

The negotiating *environment, process and style* of the participants played an important role in the evolution of the flexibility debate during the decision-shaping stage. Judging by the informal representatives meeting at Cork, it appeared that the relationship between formality and progress was inverse. If the negotiating environment was formal there was less progress in the negotiations and member governments had a tendency to repeat their previous positions; when the environment was informal, progress was made. Throughout the Italian and Irish

¹² It is interesting to note that the Irish Presidency presented the "Outline Draft Treaty" in a more authoritative bound format than the usual pile of regular A4 paper. This presentational strategy was a conscious effort by the Presidency to make the document look more official (McDonagh 1998).

Presidencies the flexibility negotiations became increasingly complex. Issues involving flexibility mushroomed during the first nine months of the IGC, making it increasingly difficult for the delegations to keep up with the debate and present coherent positions around the negotiating table. As a consequence the issue-linkage within the flexibility negotiations increased – governments were not only for or against enabling clauses, case-by-case flexibility or pre-defined differentiation in the different pillars, but they also had to take issue with how the institutionalisation of flexibility would be done in practice (decision-making, budget, etc.). The negotiating styles of the participants remained the same during the decision-shaping stage. All participants remained principled negotiators focused on the merits of the arguments presented.

The decision-shaping stage demonstrated that the positions of the governments were not static – quite the contrary. An examination of the government positions over the decision-shaping period (tables 7 and 8) demonstrated that there was a great deal of fluctuation. At times the positions shifted for a clear reason if a particular issue was clarified. At other times there was no apparent reason for changing a position. The negotiators often reacted on the basis of assumptions about what a particular flexibility rule would do to their influence in the system. They were not certain about the implications of the flexibility clauses, but their basic assumptions remained the same.

Throughout the decision-shaping stage the delegations were learning about the positions of other delegations. They also had to think through the implications of their own positions – a process in which some governments adjusted and changed their positions because contradictions were discovered or disadvantages understood in a new way (the United Kingdom and Sweden, for example). During the Italian and Irish Presidencies there was extensive communication and discussion between groups and individuals on several levels. Within the EU game, representatives and ministers interacted frequently. In addition, each national negotiation team had to keep in touch with its base on multiple tiers – officials with officials from different ministries, officials with ministers, ministers with the government, government with the Parliament, the public and the media.

The decision-shaping stage, like the agenda-setting phase, demonstrated that although all member states, large and small, play an important role in the IGC

process, the most influential actors in an IGC are the civil servants of the Presidency and the Council Secretariat. As an Irish negotiator put it “virtually every document tabled at the IGC during the Irish Presidency was a collaborative effort between the Presidency and the Council Secretariat – a first Secretariat draft initially guided and subsequently adapted by the Presidency” (McDonagh 1998, p.44). The Council Secretariat had been involved during the agenda-setting stage, but became increasingly involved during the decision-shaping stage when article drafting took place. Much of the role of the Council Secretariat depended on the strength, imagination and initiative of the Presidency in a particular issue. The more the Presidency was involved, the less the Council Secretariat could influence the documentation and *vice versa*. Both the Council Secretariat and the Presidency were responsible for preparing and tabling discussion proposals and it was very rare that member state proposals were treated as the basis for discussion. The show was run from the Justus Lipsius building and either Rome or Dublin.

A final observation from the decision-shaping stage relates to the role of France and Germany in the flexibility debate. The Franco-German axis had provided the impetus for the flexibility debate throughout the IGC. Informal papers by prominent French and German politicians in 1994, joint ministerial letters in 1995 and 1996, and the joint proposal in October 1996 indicated that France and Germany were pushing flexibility very hard. Yet it is striking how little thought Paris and Bonn had given to the practical implications of flexible integration. The political vision was not backed up by legal pragmatism. The joint proposal went some way in clarifying French and German thinking on flexibility, but it did by no means answer all the questions raised by other EU governments. There was nothing radically new in the joint proposal – most of the issues had already been discussed at the representatives level during the Italian and Irish Presidencies. From the autumn of 1994 when Schäuble and Lamers and Balladur outlined their ideas on flexibility it had taken two years for France and Germany to come up with a joint proposal with any detail. There were two reasons for this long delay. Firstly, flexibility was an abstract issue which was difficult to deal with even for the most seasoned civil servant or politician. The French and German governments had simply not thought through the implications of institutionalised flexibility before they launched their visions. Secondly, it seemed that France and Germany did not necessarily have the same understanding of what flexibility really meant. At the beginning of the debate the French argued for a multitude of cores and the Germans supported one core

that would drag the recalcitrant member states along. By October 1996 the French government appeared to want to create a single core around the Franco-German axis, but the Germans were more keen on an open core for all willing and able member states. The problem with the flexibility debate in the first nine months of the IGC was that the delegations were involved in a long learning process without any qualified teachers leading the way.

This chapter has analysed the most difficult stage in the IGC negotiations – the decision-shaping stage. The next chapter will look at the final stage of the IGC, the grand finale of the flexibility negotiations.

Chapter 6

THE DECISION-TAKING STAGE: FROM DUBLIN II (DECEMBER 1996) TO AMSTERDAM (JUNE 1997) AND BEYOND

INTRODUCTION

The final chapter of this thesis deals with the flexibility debate during the decision-taking stage of the 1996-97 IGC. This phase starts at the beginning of the Dutch Presidency on 1 January 1997, runs through the official end of the IGC with the European Council of Amsterdam at 3.35 a.m. on 18 June 1997 and concludes with the signing of the Amsterdam Treaty on 2 October 1997. The stakes of the negotiations were now much higher. Failure to reach agreement in Amsterdam would be a significant setback for the Union as a whole. At best it would be an embarrassment and an interruption to the regular work of the Union; at worst it would delay enlargement and the third stage of EMU.

The principal challenge of the 1996-97 IGC fell to the Presidency of the Netherlands. The European Council of Dublin had set a clear mandate for the new Presidency when it stressed "the importance of completing the Conference at Amsterdam in June 1997" (European Council of Dublin 1996, p.11). The task was now to move to definitive and detailed negotiations. The Dutch Presidency took the bull by the horns and began pushing sensitive issues, such as flexibility, to the fore. The frequency of meetings on flexibility doubled in comparison to the Irish Presidency. This was necessary if any results were to be achieved at Amsterdam. The participants knew that flexibility was one of the most important and in many respects most difficult issues on the negotiating table. If mishandled, the institutionalisation of the flexibility provisions could undermine the coherence of the Union. The problem with pushing flexibility to centre stage was that it was linked to other issues on the agenda, namely CFSP and JHA. The Dutch wanted to avoid a situation whereby these two issues were undermined because of flexibility. The

other problem was that even though the member states now understood the flexibility options in the same way, they did not necessarily agree about the purpose of flexibility. Some saw it as an instrument for enlargement, for others flexibility was a way in which to bypass awkward member states and others still saw flexibility as a way in which to opt out of certain policy areas. All of this led to an intense flexibility debate during the first two months of the Dutch Presidency. The Dutch were mindful of the difficulties they had faced on "Black Monday" during the Maastricht negotiations and did not want to repeat that traumatic experience.

One of the arguments of this chapter is that the key player of the final six months of the flexibility negotiations was the IGC Chairman of the Dutch Presidency, Michiel Patijn. His relentless efforts to drop the enabling clause from the second pillar and force the Schengen agreement into the new treaty were the most important factors influencing the final outcome of the flexibility provisions. Without Patijn's personal vision of an Atlanticist security structure it could have been possible that the member governments would have been able to agree on an enabling clause in the second pillar, which might have led to flexible defence arrangements within the treaty framework. More importantly, without Patijn the Schengen agreement would not have been incorporated to the Amsterdam Treaty. Patijn's negotiating style in the final stages of the IGC was hard. Through his personal dedication and persistence he forced compromises in issue after issue. Patijn's personal involvement in the final outcome is an illustration of the importance of individuals in the IGC process.

This chapter also argues that the representatives remained the central forum of negotiation all the way up to the European Council of Amsterdam. The representatives hammered out detailed legal compromises which were examined by the Foreign Ministers before finally being rubberstamped by the Heads of State or Government in Amsterdam. This does not, however, render the role of politicians unimportant in an IGC. On the contrary, without the political impulse from Foreign Ministers and without the political determination of Prime Ministers and Presidents, the 1996-97 IGC could easily have carried on for another year or two.

The pivotal moment of the Dutch Presidency in flexibility terms was the meeting of Ministers for Foreign Affairs in Rome on 25 March 1997 when the draft article on flexibility was examined and broadly approved by the ministers. Thereafter the

flexibility debate slowed down and it became clear that only three outstanding issues relating to flexibility would be raised at Amsterdam: the second pillar enabling clause, the trigger mechanism and the role of the Commission. During the last four months of the IGC flexibility was addressed four times and only a limited number of technical changes were made to the draft articles on flexibility which had been debated in the previous months.

The Dutch Presidency took charge of the negotiations from the outset, leaving the Council Secretariat with less room for manoeuvre. As the flexibility negotiations proceeded the Dutch Presidency was able slowly to iron out the differences between the member states. The representatives were forced to deal with difficult and detailed legal technicalities which had political implications. In addition they had to keep their finger on the political pulse of the negotiations in order to be able to hammer out compromises and find a consensus among the delegations. In meeting after meeting the scope of outstanding issues was narrowed and by the time the Conference reached Amsterdam there were only three outstanding flexibility issues on the negotiating table. It was the role of the Dutch Presidency to find a way to draw all the strands of argument together.

Chapter 6 tries to answer three questions:

- (1) How did the flexibility debate evolve during the decision-taking stage?
- (2) When and why did some governments shift their flexibility positions towards the end of the negotiations?
- (3) Who were the most important players in the decision-taking stage of the negotiations?

In order to answer these questions the chapter is divided into three parts:

- (1) The political context of the Dutch Presidency
- (2) From Dublin II (December 1996) to Rome (March 1997) – getting started
- (3) From Rome to Amsterdam (June 1997) – getting going and finishing up.

The first part outlines the political context in which the Dutch Presidency began its work. The second part examines the first two months of the Dutch Presidency. During this period the flexibility debate was at its most intense and detailed stage. A

total of five flexibility documents were issued and some three meetings on flexibility were conducted during this period. The final part of the chapter looks at the last four months of the IGC, leading up to the end game at the European Council of Amsterdam. The conclusion of the chapter makes an assessment of the negotiations during the last months of the IGC.

1. POLITICAL CONTEXT - THE DUTCH PRESIDENCY

The Dutch Presidency was dominated by three issues: reaching agreement on the IGC at Amsterdam, EMU and preparations for Agenda 2000 (Laffan 1998). In addition there were three elections in member states (the United Kingdom, France and Ireland) between January and June 1997. These factors inevitably influenced the flexibility debate of the Conference. The aim to reach agreement at Amsterdam meant that there was pressure on IGC participants to conclude their deliberations. The aim of the Presidency was to iron out the majority of differences between the governments so as to leave as few open issues as possible for the European Council of Amsterdam. The Dutch Presidency picked up the pace of the negotiations by increasing the frequency and length of the representatives meetings.

The single currency was on the domestic agenda of all of the member states throughout 1997. Most governments were struggling to bring their budgetary and fiscal figures in line with the requirements for EMU membership. In France the new left-wing Jospin government raised questions about its commitment to the single currency. The new government established four goals for participating in EMU (Laffan 1998): (1) the inclusion of Spain and Italy in a broadly-based EMU, (2) avoiding an overvalued Euro, (3) the establishment of a Euro-zone council, and (4) the establishment of a growth and employment pact. Two of these issues were to have an impact on the flexibility debate both before and after Amsterdam. Before Amsterdam it became increasingly clear that the Euro-zone was going to be wide and thus include countries such as Spain and Portugal, which had previously been reluctant to accept flexibility because of their fear of exclusion. The French suggestion about the establishment of an Euro-zone council played an important role in the post-Amsterdam debate. While the ink was still drying on the Amsterdam Treaty, eleven EMU-governments decided to establish the so-called Euro-11

Council, an informal body of Finance Ministers designed to deal with issues of common concern within the Euro-zone. This body excluded all non Euro-members, i.e. the United Kingdom, Sweden, Denmark and Greece. The group was not based on the new flexibility articles, but on political ideas relating back to the early EMU-visions of the Jospin government.

Agenda 2000 was another issue which related, at least partially, to the flexibility debate in the IGC. Agenda 2000 was a Commission paper, published in July 1997, dealing with reforms in a number of policy areas in relation to enlargement. Though the paper was not published during the IGC the member state governments knew that the Commission was going to suggest that membership negotiations should begin with 5+1 applicant states (Poland, the Czech Republic, Slovenia, Hungary, Estonia and Cyprus). This meant that the IGC delegations had an idea about the size of the next enlargement. This had an implication on the flexibility debate because now delegations could assume that there would most probably be another IGC before the Union would start negotiating membership with all the applicant countries. In practice this meant that any flexibility arrangements that would be institutionalised in the new treaty could be rectified before the next enlargement.

The most important political development during the final stages of the IGC negotiations was the British election on 1 May 1997. The internal strife within the Conservative Party had caused problems for the Union in a number of policy areas including the IGC. The sentiment among the delegations throughout the Conference was that the IGC could not end before the British elections. The Labour Party won a landslide victory, gaining a total of 419 seats against 165 for the Tories and 46 for the Liberal Democrats. During the election Tony Blair argued that "Britain had a choice in Europe between disengagement, a sullen presence on the sidelines or engagement and leadership" (Laffan 1998, p.145). Much to the delight of its EU partners the tone of the new government's pronouncements on Europe changed rapidly. The new Foreign Minister, Robin Cook, spoke of making the United Kingdom a "leading player in a Europe of independent nation states" (Cook 1997, p.2). This was echoed by Prime Minister Blair arguing that the United Kingdom needed to "end the isolation of the last twenty years and be a leading partner in Europe" (Blair 1997, p.1). Along similar lines, Europe Minister Doug Henderson gave a constructive opening statement at the first IGC meeting in which he was

involved (interview). The whole mood of the IGC changed as a result of the British elections (see below).

There were two further elections – in France and Ireland – which were important as such, but did not have a great impact on the outcome of the IGC. In April 1997 President Jacques Chirac took the unprecedented step of dissolving the French National Assembly and calling elections a year ahead of schedule. His aim was to guarantee that the right remained in power until the end of his own electoral mandate in 2002. Chirac's plan backfired and the elections of 25 May brought in a new socialist coalition lead by Prime Minister Lionel Jospin. The elections had an impact on EMU (see above), but its impact on the IGC debate on flexibility was marginal. The other election took place in Ireland in June 1997. The opposition party Fianna Fáil, under Bertie Ahern, achieved an election victory only a few days before the European Council of Amsterdam. The election had no impact on Ireland's IGC positions – it was even agreed that by then former Prime Minister Bruton should attend the summit meeting instead of Ahern.

It is important to point out that as the final stages of any IGC negotiations approach member state governments are less and less influenced by the political context outside the actual negotiations. Domestic and external constraints are taken into account throughout the negotiations and hence when the final stages approach the broad lines of agreement have been established taking into consideration the political context in which the negotiations are taking place (see conclusions).

2. FROM DUBLIN II (DECEMBER 1996) TO ROME (MARCH 1997) – GETTING STARTED

The agenda-setting and decision-shaping phases had prepared the stage for the grand finale - the actual negotiations could begin. The first draft article on flexibility proposed by the Dutch Presidency was released on 11 February 1997. The Dutch document was influenced by five other documents which had been released in the previous weeks and by a debate on flexibility at ministerial level on 20 January 1997. The first of these documents (SN 639 1996) was the legacy of the flexibility debate during the Irish Presidency. As a non-paper, distributed before the end of the Irish Presidency on 20 December 1996, it contained a general flexibility clause

supported by three specific flexibility clauses. The second document was a questionnaire released on 8 January (SN 500 C1 1997), and again on 16 January (CONF 3802 1997), which asked the member states to indicate their positions on flexibility in the first pillar. The third document was a draft article on flexibility, circulated by the Italian delegation on 15 January (CONF 3801 1997), dealing mostly with the second pillar. The fourth was a paper distributed by the Commission on 23 January (CONF 3805 1997), mainly on first pillar flexibility. And the fifth one, dealing with the incorporation of *Schengen*, was released on 4 February by the Presidency. These documents and the ministerial debate were important in moulding the Dutch Presidency's thinking on flexibility. The Commission document was particularly important in that it gave the "green light" to the idea of an enabling clause in the first pillar, provided that it was accompanied by safeguards¹.

2.1. The legacy of the Council Secretariat - the unofficial draft article

SN/639/96 was a non-paper distributed by the Council Secretariat before Christmas 1996. The paper was a draft article outlining a possible approach for enabling clauses on closer cooperation. Much like the previous draft article (CONF 3914 1996) the document consisted of a general clause applicable to the three pillars, setting out the general conditions and institutional arrangements for closer cooperation, and specific clauses applicable to the TEC, CFSP and JHA, respectively. The main difference from the earlier draft article was that SN/639/96 had incorporated the conditions and institutional arrangements into the general flexibility clause. The aim was to lay out the general rules of the game as soon as possible.

It is important to stress that this document formed the starting point for the flexibility articles which were drafted during the following six months. More importantly it was a document which was drafted and issued unofficially by the Council Secretariat. The Irish and the Dutch Presidencies had agreed to its distribution, but they did not influence the preparation of the document, and in fact, no government had asked the Council Secretariat to provide the document. This further highlights that the

¹ This section is based on participant observation which has been cross-referenced with interviews and publicly available Conference documentation.

Council Secretariat has an important role in an IGC and sometimes it even seems to have its own agenda. Much of the role of the Council Secretariat depends on the activity of its lawyers and how much room for manoeuvre is given by the Presidency. The Council Secretariat had a very competent set of lawyers on their IGC team, including Jean-Claude Piris, Max Keller, Jean-Paul Jacqué and Giorgio Maganza, who were able to produce papers on difficult issues such as flexibility. The general role of the Council Secretariat in an IGC is to provide legal texts in cooperation with the Presidency and on the basis of what delegations have said in the negotiating room. Their role is supposed to be that of a neutral broker bringing clarity to the chaos of the negotiations. Nevertheless, the Council Secretariat is composed of individuals who bring their own ideas to the work that they do. It is virtually impossible for any participant in the negotiations to be completely objective. Every negotiator, even the members of the Council Secretariat, brings with him experiences and assumptions which affect what they do in the IGC. Judging by papers which originated in the Council Secretariat (Charlemagne 1994, Justus Lipsius 1995, Kortenberg 1998) there seemed to be sympathy for flexibility among key lawyers. Against this background it should come as no surprise that, on occasion, the Council Secretariat expanded its role as the "advocate" of the negotiations to become the "judge" of the 1996-97 IGC debate on flexibility².

² The technical detail of the document provided by the Council Secretariat during the final days of the Irish Presidency merits a close examination because it provided the unofficial basis for the Dutch draft article which was published in February 1997. The general flexibility clause in SN/639/96 contained eight conditions for flexibility. The document noted that flexibility could be pursued provided that the cooperation:

- (a) was aimed at furthering the objectives of the Union and at protecting and serving its interests
- (b) respected the principles of the treaties and the framework of its objectives (institutional framework)
- (c) concerned a minimum number (8) of member states (majority)
- (d) preserved the single institutional framework of the Union (see above)
- (e) did not affect the *acquis communautaire* or the measures adopted under the other provisions of the treaties
- (f) did not affect the competences, rights, obligations and interests of those member states which did not participate in the cooperation, was open to all member states and allowed them to become parties to the cooperation at any time, provided that they complied with the basic decision and with the decisions taken within that framework
- (g) was only used as a last resort, where the objectives of the treaties could not be attained by applying the relevant procedures laid down therein
- (h) complied with the specific additional criteria laid down in Article 5a of the TEC and Article K.12 of this treaty, depending on the area concerned and was authorised by the Council in accordance with the procedures laid down therein.

These eight conditions were very similar to those finally agreed in the Amsterdam Treaty. In essence the only difference lies in their order - all the same elements are there. This is an important observation in that it indicates that even if there were still some six months of negotiations left, the conditions for flexibility had already been pretty much established by December 1996. The institutional provisions, on the other hand, - the European Parliament, division of votes and finances - of the general flexibility clause were slightly different from those finally agreed in the Amsterdam Treaty, the main exception being that SN/639/96 still advocated an arrangement whereby the European Parliament would be split so that those MEPs who came from a member state which did not participate in a given form of closer cooperation would not be able to take part in the voting procedure.

From SN/639/96 it was clear that though flexibility had not been on the agenda during the final two months of the Irish Presidency there had been no shortage of preparation on the subject in the Council Secretariat. The draft article again highlights the influence of those who provide draft texts for debate – they run the show. If another delegation wants to influence the text it must resort to both formal and informal persuasion, preferably as early as possible. Although the formal channel, i.e. giving out policy papers and discussing the issue at the representatives meetings, is important, the best channels of influence are informal and include bilateral discussions with other parties, particularly the Presidency and the Council Secretariat.

2.2. Bringing flexibility back to centre stage – January 1997

The working programme of the Dutch Presidency was launched with an informal meeting of the representatives in Amsterdam on 13-14 January. The format and the idea behind the meeting was roughly the same as that arranged by the Irish at the beginning of their Presidency in Cork. The informal setting of the meeting gave the Presidency an opportunity to present its agenda and establish further positions of the member states. The Conference had to start dealing with the more sensitive issues; the informal Amsterdam meeting provided the Presidency with an opportunity to map out some of the key issues that needed attention in the coming months.

The Dutch had decided to increase the intensity of the meetings and decided to focus almost entirely on the more sensitive and difficult issues. Much like the Irish, the Dutch Presidency argued that it was time to move the negotiations into a new phase. The corridor discussions became more intense and most of the participants emphasised that results had to be achieved in the European Council of Amsterdam

This was an interesting element of the draft article because the division of the European Parliament was an issue to which most member states objected. One can only assume that this idea continued to see the light of day thanks to the personal preferences of the drafters in the Council Secretariat. The financial provisions for flexibility were the same in both SN/639/96 and the Treaty of Amsterdam except for the fact that the final provisions in the Amsterdam Treaty added the possibility of the Community budget being used for all expenditure resulting from flexible provisions, provided that there was Council unanimity on that front. In SN/639/96 there was also a reference to flexibility in relation to third countries. The Schengen agreement in relation to Norway and Iceland was the cited example. The idea of including this provision in the general flexibility clause did not gain much ground later in the negotiations. Consequently measures relating to Schengen and Norway and Iceland can be found in a separate protocol relating to pre-defined flexibility.

in June 1997. At the same time negotiators knew that little real progress could be made before the British elections, which were to take place around the beginning of May 1997, at the latest. The dilemma with the elections was that the IGC had to make progress during the first four months of the year, but at the same time no-one wanted to handle the Conference in such a way that it would become a contentious issue in the British elections. As a result, delegations tried to avoid bringing the inherent tensions from the negotiations into the public domain. But the Dutch nevertheless aimed to put the other governments under pressure to produce results. This was done both by increasing the frequency and tempo of the meetings and by using tougher rhetoric around the negotiating table. The Dutch representative, Patijn, was particularly forceful in pushing member states towards results. The Dutch focused on three key issues during the first few months of its Presidency: flexibility, institutional questions and JHA. On the first two the aim was to provide a draft text at the ministerial level. On the third, the texts of the Irish Presidency provided the basis of discussion. The remaining issues of the IGC were "parked" until progress had been made in these three areas.

The trend in the latter part of the Irish Presidency was for governments to begin to table their own proposals. In the field of flexibility this was done by the French and Germans, and the Portuguese. At the informal meeting in Amsterdam the Dutch Presidency noted that the final agenda for the IGC was pretty much established and asked the member states not to come up with any new surprises (interview). But, as will be illustrated below, this did not stop member states from churning out new national proposals. Nevertheless, as an Irish negotiator correctly points out "these proposals were largely irrelevant, other than for domestic consumption, except in so far as they influenced the papers tabled for discussion by the Presidency" (McDonagh 1998, p.139). Using the proposals for domestic consumption illustrated that member governments were avoiding the mistakes encountered at Maastricht, where many member governments failed to highlight to their domestic public negotiating victories which had been achieved on the EU arena.

2.2.1. Focusing on key questions

The first document influencing the early flexibility debate during the Dutch Presidency was a questionnaire released on 8 January (SN 500 1997) and again on 16 January (CONF 3802 1997) which asked the member governments to indicate

their positions on flexibility ranging from enabling clauses to pre-defined flexibility. The document referred back to the Irish draft treaty and stated that the aim there had been to find a degree of common ground among the member states. It was also pointed out that the European Council of Dublin had asked the Conference to pay special attention to the issue of flexibility (European Council of Dublin 1996). This gave a further political impulse to the discussions at the representatives' level. SN/500/97 was supposed to be subject to informal debate in Amsterdam on 13-14 January 1997 at the representatives' level. However, the representatives did not have time to address the issue and the same document was reproduced for the ministerial meeting of 20 January 1996. The aim was to provide guidance for further elaboration on the possible forms of flexibility in the first pillar. The document posed a number of questions:

- (a) Should flexibility be limited to areas determined in advance (positive list) and/or should certain areas be excluded in advance (negative list)?
- (b) Should the decision to establish enhanced cooperation require unanimity, a qualified majority or a new specific procedure (not yet determined) which would guarantee that no member state would be able to prevent others from pursuing closer cooperation?
- (c) Should the use of qualified majority or any new specific procedure be limited to areas determined in advance (i.e. the positive list), the other areas being subject to unanimity?
- (d) Should the Commission have an autonomous right to trigger closer cooperation, should it also have that right at the request of (a minimum number of) member states or should it have the right of approval, on a request by (a minimum number of) member states?

There were some interesting elements in this set of questions. Firstly the Dutch Presidency implicitly suggested, along the lines of the earlier document from the Council Secretariat (SN 639 1996), that the enabling clause in the first pillar could actually have both a negative and a positive list. This issue was to become the topic of heated debate during the next two months of the IGC. Secondly, it is interesting to note that the Presidency document included the Franco-German idea of no-one being able to block a flexible decision. The addition of such an undefined decision-making procedure was a strong attempt to have a mechanism in which there would

be no possibility of having a veto. Finally the Dutch Presidency brought in the idea of qualified majority voting in areas covered by the positive list. This was an interesting addition for many reasons, not least because it would have added to the confusion. There would have been three categories in the first pillar: those areas not open to flexibility, those open to flexibility but subject to unanimity and those open to flexibility and to be decided by qualified majority.

The second document which had an influence, though marginal, on the early flexibility debate during the Dutch Presidency was submitted by Italy on 15 January 1997 (CONF 3801 1997)³. This document followed the lines of earlier draft documents which had suggested the 1+3 enabling clause model. It was thereby different from the Portuguese model (CONF 3999 1996) which had suggested only a general clause. The Italians argued that the Franco-German and Portuguese papers had been too general in nature. It would be impossible to convince the sceptical governments of the need for flexibility as long as there was no clear picture how and where flexibility would actually be applied. It would be equally difficult to convince them unless the new articles had strict conditions on the application of flexibility.

The Italian document stressed the importance of flexibility in the second pillar. It is interesting to note that Italy was exploring two complementary avenues. The document suggested that some foreign and security policy issues should be decided by qualified majority and those that remained subject to the unanimity rule should be subject to constructive abstention. If these two approaches were adopted, then, the Italians argued, flexibility would not be necessary in foreign policy, but issues relating to security and defence could still be dealt with using flexibility.

The Italian flexibility article defined the second pillar enabling clause as being applicable to defence. In addition it included a clear exclusion clause for non-WEU members. The document stated that the provisions "shall not prevent member states being authorised to develop, through the institutions, procedures and mechanisms of this Treaty, closer collaboration in the area of security and defence - including cooperation on armaments - based on their common membership of the

³ Some participants in the negotiations actually said that the Italian delegation's proposal was drafted by the Belgian negotiating team and that Belgium did not want to submit the document because it thought that it would interfere with the Dutch Presidency and Benelux cooperation.

WEU" (CONF 3801 1997, p. 5). The authorisation for this clause was "by a qualified majority at the request of the member states concerned, which must in any event include the member states of the Union which are also members of the WEU" (CONF 3801 1997, p. 5). In plain language this meant that the Italians wanted an enabling clause for issues relating to defence and that the clause would mainly be used by full members of the WEU. The Italian interpretation of the issue was that flexibility should be an obligation for WEU members and an opportunity for non-WEU members. They also argued that they would be prepared to launch an initiative which would set a timetable for merging the EU with the WEU.

2.2.2. Coming to grips with flexibility in the first pillar - Ministerial discussions in January 1997

The first actual flexibility debate during the Dutch Presidency took place on the ministerial level on 20 January 1997 and was based on CONF/3802/97 which focused on flexibility in the first pillar. This was the third time during the IGC that ministers had discussed flexible integration. Delegations also made reference to the Franco-German (CONF 3985 1996), Portuguese (CONF 3999 1996) and Italian (CONF 3801 1997) documents on flexibility. The aim of the Dutch Presidency was to deepen the debate about flexibility especially in the first pillar. There were two reasons for this approach. Firstly, the first pillar was an area where many member governments had voiced concern about flexibility. Secondly, by focusing on first pillar flexibility the Dutch Presidency was able to make further preparations on flexibility issues relating to the second and the third pillars, before bringing out official proposals.

The ministerial meeting on 20 January was significant for many reasons. Firstly, it was the first time that ministers had had an in-depth debate about flexibility in the first pillar. Previously ministers had discussed flexibility in all the pillars, but this time the focus was on the substance of Community matters. This was a further indication that the Dutch Presidency wanted the member governments to start opening up their positions and indicate more clearly which issues they believed to be problematic. The Presidency's approach was successful: there were the first indications of movement in the positions of some member states. Spain, for instance, had fiercely opposed an enabling clause in the first pillar, but at the ministerial meeting Foreign Minister Matutes indicated that the Spanish government

might be willing to accept an enabling clause in the first pillar as long as the trigger mechanism for flexibility was unanimity (interview). Likewise the Irish delegation, which for the past six months had focused on the management of its Presidency, began to indicate that its government might be able to accept an enabling clause in the first pillar as long as the Commission had an important role to play (interview). The reason for the Spanish change in position was Spain's new confidence that it would meet the convergence criteria for the third stage of EMU which meant that its fear of exclusion decreased. The Irish delegation began to accept first pillar flexibility when they saw that the level of the debate had been raised to include issues, such as the role of the Commission, which had previously been very unclear (interview).

The second significant development of the ministerial meeting related to positive (areas suitable for flexibility) and negative lists (areas not suitable for flexibility). In November 1996 the Benelux, French, German, Portuguese and Spanish governments had voiced support for negative lists, whereas the rest were still undecided. In the ministerial meeting in January some of the governments that had been (or were still) sceptical about flexibility in the first pillar argued for a positive list. This group comprised Ireland, Greece, Spain and the United Kingdom (interview). The governments that were in favour of an enabling clause in the first pillar (B, NL, LUX, FIN, I, F, D, AUS) supported a negative list (interview). The reason for these positions was that the governments that supported the enabling clause approach agreed that there needed to be some limits to flexibility in the first pillar, but that the limits should not extend to all areas. If the negative list was limited to the single market, for example, then flexibility could take place in all other areas of cooperation in the first pillar. The reasoning of the more sceptical member governments was the opposite – if the positive list could be limited to include only a few areas such as environment and industrial policy, then there would be virtually no flexibility in the first pillar.

The third key issue in the ministerial debate related to the role of the Commission in first pillar flexibility. Throughout the negotiations a majority of the delegations had stressed that the Commission, in its role as the guardian of the treaties, should have a central role in any future flexibility. Some governments suggested that flexibility should be triggered by the Commission (FIN, S, I, POR, GR, IRL); others argued that the Commission should at least be able to reject or approve a flexibility

proposition from a willing and able group of member states (D, F) (interview). The Irish, in particular, argued that "there was a world of difference between a proposal for the application of flexibility being developed by and within the checks and balances of the Commission itself and such a proposal being first developed and even drafted between a group of foreign ministers before being presented to the Commission for its possible endorsement and formal submission to the Council" (McDonagh 1998, p.148). There was a subtle but symbolic difference between the Commission initiating a flexible arrangement and the Commission approving such an arrangement. Initiating a flexible arrangement meant that the Commission would be completely in charge of when and where flexible arrangements would take place in the first pillar. Approving flexibility meant that the willing and able member governments would have more say. Against this background it should come as no surprise that the French and German governments supported the latter idea of the Commission simply approving flexible measures, which would give more room for manoeuvre for the member states. There was, however, an inherent paradox with the role of the Commission and flexibility – namely that a flexible arrangement was not necessarily in the interest of the Union as a whole, but would most probably benefit only the member states which decided to participate. This was one of the reasons for the Commission's difficult position on flexibility. Some members of the Commission's IGC Task Force saw flexibility as a way in which the integration process could be deepened; others saw it as a risk to the unity of the Union. The IGC had to establish a way in which the interests of those inside and those outside a flexible arrangement would be guaranteed.

The fourth significant development in the ministerial meeting concerned the decision-making mechanism in first pillar flexibility. It was clear that there was great divergence in the positions of the delegations on how flexibility should be triggered. Increasing numbers of delegations appeared to be saying that the trigger mechanism should be something other than unanimity (I, F, D, B, NL, FIN, AUS) (interview). Only the Swedish, British, Danish, Irish and Greek governments pushed for unanimity (interview). The Spanish delegation left its position open at this stage (interview). The difference of opinion between member states was to play a central role all the way to Amsterdam. The general division was between those who were for the establishment of flexible arrangements and those who were sceptical about them. The former argued for a mechanism which would not allow a member

government a veto, the latter argued for unanimity. These positions were inevitably based on member states' assumptions about inclusion and exclusion, respectively.

A final point arising out of the ministerial meeting related to the British position. With the beginning of the final phase of the negotiations it was clear that the British position was getting tougher. In the January meeting the British government reminded its partners that if flexibility was to be established in the new treaty it would be essential to guarantee that the cooperation would not lead to a situation whereby it would be impossible for non-participants to join at a later stage (interview). They also argued that no member state should be forced into participating in a flexible arrangement. Moreover, the British government made it clear that it could accept flexibility only if the participating member states would bear all the costs of the cooperation in question. And, significantly, the British wanted to make sure that they would not be marginalised by arguing that non-participants should be given observer status and have the right to voice their opinion in matters that were dealt with within the flexibility group (interview). This was clearly the argumentation of a government which realised that it would not be able to participate in a given form of cooperation, but wanted to guarantee that it would at least be able to influence others.

In sum, the significance of the first ministerial meeting on flexibility during the Dutch Presidency was that it focused the debate seriously on flexibility in the first pillar. As shown in chapters 4 and 5, flexibility in the first pillar was by no means self-evident and at the beginning of the actual IGC many member states had opposed first pillar flexibility. Now that the debate had focused on the trigger mechanism, the role of the Commission and positive and negative lists, the Foreign Ministers began to warm up to first pillar flexibility. It became clear to many delegations that if flexibility was institutionalised in the first pillar it would be accompanied by strict conditions and safety measures so as to ensure that no member state would be sidelined in the process. Furthermore the ministerial meeting on flexibility was important because it gave a further political mandate for the representatives to discuss the issue.

2.2.3. The Commission gives its verdict in writing

The Commission came out with an important paper on flexibility on 23 January 1997, just a few days after the ministerial meeting (CONF 3805 1997). The paper was generally in favour of flexibility. A British negotiator privately criticised the Commission for "selling its soul" as the guardian of Community interest in that it was supporting flexible measures which would allow a limited number of member states to pursue deeper integration, an apparent contradiction to the unity of the Community (interview). Nevertheless, the paper gave an important "green light" to flexibility. The Commission had been struggling with flexibility for many months and officials had had differing opinions on the subject. So when the Commission finally produced a single clear position, it was welcomed by all member states as a point of reference. The basic premise of the Commission paper, echoing the words of Chancellor Kohl, was that on the eve of enlargement "the European Union must not forever be bound to advance at the speed of its slowest members" (CONF 3805 1997, p.1).

Nevertheless, the Commission was diplomatically cautious in expressing its support for flexibility. It noted that "the idea seems to be gaining ground of the need, or at least the desirability, of a more general mechanism which would allow the member states which so wished, subject to certain conditions, to move forward by means of enhanced cooperation in the single institutional framework of the Union" (CONF 3805 1997, p.1). In addition the Commission noted that flexibility should comply with the *acquis communautaire* and could only be used in areas where it was clearly impossible for all the member states to progress together. It also stressed that any flexibility should be based on strict conditions which would allow any member state to join the more integrated group of states in due course⁴.

⁴ For the purpose of the general debate in the Conference, the document was very helpful in highlighting concrete areas in which flexibility could be applied. The Commission first pointed to the second and third pillars, arguing that areas such as defence, arms policy, Europol and the incorporation of the Schengen agreement would be clear candidates for flexibility. The Commission argued that flexibility was appropriate only in matters where decisions had to be taken unanimously and issues had a tendency to be blocked. Qualified majority decisions, on the other hand, were, according to the Commission, an illustration that the members shared the determination to work together. This line of argumentation indicated that the Commission saw flexibility as a way in which the integration process could be driven forward. The Commission document, much like the ministerial meeting a few days earlier, was helpful in focusing on flexibility in the Community field. It argued that the Conference had not, until the previous ministerial meeting, really addressed the question of whether flexibility was acceptable in Community matters and suggested that there were three approaches to flexibility in the first pillar:

It is interesting to note that it had taken almost ten months for the Commission to come out with a written proposal about flexible integration. The problem was that the Commission was in two minds about flexibility. On the one hand it sympathised with the member states that did not want to proceed at the pace of the slowest ship of the convoy – i.e. those that argued that flexibility would deepen the integration process. On the other hand the Commission was concerned about its role as the guardian of the treaties. In order to preserve the unity of the Community the Commission wanted to make sure that necessary safeguards were put into place. For this reason it had taken a long time for the Commission to come to grips with flexibility and for the same reason it was not until January 1997 that the Commission was willing to submit their flexibility ideas to the IGC in a more concrete way.

- (1) A rejection of any flexible mechanisms in Community areas. This approach would consider the first pillar sacrosanct, the fear being that flexibility would damage the unity of the Community. The Commission pointed out, however, that if flexibility in the first pillar was ruled out it would mean, in practice, that there would be little progress in matters such as the free movement of persons, taxation or statutory contributions. In addition, the Commission argued, it would most probably mean that some additional flexibility would be established outside the treaty framework.
- (2) The establishment of positive or negative lists of areas in which flexibility might or might not be suitable. The document pointed out that it was difficult to predict how the need for flexibility would arise in the future. Some member states had already argued for no restrictions, others wanted specific areas in which flexibility would or would not be appropriate to be listed.
- (3) The Commission favoured what they called a third option. This option would be a combination of a negative list and a set of fundamental principles (i.e. conditions) for controlling flexibility. The Commission argued that the internal market and the policies linked to it such as the CAP, fisheries, commercial policy, transport, competition and cohesion, should be excluded from any form of flexibility. In addition the Commission wanted to safeguard the first pillar by adding conditions to any flexible arrangements (the conditions were the same as those mentioned in earlier article drafts on flexibility).

The Commission was adamant about keeping flexibility under control. This approach was also apparent in the way the Commission's document dealt with the decision-making procedure. The suggestion was that the Commission would present a proposal on the basis of a request by the member states. The document thus argued that the Commission should maintain its role as the guardian of the treaty. The most controversial aspect of the document was the Commission's proposal that the decision trigger should be a qualified majority, or a special qualified majority with strict conditions. It was important for the Commission that interests of outsiders were not to be affected and non-participants could bring a case before the ECJ if their rights were thought to have been affected. As far as the institutions were concerned it was suggested that the Commission, the ECJ and the European Parliament should have their normal roles. The Commission put an end to the debate about the composition of the EP in flexible legislation. It noted that the EP was indivisible, i.e. it could not be split up to deal with flexibility. However, the Commission's view was that Council decisions should be taken only by participating member states. The Commission had an interesting line of argumentation on the financing of flexible arrangements. It argued that since flexibility formed part of the institutional framework, the administrative costs for the work done by the institutions should be borne by the Community. The operational costs could come from either the Community budget or from the participating countries. For the Commission it was important for a mechanism to be established which would allow member states which were not participating from the outset to join the circle of closer cooperation at a later stage.

2.3. Moving towards Schengen and new article drafts – February 1997

After the avalanche of flexibility documents in January 1997 the Dutch Presidency began preparing a new draft article which was to be discussed around mid-February. Before that, however, the Presidency convened two meetings – 27-28 January and 10-11 February - to discuss issues relating to justice and home affairs. This area of cooperation had been divided into two strands of issues: (1) cooperation as regards asylum, visas, immigration and the control of external frontiers, and (2) cooperation in the fight against international crime. The distinction between these two areas of cooperation was important not only because the former was considered to be suitable for flexibility, whereas the latter was not, but also because the former was considered to be a Community issue and the latter was seen more as intergovernmental cooperation. The view that free movement, asylum and immigration should be communitarised came to be seen as one of the litmus tests of "community orthodoxy" during the IGC. The British and Danish governments, in particular, had strong reservations about any suggested moves from the third to the first pillar. The second of the meetings mentioned above dealt with incorporation of the Schengen agreement which was to become one of the more difficult negotiating subjects towards the end of the Conference.

2.3.1. The Dutch pushing Schengen

The Schengen debate had been opened by the Dutch as early as 15 July 1996 when they suggested incorporating Schengen into the EU (CONF 3872 1996). Lack of enthusiasm on the part of the other member states, meant that the proposal had lain dormant during the Irish Presidency. Ireland was a non-Schengen country and hence, in the role of the Presidency, was not particularly interested in bringing the issue to the fore. In addition, the Schengen countries themselves seemed to have differing opinions on the subject. The Danish, Portuguese, French, German and Spanish governments, for instance, were raising questions about how the institutionalisation of Schengen would be achieved in practice. Nevertheless the Dutch re-introduced the subject in February 1997, knowing that it was a complex issue legally, institutionally and politically which needed to be resolved.

Patijn was incremental in pushing for the incorporation of the Schengen agreement into the new treaty. The Presidency released a proposal 11 February 1997 on how this might be achieved (CONF 3806 1997). The document was submitted at the same time as the first Dutch draft article on flexibility (CONF 3813 1997, see below). However, the Presidency wanted to keep the Schengen discussions partially separated from the flexibility debate so as to make sure that if the institutionalisation of flexibility as a general principle failed then there would at least still be the possibility of incorporating the Schengen agreement into the treaty in a flexible manner. Again this is a demonstration of the important role of the Presidency in setting the agenda and manipulating the issues that are to be negotiated.

The idea behind incorporating the Schengen agreement was closely related to the aim of gradually developing the Union into, what during the IGC negotiations came to be called, "an area of freedom, security and justice". The aim, furthermore, was to expand the Schengen area to include all the member states of the Union. The Presidency's Schengen document sketched two ways in which the Schengen agreement could be incorporated into the treaty: (1) the enabling clause approach and (2) pre-defined flexibility. Under the enabling clause approach, familiar from the earlier debates on flexibility, a declaration to the Final Act of the treaty would note that "the enabling provisions would be used in particular, as soon as the treaty enters into force, to set up ... Schengen enhanced cooperation among the thirteen member states party to Schengen" (CONF 3806 1997, p.3). The aim of the Presidency was to allow the Schengen states to establish closer cooperation among themselves within the framework of the EU. The scope of the closer cooperation was to be the whole Schengen *acquis*. Decisions would have to be made, however, as to which parts of the agreement would go into the first pillar and which into the third pillar.

The second suggested way of incorporating the Schengen agreement was the so-called pre-defined approach, the aim of which would be to incorporate the Schengen agreement lock, stock and barrel into the new treaty. Under this approach, the thirteen Schengen countries "would be authorised through a Protocol to have recourse to the institutions, procedures and instruments of the treaty for the purposes of adopting and applying among themselves the acts and decisions required to give effect to their Schengen cooperation" (CONF 3806 1997, p.4). There were attractions to this approach. It would bring the agreement into the treaty

as a whole and hence allow for the development of Schengen inside the treaty. The incorporation of Schengen would also consolidate and strengthen the Union before enlargement and participation could also be a requirement for any future enlargement. The problem was that Ireland and the United Kingdom would not take part in the deliberations and that special arrangements would have to be provided for Norway and Iceland, which were a party to Schengen but not members of the Union. This indicated that some form of flexibility would have to be established.

The Dutch proposal gave rise to two types of potential difficulty (McDonagh 1998). The first problem was that it was not clear how the incorporation of Schengen would work in practice. The Schengen *acquis* was thought to contain some 3000 pages of legislation (no-one seemed to know what it really contained!). This, combined with the Nordic Passport Union which included Norway and Iceland, and the fact that Ireland and the United Kingdom were not part of the Schengen agreement, meant that the Conference was faced with great practical problems in incorporating the Schengen agreement. The other potential problem related to preserving coherence in JHA matters on the Union level. While the Schengen agreements had allowed the majority of EU member states to deepen their cooperation on immigration and external frontiers, the third pillar of the Union had also made significant developments in these areas. The Irish, in particular, worried that Schengen and Union provisions would overlap, with the result that the Schengen measures would displace rather than supplement existing cooperation in the third pillar (McDonagh 1998).

The Dutch did not table the Schengen document at the ministerial meeting of 24 February. Instead that meeting dealt with other issues relating to JHA with an emphasis on coherence and unity, as opposed to differentiation. The incorporation of the Schengen agreement was brought onto the negotiating table with the Dutch addendum to the Irish draft treaty in March 1997. The key observation relating to Presidency management was that the Irish did not want to introduce third pillar flexibility, whereas the Dutch Presidency made it into one of its priorities because Patijn was adamant about integrating Schengen into the treaties.

2.3.2. The first Dutch draft article on flexibility

The next move from the Dutch Presidency was to issue a draft article on flexibility which was to be discussed by the representatives on 17 and 18 February. This draft article (CONF 3813 1997) was to have an important impact on the final outcome of the flexibility clauses in the Amsterdam Treaty. The document started from the "old" premise that a general flexibility clause and three specific clauses could be incorporated into the new treaty. The Presidency, however, questioned the necessity of a flexibility clause in the second pillar and suggested that constructive abstention combined with "old" articles J.4(4) and J.4(5) would provide sufficient flexibility for CFSP matters. The reason for this stems from the fact that Patijn was personally very sceptical about any form of flexibility in the second pillar. As a former State Secretary for Defence of the Netherlands he believed that questions dealing with defence implications would be better taken care of by the North Atlantic Alliance (NATO) than any flexible arrangement which might eventually lead to the incorporation of the defence arm of the Western European Union into the EU. This was not necessarily the position of the rest of the Dutch government. The division was such that the Social Democrats and Liberal Democrats were in favour of stronger European based security structures and the Conservatives (Patijn's party) were trying to steer Dutch European policy in a more Atlanticist direction.

The ministerial debate of 20 January 1997 had dealt with three main questions relating to first pillar flexibility: (1) should flexibility be limited to predetermined areas (positive list) and/or should certain areas be excluded from the outset (negative list)? (2) Should first pillar flexibility be triggered by unanimity or qualified majority? (3) What should be the role of the Commission (autonomous right of initiative or at the request of the member states concerned)? The Dutch Presidency document responded to the ministerial debate by including both a positive and a negative list. The suggested trigger for flexibility was qualified majority in areas which were covered by the positive list and unanimity in all other cases. The Commission had the right of initiative at the request of the member states concerned.

The representatives were asked to consider an additional set of issues:

- Should a Council decision be required for those member states which wanted to join closer cooperation at a later stage? Would this run counter to the principle

that any member state wishing to join should be able to do so on the sole condition that they agreed to comply with the decisions already taken?

- Under such modalities would third countries be allowed to participate in enhanced cooperation established between member states? Should an agreement be concluded to that effect between the third country and the member states concerned? Under which conditions would the third country be allowed to take part in the Union's institutional activity?
- Should it be stipulated that ECJ rulings on flexibility would apply only to the member states involved in a particular form of closer cooperation?

These questions went to the core of some of the fundamental problems in institutionalising flexibility. The first group of questions tackled the issue of how open a flexible arrangement should be. This was, once again, the worry of those member states which, for one reason or another, saw themselves outside closer cooperation. The second group of questions addressed the issue of third countries - the implicit reference being to Iceland and Norway, because of problems raised by the Nordic Passport Union. And the final question addressed the worries of the British government, among others, that the ECJ would start creating a flexible *acquis* which would affect non-participating members as well as participating members.

The Dutch draft article differed from SN/639/96, which had been unofficially issued by the Council Secretariat in December 1996, on the following points. Firstly, the general clause now talked about a "number of member states" (CONF 3813 1997, ANNEX, p. 1) as opposed to "two or more member states" (SN 639 1996, ANNEX, p.1) being able to establish closer cooperation. This change was made by the Dutch in order to avert any legal contradictions between the introduction and the conditions (which specified the number) of the general clause. Secondly, the specific number of member states now required for triggering flexibility was increased from eight to ten. Both documents had only suggested figures, but increasing the participating members reflected the ministerial debate and was an indication that the Presidency wanted to reassure non-participating members that flexibility would not be an exclusive project for a relatively small number of member states. The final difference in the general flexibility clause was that the reference to the divisibility of the European Parliament had been put in brackets. Only France had advocated the idea that MEPs from a non-participating member state should be

excluded from participating in legislative action falling into the realm of enhanced cooperation. An added incentive not to include the divisibility clause was provided by the Commission document, which had argued strongly for an indivisible European Parliament (CONF 3805 1997).

The most significant difference in the first pillar flexibility clause between CONF/3813/97 and SN/639/96 related to the decision-making mechanism triggering flexibility. The earlier draft article had suggested that flexibility in the first pillar should be triggered by qualified majority voting. The newer version echoed some of the ideas floated in the ministerial debate and gave three options: (1) qualified majority, (2) qualified majority in relation to the positive list and unanimity in all other cases, or (3) unanimity. The whole debate about the negative and positive lists and related decision-making mechanisms was a reflection of the difficulty in reconciling two opposite positions: on the one hand were those member states which wanted to pursue flexibility in a relatively liberal manner; and on the other, were those which were more hesitant about the issue and wanted to apply a set of straight jackets for its application. The Presidency had to play a carefully balanced game between the two and hence at times the draft articles seemed both politically and legally contradictory. But this was simply part of the negotiating and drafting process - eventually a compromise would be found to satisfy all parties.

As mentioned above, the most radical shift in the flexibility debate related to flexibility in the second pillar. During January and early February the Dutch Presidency had focused on flexibility in the first and the third pillars, and avoided bringing second pillar flexibility on to the agenda. Now the Dutch Presidency introduced the section dealing with the enabling clause in the second pillar as follows: "At present CFSP enables closer cooperation in the area of defence (old Articles J.4(4) and J.4(5)). Furthermore the Dublin II outline sets out a draft text for constructive abstention in the context of CFSP. Hence, it might be considered that these provisions sufficiently take into account the need for flexibility in CFSP. Should delegations, however, be of the opinion that an enhanced cooperation clause should be envisaged, this possibility could be explored further along the lines of the text below drafted by the Conference Secretariat" (CONF 3813 1997 ANNEX, p. 7). This was a clear indication that the Dutch (Patijn in particular) were not keen on an enabling clause in the second pillar. This strategy would become even more apparent in the latter part of the negotiations.

Nevertheless, despite Dutch reservations about an enabling clause in the second pillar, the Council Secretariat together with the Dutch Presidency had prepared a draft article which differed in only one respect from the draft article of 20 December 1996 (SN 639). The new draft raised the question, similar to that in the first pillar, of whether it would be plausible to trigger flexibility in the second pillar with a qualified majority decision in areas which were determined in advance (positive list).

The third pillar flexibility clause differed mainly in procedural matters. The December draft article had suggested that member states intending to establish closer cooperation should submit a proposal to the Commission, which would in turn submit a reasoned opinion (*avis motivé*) (SN 639 1996 ANNEX, p. 8). The February draft added that the proposal should also be delivered to the Council and the European Parliament, both of which would submit additional opinions. In the earlier version the Commission had a stronger role because the Council decision was taken by qualified majority on the basis of a proposal by the Commission. The February version noted that the Council should merely take into account the opinion of the Commission and the European Parliament.

As a result of the Dutch draft article, the representatives, meeting on 17-18 February 1997, began more detailed discussions on the mechanics of flexibility, indicating that the negotiations had entered a new phase. Member state governments began to reveal more detail of their positions on questions relating to decision-making mechanisms, the budget, the number of participants and the involvement of the institutions. Most of governments saw the Dutch draft article as a good basis for further discussion and they welcomed the fact that the issue was finally going to be dealt with on the basis of draft articles at all levels. Table 9 outlines the positions of the member governments during the first two months of the Dutch Presidency. As before, the positions are more nuanced than the table indicates. Nevertheless the table and the analysis that follows should paint a picture of the changing positions of the member governments and the reasons behind those changes. The Presidency document asked the delegations to focus on the scope of flexibility (negative or positive lists), the decision-making mechanism, the role of the Commission, modalities about joining a flexible mechanism at a later stage and the role of the ECJ.

Table 9 – Flexibility positions in February 1997

Form and mechanism	Pillar I	Pillar II	Pillar III
Favoured Enabling clauses	I, B, IRL, F, ES, S, D, LUX, AUS, FIN, POR, NL	I, (B), F, ES, D, (LUX), FIN, POR, (NL)	I, B, IRL, F, ES, S, D, LUX, AUS, FIN, POR, NL
Favoured Case-by-case		(B), IRL, DK, UK, S, (LUX), AUS, GR, (NL)	GR
Favoured Pre-defined flexibility			UK
No flexibility wanted	DK, UK, GR		DK
No clear position on flexibility			
Favoured Negative list	I, B, IRL, ES, S, D, FIN, GR, NL, LUX	not applicable	not applicable
Favoured Positive list		not applicable	not applicable
Favoured Both a positive and a negative list	POR	not applicable	not applicable
No need for negative or positive lists	F	not applicable	not applicable
No position on negative or positive list	DK, UK, AUS	not applicable	not applicable
Favoured Unanimity	IRL, DK, UK, ES, S, POR, GR	IRL, DK, UK, S, AUS, POR, GR	IRL, DK, UK, ES, S, POR, GR

Form and mechanism	Pillar I	Pillar II	Pillar III
Favoured QMV	I, B, F, D, LUX, AUS, FIN, NL	I, B, F, ES, D, LUX	I, B, F, D, LUX, AUS, FIN, NL
Other decision-making		FIN	
No position on decision-making		NL	
Commission initiative	B, IRL, DK, ES, POR	ES, POR	ES, POR
Member state initiative with Commission "approval"	I, F, S, D, LUX, AUS, FIN, NL	I, B, IRL, DK, F, S, D, LUX, AUS, FIN, NL	I, B, IRL, DK, F, S, D, LUX, AUS, FIN, NL
No position on approval mechanism	UK, GR	UK, GR	UK, GR
Community finance			
Participants finance	UK	UK	UK
Community finance administrative expenses, participants pay for operative expenses	I, B, F, D, LUX, AUS, FIN, NL	I, B, F, D, LUX, AUS, FIN, NL	I, B, F, D, LUX, AUS, FIN, NL
No position on finance	IRL, DK, ES, S, POR, GR	IRL, DK, ES, S, POR, GR	IRL, DK, ES, S, POR, GR

The first observation from the representatives' meeting on 17 and 18 February is that there was a narrowing of the scope of issues that had been dealt with in previous months. This is a normal development in an IGC. First a subject, such as flexibility, is introduced on a very general level. As the negotiations proceed an

increasing number of detailed issues emerge on the agenda. When the detailed issues have been dealt with sufficiently and the member governments have, in the Presidency's view, reached agreement, the issue is dropped off the agenda and considered final. It is not always necessary, however, for the Presidency to formally announce that it considers an issue has been dealt with sufficiently. The difference between the state of the flexibility debate in November 1996 and February 1997 was that conditions relating to the management of flexibility were no longer discussed around the negotiating table. There was agreement among all member governments that strict conditions should apply to all areas of flexibility. Indeed the establishment of first pillar flexibility was directly linked to strict conditions. The sceptical member governments, such as Spain and Portugal, began accepting the enabling clause approach in the first pillar only after the conditions had been determined.

The second observation is that even though the whole IGC process, including the Reflection Group, had been going on for over 20 months there were still a number of issues on which the delegations had not articulated a position. Some governments, for instance, had not expressed a preference between a positive or negative list (DK, UK, AUS). Others had not come out with their position on the financing mechanisms related to flexibility (IRL, DK, ES, S, POR, GR). There were a number of reasons for not outlining a position on a particular flexibility issue. The British government, for example, was sceptical towards flexible arrangements in general and thus preferred not to articulate its position on the role of the Commission or negative and positive lists. At other times a delegation did not have time or indeed forgot to give a particular position. There could also have been instances where a particular negotiator disagreed with the position that had been established in his home capital and chose not give a position at all. In general, most governments did have a position on most flexibility issues by February 1997, but for one reason or another they had chosen not to present them all at that stage. Unannounced positions could perhaps be useful bargaining chips at later stages in the negotiations.

The third observation is that the Spanish, Irish, Portuguese and Swedish governments had radically shifted their flexibility positions since November 1996. The Spanish, Irish and Portuguese governments had been sceptical about flexibility throughout the IGC. Spanish and Portuguese worries related to the fear of

exclusion in the first pillar in particular, whereas the Irish, as non-members of the WEU and the Schengen agreement, were sceptical about flexibility in the second and third pillars. The shift in the positions had taken place for two reasons. Firstly, the flexibility debate had improved dramatically during the previous months, since the first draft article on flexibility had been released. Consequently many of the worries about institutional mechanisms and possibilities of participation had been clarified. Secondly, the Spanish and Portuguese governments were by now sure that they would be able to participate in the third stage of EMU. This meant that one of their original fears – marginalisation in monetary matters – was now off the agenda.

There had been an interesting change in the Swedish position over the previous ten months. At the beginning of the IGC the Swedish government had favoured enabling clauses in all three pillars. By the autumn of 1996 the government's scepticism towards flexibility had reached its peak as it became increasingly clear that Sweden, for domestic reasons, was going to stay outside of EMU. In February 1997 the Swedish negotiating delegation accepted the reality that an enabling clause would most probably be inserted in the first and third pillars, and thus it would be important to try to influence the institutional arrangements of the new articles. Against this background the Swedish delegation therefore indicated that it would be willing to accept enabling clauses in the first and third pillars as long as the decision triggering flexibility was based on unanimity.

A further change of position had taken place within the Greek and Danish governments. Both governments were still sceptical about flexible arrangements in general – indeed they, together with the British government, opposed flexibility in the first pillar all together. The Greek government now tacitly approved of case-by-case flexibility in the second pillar (constructive abstention) and the third pillar. The Danish government was by now willing to consider case-by-case flexibility in the second pillar, but had become adamant in opposing an enabling clause in the third pillar. It is interesting to note that the Greek government argued that the negative list of areas in which flexibility could not apply, should include the structural funds (interviews). This position highlighted Greek fears of financial loss and exclusion in the first pillar if flexibility was institutionalised. The position of the Danish government highlighted an inherent dilemma – if an enabling clause would be

inserted into the third pillar, Denmark would not be able, for constitutional and political reasons, to participate in any of the new cooperation based on the clause.

The fourth observation relates to flexibility in the second pillar. By February 1997 the idea of constructive abstention, instead of an enabling clause, seemed to be gaining ground in the second pillar flexibility debate. The push for this came from the Dutch Presidency (see above). The French, Italian, German, Spanish, Finnish and Portuguese governments supported an enabling clause and the Irish, Danish, British, Greek, Swedish and Austrian delegations preferred constructive abstention. Belgium and Luxembourg had by now taken a more neutral position on flexibility in the second pillar. They were advocating an enabling clause, but said that constructive abstention could be a beneficial "second best" solution (interview). They were sitting on the fence for two reasons. Firstly, the Belgian and Luxembourg governments, who actually preferred enabling clauses to constructive abstention, wanted to show solidarity with the Dutch Presidency and Patijn by indicating that constructive abstention was better than no flexibility at all in the second pillar. Secondly, behind the scenes, the founding members (minus the Netherlands) and Spain were in the process of preparing a paper on the incorporation of the WEU into the EU. Belgium and Luxembourg wanted to see the reaction of other member states to the WEU merger proposal before they finally outlined their positions on second pillar flexibility. It should, however, be pointed out that indecision about second pillar flexibility and the late tabling of a merger between the WEU and the EU (see below) indicated that there seemed to be little political will among the founding members to advance the defence dimension of the Union. Moreover, it is interesting to note that whereas it was increasingly clear that enabling clauses would be inserted in the first and third pillars because there was a clear majority behind the proposals, it was also increasingly clear that issues relating to second pillar flexibility would be a source of contention throughout the final stages of the negotiations.

The final observation is linked to the flexibility position of the French government. In February 1997 it was still evident that French thinking on flexibility was based on a vision of a core Europe. The French delegation was the only one to argue that only MEPs from the participating countries should be able to vote in the European Parliament. Moreover the French government was the only one to argue that there was no need for a positive or a negative list in the first pillar. Both of these examples

show that the French continued to see flexibility as a means by which to create a core on all levels of the Union. This had been the vision of the French government since the relaunch of the flexibility debate in 1994, albeit with different nuances. It was also to be their position after the Amsterdam negotiations when the French insisted on creating the Euro-11 Council, excluding non-EMU member states.

3. FROM ROME (MARCH 1997) TO AMSTERDAM (JUNE 1997) – GETTING GOING AND FINISHING UP

The second part of this chapter deals with the last four months of the IGC⁵. It looks at how the Dutch strategy of pushing flexibility in the early months of the year influenced the final debate. At the end of March, the Dutch Presidency circulated a revised draft of some of the issues in the Irish draft treaty (CONF 2500 ADD1 1997) including a new draft article on flexibility. The document drew mostly on suggestions from a revised version of the first Dutch draft flexibility article (CONF 3835 1997) and less, if at all, on two Irish non-papers – one on the third pillar (3-4 March 1997) and the other on the first pillar (7 March 1997) – or a Presidency progress report on the state of play of the Conference issued on March 19 (CONF 3848 1997). Three more documents were submitted before Amsterdam. The first was a non-paper called a “Compilation of texts under discussion” (SN 2555 1997). The second, a “Consolidated Draft Treaty” (SN 600 1997), amended as agreed in the preceding meetings, was not substantially different from the first. The third document dealing with flexibility, the Draft Treaty published on 12 June 1997 (CONF 4000 1997) was drafted on the basis of earlier discussions. After all the documents and meetings of the final three months of the IGC, Amsterdam had to deal with only three outstanding issues relating to flexible integration: the trigger mechanism, the role of the Commission and the second pillar enabling clause.

⁵ This section is based on participant observation which has been cross-referenced with interviews and publicly available Conference documentation.

3.1. First draft article on the ministerial level - March 1997

3.1.1. The Dutch draft article lives

After discussions at the representatives' level on 17 February, the Presidency submitted a revised draft article on flexibility on 4 March 1997 (CONF 3835 1997). This draft was never discussed by the representatives, but it will be mentioned here in order to illustrate the way in which the Presidency and the Council Secretariat took into account the positions of member governments when developing new versions of draft articles. The institutional provisions of the general flexibility clause saw some minor changes which had little practical impact, but changed the tone of the provisions from an exclusive to a more inclusive one. The major addition to the general flexibility clause was a new article which was introduced in light of the representatives' previous meeting, pushed by the Swedish, Spanish and British delegations (interview). The idea behind the article was to clarify the position of non-participating member states and their entitlement to participate at a later stage. This was a somewhat strange addition particularly since the article included procedural matters, which are not normally found in provisions setting out the broad principles. Nevertheless it was an important psychological addition for those member states which were afraid they might be excluded permanently from a particular field of closer cooperation. The important institutional point was that the article provided that the participating member states would decide by a qualified majority if the applicant was suitable to join a given flexible arrangement.

3.1.2. The pivot of the Dutch Presidency - Addendum to the Irish draft treaty in March 1997

The key moment in the political debate on flexibility was the Ministerial meeting in Rome on 25 March 1997. Before this meeting the Irish delegation issued two non-papers on flexibility (3-4 March 1997, 7 March 1997). The first non-paper dealt with flexibility in JHA and the second outlined Irish concerns about flexibility in general. It is interesting to note that the Irish delegation was more active in presenting non-papers during the Dutch Presidency than it was during its own Presidency. The Dutch Presidency issued a progress report on 19 March 1997 (CONF 3848 1997). This set out the Presidency's assessment of the Conference since the European

Council of Dublin in December. At the same time the Presidency produced revised texts on a number of areas, one of which was flexibility.

The concrete manifestation of the progress report of the Presidency was an "official" draft article on flexibility on 21 March 1997 (CONF 2500 1996 ADD.1). It had taken almost twelve months for the IGC to produce a draft article for discussion at the political level. This is an indication of the difficulties experienced in negotiating flexibility⁶.

The Foreign Ministers' meeting in Rome on 25 March 1997 dealt with the new draft article on flexibility. The meeting was important for two reasons. Firstly it was a meeting which strengthened the political incentive to conclude the IGC at the Amsterdam European Council of June 16 and 17. For that reason the Presidency noted that all the negotiations from then on would be based on concrete draft articles. There would be more frequent representatives' meetings and additional

⁶ The draft article differed from the previous unofficial version (CONF 3835 1997) on the following points. The general flexibility clause was shortened so that the new version contained only the general conditions on flexibility and the institutional provisions. In other words the first paragraph introducing flexibility and the last paragraph setting out decision-making mechanisms for joining were dropped because they were considered to be redundant. As far as the conditions were concerned the notion of "last resort" was clarified, as a result of Irish persuasion. The new version of the condition read: "[flexibility] is only used as a last resort, where objectives could not be attained by applying the relevant procedures laid down in the Treaties" (CONF 2500 1997 ADD.1, p.52). The other conditions remained unchanged. The other difference in the general flexibility clause was that the reference to a divided European Parliament was finally dropped. The member states had finally made their voices heard on this point.

In the first pillar enabling clause the negative list of areas where flexibility would not apply remained the same. The decision-making procedure differed only inasmuch as the reference to qualified-majority decisions for the positive list was dropped because the positive list itself had been dropped. The draft article proposed either unanimity or qualified majority voting for the decision-making mechanism. The article setting out the procedure by which a member state could join a flexible arrangement was moved from the general flexibility clause to the flexibility clause in the first pillar. The first pillar enabling clause now also noted that the ECJ would have full jurisdiction in first pillar flexibility cases.

The proposed mechanisms for the second pillar were very similar to those suggested in CONF/3835/97. There were four proposed models: an enabling clause, constructive abstention, pre-defined flexibility and conferral of joint actions. There were only two differences in the enabling clause from its previous version. The first was a change from "to avail themselves of the institutions" (CONF 3835 1997 ANNEX, p.10) to "to make use of the institutions" (CONF 2500 1997 ADD.1, p.57). The other difference was the removal of a reference to the European Parliament, whereas the previous draft had noted that "the Council shall regularly inform the European Parliament of the development of closer cooperation", the view of certain governments that there should be no EP involvement in the second pillar had prevailed in the official draft.

The third pillar flexibility clause differed from the previous draft in three ways. Firstly, it suggested that all decisions triggering flexibility should be taken by qualified majority, regardless of the reasoned opinion of the Commission. In the previous version qualified majority voting had been proposed except where the Commission's reasoned opinion was negative, in which case unanimity had been suggested. The second difference was that the joining mechanism had been added to the third pillar flexibility clause just as it had been added to the first pillar clause. Thirdly, as in the second pillar clause the reference to the EP had been removed. Finally, a reference to the jurisdiction of the ECJ was added to the third pillar flexibility clause.

conclaves in order to speed up the pace of negotiations. In addition the Presidency said it would start using a group of lower ranked civil servants (*Amis de la Présidence*) to support the representatives' group. The "Friends of the Presidency" group would deal mostly with legal and technical matters. The Foreign Ministers were to have two conclaves. The first would take place in Noordwijk on 6 and 7 April and the second in the Hague on 25 and 26 April. This push from the Dutch Presidency resulted from a general feeling that urgent work was necessary if negotiations were to conclude at the European Council of Amsterdam. Insiders who had been involved in other IGC negotiations said that at the equivalent stage in the Maastricht negotiations work had been further advanced (interview).

The second reason that the Rome meeting was important related to the merger between the WEU and the EU. Germany, France, Belgium, Luxembourg, Italy and Spain had issued a protocol on the gradual merging of the WEU into the EU. The paper had been discussed by the representatives on 10 March (CONF 3855 1997). Consequently the Presidency had inserted into the newest version the words: "with the objective of gradual integration of the WEU to the Union" (CONF 2500 1997 ADD.1, p.57). The significance of the proposal relates not to substance, but to timing. One of the main purposes of the IGC was to examine ways in which to develop the Union's foreign, security and defence policy. Yet it had taken France, Germany, Italy, Belgium, Luxembourg and Spain almost a year to come out with a joint proposal on a WEU-EU merger. There are two reasons for this late response. Firstly, and more importantly, there did not seem to be consensus between the six countries on the benefits of a merger proposal. After NATO's Berlin summit in 1996 it had become increasingly clear that the WEU would become the European pillar of the transatlantic alliance. As a consequence there was no urgency to push for a defence arm in the EU. Secondly, Finland and Sweden had come out with a "pre-emptive strike" in 1996 by suggesting that the Union should incorporate the Petersberg Tasks into the EU. There seemed to be a permissive consensus among the member states, both allied and non-allied, that giving the Union a soft defence dimension in the Amsterdam Treaty was sufficient for the time being. Against this background the merger suggestion came almost a year too late. If the six countries suggesting the merger had been serious about their proposal they would have issued it right at the beginning of the IGC. There simply was not a strong political will to develop the Union's defence dimension.

The actual flexibility debate in the ministerial meeting of March was short and no specific references were made to the actual draft articles. The general approach of the Presidency was well received. Poos (LUX) stressed that it was important to have strict conditions for flexibility (interview). Kinkel (D) referred to the Franco-German proposal (interview). Hurd (UK) was sceptical about flexibility in general and suggested that any decision about flexibility should be unanimous (interview). Dini (I), Derycke (B) and de Charette (F) on the other hand favoured qualified majority voting. Schlüssel (AUS) and Hjelm-Wallén (S) objected to the enabling clause in the second pillar and said that constructive abstention would be enough (interview). On the eve of the ministerial meeting, the Greek delegation submitted a proposal on flexibility which, much like Portugal's suggestion in 1996, was defensive in character (CONF 3866 1997) and was never really addressed in the negotiations⁷.

3.2. Fine-tuning flexibility and tackling Schengen and free movement – April, May and June 1997

By the time representatives met on 14-15 April the negotiations had moved to the stage of drafting and fine tuning articles. The debate was based on CONF/2500/97/ADD.1 which elaborated upon previous drafts - CONF/3813/97 and CONF/3835/97. Delegations proposed many detailed technical amendments to the draft article (over 100 according to one interviewee), which the Presidency agreed to consider before the next meeting. However, whilst these comments were of legal relevance, their political impact was marginal and it is therefore perhaps better to spare the reader a close analysis of their effects and focus instead on the overall government positions in April 1997. Inevitably, these positions were more complex than table 10 suggests, but it is hoped that this categorisation nevertheless helps to give a general picture of the issues that were carried forward into the final weeks of the negotiations.

⁷ The Greek paper on flexibility was issued on 8 April 1997 (CONF 3866 1997). The document had been drafted on 21 March 1997 and took issue with an earlier draft article on flexibility, in CONF/3813/97. The paper was very sceptical about flexibility. The Irish also came out with a non-paper on flexibility on 18 April 1997. This paper dealt solely with the first pillar flexibility clause and included a draft proposal on it.

Table 10 – Flexibility positions in April 1997

Form and mechanism	Pillar I	Pillar II	Pillar III
Favoured Enabling clauses	All member governments	ES, I, D, FIN, LUX, F, B	All member governments
Favoured Case-by-case		DK, IRL, S, UK, AUS, GR, POR, NL	
Favoured Unanimity	ES, IRL, S, UK, GR	IRL, S, UK, AUS, GR, POR	ES, IRL, S, UK, GR, POR
Favoured QMV	I, D, FIN, AUS, LUX, F, B, POR, NL	ES, I, D, LUX, F, B	I, D, FIN, AUS, LUX, F, B, NL
No position on decision-making	DK	DK, FIN, NL	DK
Commission initiative	IRL, S		
Member state initiative with Commission “approval”	ES, I, DK, D, FIN, GR, UK, AUS, LUX, F, B, POR, NL	All member governments	All member governments

The first observation to make about the representatives' meeting on 15 April 1997 is that it was the first time delegations accepted a particular part of the draft article lock, stock and barrel. The Italian and Luxembourg delegations, for instance, said that the draft article was very good and that their respective governments could accept it with only a few technical changes (interview). It should also be pointed out that though many of the comments were about legal detail the issues of contention had decreased dramatically. In previous meetings, for instance, some member governments had opposed flexibility in the first (DK, UK, GR) and third pillars (DK). In April the choice was only between different forms of flexibility and all governments accepted that some form of flexibility would be institutionalised in the new treaty. The decision-making mechanism for flexibility had also been narrowed down to two choices – unanimity or qualified majority voting. Gone, at least at this

stage, was the option of "some other form of decision-making" although it returned in a most peculiar way in the early morning hours of the European Council of Amsterdam (see below). The debate about positive and negative lists had also disappeared, the latter being the only option for the delegations. Moreover, the Presidency had established that the financial issues had been tacitly approved by all member governments – the Community would take care of administrative costs and the participants would pay for operative expenses. This is a classic example of the way IGC negotiations normally proceed. Issues emerge on the agenda and as the negotiations move towards conclusion, differences are ironed out and the outstanding issues decrease in number. By April the focus already seemed to be on three key issues alone: the second pillar enabling clauses, decision-making and the role of the Commission.

The second observation relates to third pillar flexibility. In the representatives meeting it was clear that all governments had accepted that an enabling clause would be inserted into the third pillar. The interesting thing was that no-one talked about special arrangements for the United Kingdom, Ireland and Denmark. This is in stark contrast to the Maastricht negotiations where the opt-outs for Britain from EMU and the Social Agreement were subject to fierce debate, especially during the final stages of the negotiations⁸. This almost indifferent approach indicated that the other member governments had accepted that it would be politically and constitutionally difficult for the United Kingdom, Ireland and Denmark to participate in the issues that were to be transferred from the third to the first pillar and the Schengen agreement. These issues would have to be dealt with bilaterally between the Presidency and the government involved.

The third observation relates to the second pillar. The proposal about merging the WEU and the EU did not appear to receive an enthusiastic response from many governments. The six initiators (D, F, I, B, LUX, ES) were only tacitly supported by the Greek and Portuguese governments, who said that they were willing to consider the proposal (interview). Given that there was lacklustre backing for the merger, the Belgian and Luxembourg governments withdrew their previous suggestion that constructive abstention in the second pillar would perhaps be sufficient. They now came back to their earlier position, arguing that an enabling clause in the second

pillar was indeed needed. This was a clear indication of the lack of political will behind the WEU proposal. It seems that the suggestion was thrown into the IGC debate without much conviction and with the initiators knowing full well that the proposal would not be supported by a majority of member states. It was as if France and Germany, in particular, felt obliged to promote a European security dimension by putting forward the proposal. It is, however, interesting to note that the coalition that favoured the "second best" solution – i.e. the enabling clause – did not comprise exactly the same governments that supported the merger proposal. Finland, for instance, did not support the proposal about merging the WEU with the EU, but could envisage an enabling clause in the second pillar. As mentioned previously the thinking behind this position was that an enabling clause could be used at a later stage to create a defence dimension, the timing of which might be more suitable for Finland⁸.

The final observation relates to the decision-making mechanism triggering flexibility. By looking at table 10 it becomes evident that those governments that had a generally positive outlook on the enabling clauses favoured qualified majority voting and those that were sceptical about flexibility in general preferred unanimity. In the first pillar there was one exception to this rule – Portugal. In the beginning of the IGC negotiations the Portuguese government opposed flexibility in general. As the negotiations proceeded and it was increasingly clear that Portugal would not be excluded from future flexible arrangements, the government began to warm up to the idea of flexibility. In February 1997 the Portuguese still called for unanimity in the first pillar enabling clause, but by April they were willing to accept qualified majority voting. Another interesting aspect of decision-making related to the Finnish and Dutch positions in the second pillar. The Dutch delegation was not in favour of an enabling clause in the second pillar and thus it did not come out with a position on the decision-making mechanism. The Finnish reason for holding back on the decision-making position was different. Finland had pledged in its accession treaty that it would not obstruct the development of the second pillar. Supporting both the enabling clause and qualified majority voting would have been too "radical" for many domestic observers, so Finland chose to remain silent on how flexibility should be triggered in the second pillar.

⁸ The EMU opt-outs for Britain had been subject to debate throughout the Maastricht negotiations, whereas the Social Protocol was mainly debate during the final stages.

⁹ This was the thinking of some government officials, not necessarily the politicians.

3.2.1. Back to Schengen

Another issue also took centre stage during April: the Schengen agreement. A considerable amount of time was devoted to informal discussion of the Schengen issue. In the addendum to the Irish draft treaty the Dutch Presidency had argued that all existing Schengen legislation should be incorporated into the Amsterdam Treaty when it entered into force. Although some Schengen members had initially been sceptical, the persuasive force of the Netherlands Presidency and its arguments gradually began to gain acceptance. And indeed on May 5 (see below) a revised draft Schengen protocol was tabled. There was still much negotiating to do, but by this stage it was clear that the incorporation of Schengen was now accepted by all of the Schengen countries. As an Irish negotiator put it "the approach had found its way through the dark forest of evolutionary competition and had now entered the sunlight of likely survival" (McDonagh 1998, p.177). The final decision would naturally be taken at the highest political level. However, the drafting exercise in relation to Schengen was firmly based on the Protocol tabled by the Dutch Presidency. It was an extremely difficult drafting exercise which would also spill over into the post-Amsterdam debate (see below).

3.2.2. The British election

The British election on 1 May 1997, bringing in a more pro-European government, brought a certain positive buzz to the final stages of the negotiations. When Doug Henderson, the new British Minister for Europe, spoke for the first time at a representatives' meeting in Brussels on 5 May, it was a significant moment not only for the IGC but also for Britain's role in Europe in general. There was no radical shift in the British IGC position – indeed in flexibility the Labour government seemed even more sceptical than its predecessor – but the change in attitude played a big role. The table could now be set for Amsterdam. Some doubts about the prospects of concluding the IGC at Amsterdam still persisted, but they now related more to the volume and complexity of the work that lay ahead than to the possibility of a block from the British government.

There was a general feeling among the negotiators that it would be easier to achieve agreement once the elections were over in the United Kingdom. One of the symbolically important signals was that the British representative, Wall, who only a

few weeks earlier had argued against Britain joining the Social Agreement, came out in the second representatives' meeting after the election and gave an argument explaining why Britain should join the Social Agreement as soon as possible. Britain's partners now felt that an agreement could be reached at Amsterdam.

3.2.3. Dealing with the last six weeks

Time was running out and the general work programme of the final six weeks of the negotiations therefore became of crucial importance, forcing the Dutch Presidency to take some important decisions. Firstly it confirmed its proposal to convene an informal European Council in Noordwijk on 23 May 1997. Although most of the subjects in the IGC were actually dealt with on a general level (no legal detail was involved) the meeting was important in that it gave an opportunity for the other Heads of State or Government to get to know the new British Prime Minister, Tony Blair, and *vice versa*. The informal summit meeting also provided a crash course in the IGC for most of the leaders. Secondly the Dutch Presidency decided that the representatives' meetings would remain the core forum in which shape would be given to the final package. Both of these points illustrate one of the central themes of this thesis – namely that over 95 percent of the IGC work takes place at the representatives level and only the most politically sensitive issues are left for the highest level. At the same time it should be pointed out that without the political authority and determination which is provided by the Heads of State or Government, IGCs could go on for ever. One should never underestimate a bureaucrat's will and ability to spend time around a negotiating table defending her national position.

The mid-April meeting preceded the final stage of the negotiations. Three more documents relating to flexibility were submitted before the Amsterdam Treaty was concluded. The first was a non-paper called a "Compilation of texts under discussion" (SN 2555 1997). The reason this document was not called a draft treaty was that the Presidency wanted to keep the debate as objective as possible. The Dutch Presidency had the same dilemma as its predecessor in trying to determine when it was most appropriate to provide an overall draft treaty. On the one hand it was important that the negotiators had a sense of the merging overall package, but on the other hand the Dutch had to be careful not to provide anything that could be torn apart by the delegations before they reached Amsterdam. The document was discussed in a ministerial conclave on 20 May, the informal European Council on 23

May and at the IGC representatives level on 26-28 May. The second document, a "Consolidated Draft Treaty" (SN 600 1997), amended as agreed in the preceding meetings, was not substantially different from the first on flexibility issues. In the first pillar it gave two options for negative lists, one more specific than the other. This document was discussed by Foreign Ministers on 2-3 June and representatives on 5-6 June and 9-10 June. The third document, the "Draft Treaty" tabled on 12 June 1997 (CONF 4000 1997), was drafted on the basis of these discussions. There were virtually no flexibility changes from the document that had been dealt with at the representatives level in April, illustrating that there were only a handful of issues relating to flexibility that were left open for the European Council of Amsterdam.

Throughout May and early June negotiations on flexibility appeared to lose the heat of previous months. A mood of indifference prevailed. The anticipated pro-European government in the United Kingdom had been elected and the EMU and enlargement questions had been implicitly agreed, so among some member states there no longer seemed to be a pressing need for enabling clauses. It was also implicit from the Franco-German side that they had far less enthusiasm for enabling clauses than had been apparent in the early stages of the negotiations. The French and German loss of interest in flexibility had been gradual. The French government slowly began to lose interest when it realised that its original idea of a core Europe would not be fulfilled in the flexibility clauses – too many tight conditions had been incorporated into the new articles. The German government seemed content with the draft articles that had been presented and was happy that the principle of flexibility was going to be included in the new treaty. Implicitly the Germans must have thought that the precise instruments of flexibility could be perfected in future IGCs. In addition, it had become clear that the enabling clause alone would not be sufficient in third pillar matters or matters relating to the incorporation of the Schengen Agreement and the new Community provisions on visas, asylum and immigration. The United Kingdom, Ireland and Denmark would have to be dealt with in the traditional way, i.e. through pre-defined opt-outs.

The Schengen debate took centre stage in the last two months of the negotiations. The key players in this debate were two non-Schengen countries: the United Kingdom and Ireland. The British and Irish delegations sought to make sure that their specific concerns would be reflected in the draft texts concerning the Schengen Agreement. In May the Schengen debate revolved around looking at

ways in which Ireland and the United Kingdom could sign up to some of the existing Schengen arrangements. This is in stark contrast to the early Schengen debate which had been based on an “all or nothing” assumption. The detailed debate also revolved around the precise method in which the Schengen Agreement would be incorporated into the treaty and the way in which Norway and Iceland were to be involved. Thanks to the relentless efforts of the Dutch Presidency throughout May and early June, a Schengen Draft Protocol was produced which, with some amendments, could be accepted at Amsterdam.

In parallel with the Schengen deliberations the member states were faced with the complex task of refining the general provisions on JHA. The most important political dilemma was whether the new title on visas, asylum, immigration and other issues relating to free movement would be placed in the first or the third pillar. The location of the new title was of more psychological than practical importance since the instruments used would be drawn from the first pillar. Nevertheless the issue had become for some, especially the Dutch Presidency. The main person behind the Dutch position was Patijn. The outcome of the first or third pillar question depended to a large extent on what sort of compromise could be struck between the Presidency and the British government. The Irish position was tied to the Common Travel Area and hence not as politically charged as that of the new government of the United Kingdom. The Irish wanted to participate fully, but were unable to do so because of their historical link to the CTA.

Since the United Kingdom was not prepared to accept a wholesale transfer of visas, immigration and asylum to the Community pillar, two scenarios were envisaged (McDonagh 1998). The first scenario was that the United Kingdom would simply block any transfer of competence to the first pillar. This would have led to an unwelcome and pointless crisis and made it more difficult for the United Kingdom to achieve other negotiating aims in the end game of the Conference. In addition this would not have been a sensible move by the new Labour government which was trying to create a constructive partnership in the EU. The alternative scenario was to allow the transfer of some issues to the first pillar and seek a formal opt-out from those provisions (i.e. pre-defined flexibility). This would be a satisfactory solution for all and it would allow the United Kingdom to seek solutions in other issues important to them. Following several days of shuttle diplomacy between the Presidency and

the United Kingdom prior to the European Council of Amsterdam, the latter option was agreed.

3.3. The end game at Amsterdam – 16-18 July 1997

After countless meetings of the Heads of State or Government, Foreign Ministers, representatives and the "Friends of the Presidency" in May and early June, the Dutch finally tabled their "Draft Treaty" on June 12, only four days before the beginning of the European Council of Amsterdam (CONF 4000 1997). A period of three days and nights of frenetic preparation in respective capitals followed. The national delegations began to arrive in Amsterdam on 15 June. The delegations were allocated several different hotels – the four largest member states were in the same hotel as the Presidency, perhaps in order to allow for any last minute horse-trading before and during the European Council. The Dutch were serious about wrapping up the IGC in Amsterdam and had therefore organised the programme so that almost the entire two days of the European Council were devoted to the IGC. The Presidency had indicated that the aim was to complete the proceedings "after luncheon" on 17 June. Though this aim was optimistic it was helpful in setting a deadline for completion. Little did participants know that the IGC would not be concluded until 3.35 a.m. on 18 July.

3.3.1. Flexibility

Prime Minister Wim Kok had sent out a letter to the participants of the summit meeting a couple of days before the start of the European Council. In the letter he noted that the Conference still faced certain challenges, notably in some of the more sensitive issues. Among these issues, surprisingly, he counted flexibility. However, on the eve of the European Council of Amsterdam there were only three open questions concerning the flexibility provisions: (1) what should the trigger for flexibility be? (2) who should have the final say in initiating flexibility in the first pillar? and (3) should there be an enabling clause in the second pillar? In the end the debate about flexibility at the Amsterdam summit took approximately seven minutes.

Firstly, France and the United Kingdom suggested that the trigger mechanism for flexibility should be qualified majority with a so-called emergency brake, similar to the Luxembourg compromise. The idea had been discussed in earlier representatives meetings in relation to the second pillar, but had not received much support. At the European Council, however, no one objected to the idea and the institutionalisation of the Luxembourg compromise became a reality. Prime Minister Tony Blair had made it clear to his partners that he would not accept a trigger for flexibility which would abolish the possibility of a veto. France, one of the fiercest advocates of flexibility, supported the British position on the decision-making mechanism of flexibility. French support on this question was of symbolic significance. The same thing happened at Maastricht where the French were seen retreating from integrationist rhetoric when it came to hard choices. But here the paradox is even greater because the French government in particular had argued for flexible arrangements which would allow a set of willing and able member states to surpass the recalcitrants, without the unable and unwilling being able to bloc the progress.

Secondly, Portugal, supported by Italy, Greece, Belgium and Austria, suggested that the Commission in its role as the guardian of the treaties should have the final say in triggering flexibility in the first pillar. The change was accepted and the Commission retained its central role in first pillar flexibility. Finally, the United Kingdom, Greece and Austria suggested that the enabling clause in the second pillar should be dropped in favour of constructive abstention. The Presidency agreed and the enabling clause was dropped without any objections from other member states.

The way in which these decisions were reached at Amsterdam is typical of the European Council. If a Head of State or Government, or a Foreign Minister, asks the Presidency to make a change to a draft text, the change is usually adopted if no-one objects to it or if it gets support from other delegations. This was the case with all of the three flexibility issues outlined above. The second pillar enabling clause, for instance, was dropped after only three member governments had voiced their opinion. The Presidency knew from previous debates that at least the Irish, Portuguese and Danish governments would join the United Kingdom, Austria and Greece in supporting constructive abstention. In this particular case it was also

convenient for the Dutch Presidency to make the change because it was itself opposed to an enabling clause in the second pillar.

For those who had been involved in the flexibility negotiations it all seemed rather anti-climactic. Over thirty months of preparations and negotiations had been concluded in less than ten minutes. Retrospectively, however, this is more of an indication that the subject had been exhaustively examined. Few issues were left open before Amsterdam and the Heads of State or Government could easily come to an agreement about the new provisions on flexibility. The exact opposite happened in the case of the negotiations on the number of Commissioners and the reweighting of the votes. These negotiations were poorly prepared and left to the last minute, only to be postponed to the next IGC. This should not have come as a surprise since these issues are much more politically sensitive than flexibility. National governments know that the general public cares far more about the number of Commissioners and the weighting of the votes in the Council than how the principle of flexibility is institutionalised in the treaty. Certainly no-one expected the flexibility negotiations to continue after the Amsterdam Summit up until the signing of the new treaty on 2 October 1997.

3.3.2. The British, Irish and Danish opt-outs

The final pieces of the JHA jigsaw were put on the table by the Dutch Presidency on the morning of 16 June 1997, i.e. the first day of the European Council of Amsterdam. The refinements reflected extensive bi- and trilateral meetings between the Presidency and the other parties involved; namely the United Kingdom, Ireland and Denmark. The Danish case was different from the British and Irish problem because it related more to constitutional problems about transferring issues to the first pillar – the Danes operated under different domestic constraints. Hence the Presidency was dealing with the parties involved separately. Contacts between the Presidency, the United Kingdom and Ireland had been more intense than with Denmark in the weeks preceding the Amsterdam summit. Once in Amsterdam meetings between these parties had continued into the small hours on the eve of the European Council. The Netherlands Presidency had remained aware of the sensitivities of the three parties involved and kept them informed of developments and emerging drafts. The other member states were, however, largely uninformed about the detail of the drafts that were later tabled. Indeed many of the

representatives of the IGC saw them for the first time after they had been agreed at the political level.

As indicated in chapter 3 the final package that emerged contained five basic elements:

- (1) a new title on visas, asylum, immigration and other policies related to the free movement of persons
- (2) a protocol exempting Ireland and the United Kingdom from those provisions
- (3) a protocol covering the special position of Denmark
- (4) a protocol on border controls relating to Ireland and the United Kingdom
- (5) the Schengen protocol.

These protocols were probably unprecedented in their complexity. It has been argued that the outcome of these provisions could have been different had the timing and the rhythm of the negotiations been different (McDonagh 1998, Petite 1997, Stubb 1997). If coalitions of interested parties had come together earlier, for instance, or the Dutch Presidency had not been so persuasive, the IGC could have ended up simply "beefing up" the third pillar instead of substantially transferring competence to the Community sphere. It is also significant that other member states were not involved in the discussions between the Dutch Presidency, the Council Secretariat, Denmark, Ireland and the United Kingdom. There are two reasons for this. Firstly, the Presidency had the Schengen agreement and issues relating to the free movement of persons as a clear priority. So it did not want anything to interfere with the incorporation of Schengen or the movement of certain issues from the third to the first pillar. If other member states had been involved they could have jeopardised the whole process. Secondly, the issues that were being dealt with concerned only the three member states mentioned above. The other member states realised that the problems were specific and did not necessarily involve them. Hence they gave the Dutch Presidency an open mandate to solve the problems involved¹⁰.

¹⁰ The seeming complexity of the provisions on free movement, asylum and immigration are neatly captured by McDonagh (1998, p.182): he cites a 15-year-old's description of the game of cricket: "You have two sides, one out in the field and one in. Each man that's in the side that's in, goes out and when he's out he comes in, and the next man goes out until he's out. When they are all out, the side that's out comes in and the side that's been in goes out and tries to get those coming in out. When both sides have been in and out, including the not outs, that's the end of the game". (The same would fit for the world famous game of Finnish baseball).

3.3.3. The post-Amsterdam debate

Despite the IGC officially ending with the European Council at Amsterdam there remained a considerable amount of work to do on the legal detail of the new treaty. At times the member states also disagreed on what had actually been concluded at Amsterdam. As noted earlier, the uncertainty arose from the nature of the negotiations in the European Council, which were complex and at times confusing. By way of comparison it should be pointed out that when the Foreign Ministers and the representatives met throughout the Conference they usually dealt with a maximum of five topics during the two day meetings. At the European Council the Heads of State or Government were asked to tackle the whole dossier of twenty-five subjects in addition to tens of protocols and declarations that were tabled during the final hours of the IGC. The negotiations at Amsterdam consisted of interventions from 32 politicians from 16 delegations in eleven languages on evolving legal texts. The issues were overlapping and frequently revisited. It was no wonder there was confusion about what had actually been agreed.

As a result, an interesting set of negotiations on Schengen took place after the Amsterdam summit. The question of what had actually been decided on the decision-making mechanism for joining the Schengen agreement inside the treaty was quite problematic. The post-Amsterdam version of the treaty (CONF 4004 1997) stated that unanimity was required whereas the pre-Amsterdam Draft Treaty (CONF 4000 1997) suggested that qualified majority voting was sufficient in deciding whether an outsider could adopt legislation which was based on the Schengen *acquis*. The Irish and British governments claimed that the original formulation (QMV) had not been changed at Amsterdam. On the other hand, the Spanish view was that a change had been made. After a review of the *antici* notes and the tapes from Amsterdam it was concluded that a change had been made. Consequently, a unanimous decision will be required by the Schengen members if the United Kingdom, for example, wants to adopt existing Schengen legislation.

3.3.4. And finally...

And finally, after all the complications had been resolved and the jurist linguists had tidied up the Amsterdam Treaty in all eleven Community languages, the new treaty was eventually signed in Amsterdam on 2 October 1997 by the Foreign Ministers of

the member states. Final agreement was reached some 553 days after the IGC had been launched in Turin on 29 March 1996. The new treaty contained a general enabling clause supported by specific enabling clauses for the first and the third pillar, and special arrangements for the United Kingdom, Ireland and Denmark in relation to the Schengen agreement and the new title on free movement, asylum and immigration. And case-by-case (constructive abstention) in the second pillar.

CONCLUSION

This chapter has given an overview of the flexibility debate from the European Council of Dublin in December 1996 to the end of the IGC in Amsterdam in June 1997 and the signing of the treaty in Amsterdam in October 1997. It has provided an analysis of the numerous draft articles on flexibility, the debate on Schengen, JHA and CFSP, the end-game at Amsterdam and the post-agreement negotiations. The conclusion assesses the final months of the 1996-97 IGC.

The decision-taking stage of the 1996-97 IGC was important because it provided the final push for concluding the Conference in accordance with the schedule that had been agreed in the European Councils of Florence and Dublin in 1996. The Dutch Presidency made flexibility a priority by increasing the number of meetings that dealt with flexibility. Flexibility was debated on all levels more than twice as many times as during the Irish Presidency. Flexibility was finally institutionalised in the new treaty because some governments wanted a mechanism by which to allow willing and able member states to pursue deeper integration. The governments which were sceptical about flexibility were able to include strict conditions and heavy decision-making procedures so as to avoid being permanently excluded from a possibly increasing number of flexible measures. The key to compromise in issues relating to JHA in a broad sense was that special arrangements had to be established for the participation - or non-participation as the case may be - of the United Kingdom, Ireland and Denmark. The Dutch Presidency handled the situation in a masterful way through bi- and trilateral negotiations with the parties involved. But flexibility itself ended up being a bit of a non-issue at Amsterdam. In a brief seven minutes the Heads of State or Government were able to abolish the second pillar enabling clause, water down the trigger mechanism and strengthen the role of the Commission in first pillar flexibility. Much of the credit for the relatively painless

flexibility negotiations in Amsterdam should again be given to the Dutch Presidency which had prepared the issue with authority.

The decision-taking stage of the 1996-97 IGC provides the clearest indication that although all member states, large and small, play an important role in the IGC process, the most influential actors in an IGC are the civil servants of the Presidency and the Council Secretariat. The Council Secretariat set the ball rolling by issuing an unofficial draft article on flexibility a few days before the beginning of the Dutch Presidency. During the final six months of the negotiations the Dutch Presidency forced the issue of flexibility and, consequently, member governments had to start revealing their detailed positions. Together with the Council Secretariat, the Presidency was able to sort through hundreds of written and oral flexibility positions and establish the final level of agreement. Moreover the Dutch civil servants, especially Patijn, proved their central role in JHA and Schengen questions by shuttling between London and The Hague during the last few weeks of the Presidency and finally brokering a deal which suited all parties involved. The Danish case was slightly different because it was presented concretely to the civil servants of the Council Secretariat and the Presidency only in Amsterdam. Overnight they had to come up with a plausible solution to the constitutional problems the Danes would have in transferring any competence to the Community level. Though not a masterpiece of legal clarity, a solution was found in the early hours of 18 June 1997.

Throughout the Dutch Presidency some governments argued that any flexible arrangement should be triggered by qualified majority, whereas others pushed for unanimity. The final compromise, which was reached only in Amsterdam, was the "emergency brake", suggested by the British Prime Minister. Though the threshold for using the "emergency brake" is high, it gives a concerned member state the possibility of blocking flexibility. The preferred model of flexibility had already been established in the first and the third pillars many weeks before Amsterdam. Throughout the Conference, however, member states had objected to an enabling clause in the second pillar. Ever since the Dutch Presidency had voiced concerns about the need for flexibility in the second pillar in a document in February 1997, it had become increasingly clear that the second pillar was likely "only" to end up with constructive abstention. And indeed this is what happened in Amsterdam. It is somewhat paradoxical that at the beginning of the Conference most member states argued that flexibility was primarily needed because of slow progress in the second

and the third pillars, whereas flexibility was not considered appropriate to the first pillar. In the end, the Conference institutionalised enabling clauses in the first and the third pillars, but only allowed for constructive abstention in the second (see conclusions). As far as the conditions were concerned, they had been established well in advance and did not need much work during the Dutch Presidency.

The negotiating *environment, process and style* came to the fore during the final months of the IGC. The working *environment* among the representatives continued to be amiable throughout the decision-taking stage. There seemed to be little hostility among the representatives despite the pressure to finish the Conference on time. The Dutch Presidency did well in increasing informal meetings and bilateral contacts as the negotiations were approaching the finishing line. In this way the Presidency was able to take into account the special interests of all the member states and present them to the others in the most objective way. The human factor was naturally important on all levels, but perhaps surprisingly so in the European Council itself. To a certain extent this reflects the fact that at the highest level there is greater scope for adapting or even abandoning national positions, with the aim of striking an overall deal. The relationship between personalities counted also on the level of the Foreign Ministers. The interplay between the three levels was also important because the relationship between civil servants and politicians is necessarily symbiotic – one cannot survive without the other.

The negotiating *process* continued to be cumbersome during the final stages of the IGC. The Dutch Presidency was juggling with a great number of issues and as time went on the representatives in particular were put under a lot of pressure to come up with solutions. Whereas the first two phases of the 1996-97 IGC progressed at a somewhat slow pace with only two or three subjects being dealt with at a given representatives' session, the decision-taking stage picked up the pace so that on occasion the representatives had to deal with half of the IGC agenda during a two day session. The British election was the trigger for the final push of the negotiations – time was running out and the member states realised that the hands of the British were no longer tied. From early May to the early morning hours of 18 July the delegations worked frenetically in search of consensus.

The negotiating *styles* of the participants were closely linked to the personalities of the negotiators. However, it is also important to point out that the negotiating style

of a negotiator was often linked to the issue that was being discussed. It was quite clear that there were no "hard" negotiators involved in the flexibility debate, perhaps with the exception of Patijn. Naturally all the member state representatives were arguing their positions for as long as possible, but no one saw the situation as "a contest of will in which the side that takes the more extreme position and holds out longer fairs better" (Fisher, Ury and Patton 1991, p.xiv). The debate about reweighting of votes was different. There it seemed likely that the Spanish negotiators would have blocked the whole IGC if a satisfactory solution had not been found. Similarly there did not appear to be any "soft" negotiators in the flexibility debate; no-one made concessions readily in order to reach agreement. The flexibility debate illustrated that most, if not all, of the negotiators were "principled".

The six basic chapters of this thesis have looked at the evolution of the concept of flexibility from an abstract principle to its institutionalisation in the Amsterdam Treaty. The conclusion will sum up the arguments and suggest ways in which the new flexibility clauses will influence Union developments in the future.

Conclusion

THE PROCESS OF THE 1996-97 IGC AND THE SUBSTANCE OF FLEXIBLE INTEGRATION

INTRODUCTION

Expansion leads to diversity and the greater the diversity, the more the issue of flexibility comes to the fore. The institutionalisation of flexibility marks a new stage in the process of European integration. Previously common objectives were sought in unison; now the treaty has established a mechanism for permanent differentiation. In the end, the effects of flexible integration will depend on the will and ability of member states' governments to apply the policies and the objectives established in the treaties.

The aim of this thesis has been to examine the *process* of negotiation and the *substance* of flexible integration in the 1996-97 Intergovernmental Conference of the European Union. The primary task was to analyse and describe the IGC negotiations on flexibility. This was done in chapters 4, 5 and 6 by looking at the agenda-setting, decision-shaping and decision-taking stages of the IGC negotiations starting with the European Council of Corfu in June 1994 through to the European Council in Amsterdam in June 1997 and the signing of the new treaty on 2 October 1997. The secondary task was to examine the evolution of flexibility from an abstract concept in the early 1970s to its institutionalisation in the Amsterdam Treaty. This was done in chapters 2 and 3 by looking at the flexibility debate over the past 25 years and the substance of the flexibility clauses in the new treaty. The thesis has tried to explain how things change in an IGC by outlining an array of ideas, interests and issues at stake for the actors negotiating flexibility in the 1996-97 IGC.

The thesis had three basic lines of argumentation. The first related to the IGC process, the argument being that the 1996-97 IGC negotiations on flexibility were an incremental learning process where the basic positions of the member governments

illustrated some continuity, but the specific positions of the negotiators fluctuated with the dynamics of the negotiations. The second line of argumentation related to the concept of flexibility itself (*substance*), the argument being that one of the main difficulties with the flexibility negotiations was that flexibility meant different things to different people. Member governments did not necessarily agree about its purpose. The final strand of argumentation related to the key players in the flexibility debate. Although all member states, large and small, played an important role in the IGC process, the most influential actors in the 1996-97 IGC were the civil servants of the respective Presidencies and the Council Secretariat.

The IGC negotiators knew that flexibility was one of the most important and in many respects most difficult issues on the negotiating table. If mishandled, the institutionalisation of flexibility could undermine the coherence of the Union. Against this background the conclusion of the thesis revisits the four basic questions posed in the introduction of the thesis and tries to answer questions relating to the process of the 1996-97 IGC negotiations and the substance of flexible integration:

- (1) How has the flexibility debate evolved since the early 1970s?
- (2) What kind of flexibility does the Amsterdam Treaty provide and what are its implications for the integration process?
- (3) What were the different negotiating positions of the member governments and what factors shaped those positions?
- (4) How and why was the principle of flexibility institutionalised in the new treaty?

In order to be able to answer these questions the conclusion is divided into four sections. The first section gives an assessment of the 1996-97 IGC negotiations on flexibility. The focus is on the process of negotiation in the IGC and the way in which an issue can emerge on the negotiating agenda. The second section looks at the "good" news and the "bad" news of the new flexibility provisions. The focus is on the substance of flexible integration. The third section examines the implications of flexible integration on the integration process and highlights some general observations that can be drawn from the IGC negotiations on flexibility. And finally, some concluding remarks are provided.

1. FLEXIBILITY IN THE 1996-97 IGC – THE PROCESS

The key to understanding the whole IGC process is in examining an issue or a number of issues in detail from the beginning to the end – from agenda-setting to decision-taking. Assessing an IGC by looking only at the final bargain which takes place among the Heads of State or Government in a European Council is like evaluating a pyramid by looking at the final stone in its construction. An IGC is a long and cumbersome process involving negotiations on all levels between a plethora of parties both in Brussels and in respective capitals. Ignoring any of these aspects paints only a partial picture of the whole negotiating process. This thesis has made an attempt to look at the place of flexibility in the integration process in a broad sense and examine in detail the IGC negotiations which led to the institutionalisation of the principle of flexibility in the Amsterdam Treaty.

The IGC discussions on flexibility took place on two levels: an abstract political level and a concrete technical and legal level. The abstract political debate was prominent during the agenda-setting stage, whereas the more concrete legal discussions took place during the decision-shaping and decision-taking stages. The problem of the flexibility debate on all levels was that it focused mostly on the institutional, as opposed to political, implications of flexibility. In other words, there was not enough focus on the question of what flexibility was really needed for, to whose benefit it would be or in which areas it should be employed. As a result it is not surprising that while the Reflection Group suggested that flexibility should be applied in the second and third pillars but not the first, the end result was that the new treaty institutionalised flexibility in the first and third pillars, but not the second. Nor is it surprising that even if all member states rejected à la carte in the beginning, it became the central plank of flexibility as institutionalised in the Amsterdam Treaty in the form of constructive abstention (case-by-case) and opt-outs (pre-defined flexibility) for the United Kingdom, Ireland and Denmark.

1.1. The history of the flexibility debate

Looking at the evolution of the flexibility debate from 1974 onwards, it is clear 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, (2) JHA, (3)

defence, (4) enlargement and (5) the exclusion of recalcitrant member states. To put it simply, flexibility becomes an issue every time the Union is about to undergo deepening and/or widening. In the 1970s the flexibility debate was prompted by the failure of the Werner Plan and the British renegotiation of the 1973 accession agreement. The debate in the 1980s, though modest, was driven by the establishment of the EMS, the Greek and Iberian enlargements, threats of British exclusion in the SEA and the signing of the Schengen agreement outside the treaty framework. The 1990s discourse was a direct consequence of the TEU which institutionalised functional differentiation through EMU, CFSP and JHA and a number of opt-outs for Denmark and the United Kingdom.

The 1996-97 IGC was exceptional in that it met all the five criteria which tend to trigger the flexibility debate. Firstly, when the IGC began there was a general assumption that only a handful of member states would join the third stage of EMU and hence flexible clauses would be necessary in order to facilitate legislation among the EMU core. Secondly, the member states were not happy about the functioning of issues relating to the free movement of people and the third pillar - something needed to be done. Thirdly, disappointment with the functioning of the second pillar was also apparent - many governments were afraid that the new member states would block progress in that field. Fourthly, further enlargement was on the horizon. How would the EU cope with a Union of 25 heterogeneous member states? Finally, flexibility came to the fore as a way in which to allow the willing and the able member states to pursue deeper integration, without the slowest ship in the convoy determining the pace - i.e. it was thought of as a way to by-pass reluctant member states, the United Kingdom in particular.

Some member states - for example France and Belgium - were disappointed with the final outcome of the flexibility clauses in the Amsterdam Treaty. They argued that the conditions and mechanisms of the new clauses were too strict and that it would be very difficult to use flexible arrangements in the future. Why were the flexibility clauses so constrained? Again, the answer can be found by looking at the five triggers of the flexibility debate. Firstly, as the IGC drew to a close it was clear that 11 member states would be participating in the third stage of EMU. Secondly, the issue of free movement and border control had been solved through transfers from the third to the first pillar and pre-defined flexibility with opt-outs and opt-ins for Denmark, the United Kingdom and Ireland. Thirdly, the defence issue had been

solved through the incorporation of the Petersberg Tasks and the introduction of constructive abstention. Fourthly, even though the Reflection Group had argued that the main aim of the IGC was to prepare the Union for enlargement, there did not seem to be a pressing need to do this. And when it was realised that the IGC would not be able to solve the institutional dilemma the issue of flexibility was relaxed. The governments assumed that the next enlargement would entail a maximum of five new members and it would take place no earlier than 2005 and thus there would be time to hold another IGC if necessary. Fifthly, the United Kingdom had a new, more pro-European government so there was no urgent need to exclude it from future measures. Against this background it became clear that the need for flexibility was not as pressing as had been assumed at the beginning of the IGC. Consequently the new provisions on flexibility did not necessarily need to reflect the earlier "hard core" thinking of France and Germany.

1.2. The stages of the 1996-97 IGC

The agenda-setting stage, although characterised by a rather abstract and often confused debate, was very important for the flexibility negotiations. From Corfu (June 1994) to Turin (March 1996) the institutions and the member states discussed and assessed various forms of flexibility. Schäuble and Lamers, Major and Balladur launched the idea and the Reflection Group suggested to the IGC that flexibility should be on the agenda. It is also important to note that much of the flexibility debate revolved around what should not be done as opposed to what should be done. This approach ran as a theme throughout the IGC from the agenda-setting stage with the Reflection Group's conditions and Finland's Ten Commandments to the European Council in Amsterdam. Flexibility was not about allowing, it was about disallowing. The reason for this defensive approach to flexibility was that Schäuble and Lamers suggested that a hard core of five member states would drive the integration process forward. Because of this "politically incorrect" approach the flexibility debate got off on the wrong foot and some member governments became very hesitant about the whole idea. Flexibility, according to Schäuble and Lamers was a way in which to exclude awkward member states and build a core around EMU countries and those member states that were willing to pursue a common European defence. The French and German governments argued that if flexibility was not going to be institutionalised inside the treaty framework then they would take it outside. The response of governments opposed to flexibility was to demand

that a set of conditions be placed on the use of flexibility if it were to be brought into the treaty framework.

The decision-shaping stage began with the latter half of the Italian Presidency, but sprang into life with the Irish Presidency and at the first substantive flexibility debate in Cork in early July 1996. For the first time governments began looking at flexibility in more detail. However, it took another two months before the first draft article on flexibility was released because the Irish Presidency did not think that the IGC debate on flexibility was ripe enough for the delegations to be dealing with a draft article on differentiation. The Irish approach was understandable given their non-participation in Schengen and the WEU. Consequently the first draft article on flexibility was launched by the Council Secretariat in September 1996. The early drafting discussions focused on the structure of the flexibility provisions. It was clear that flexibility was intellectually, politically, philosophically and legally the most difficult topic of discussion. The basic idea was easy to cope with but once the delegations got into details it became complicated. This was apparent in the Kohl and Chirac letter of October 1996 - they could agree on the broad lines but had a hard time finding a common voice once the detailed debate was under way. It would be easy to criticise the Irish for being too conservative in the flexibility debate but this would not do justice to their Presidency as a whole. The intermediary stages in any negotiations are often more difficult than the final stages. The Irish should be given credit for keeping the issue of flexibility alive and for submitting draft articles only at the representatives level, while keeping the Ministerial debate on the level of principle.

The decision-taking stage got under way with the Dutch Presidency in January 1997. A draft article on flexibility was issued by the Council Secretariat in late December 1996. This document was important because it formed the basis of negotiation for the rest of the IGC. Another important document was issued by the Commission in January 1997. In that document the Commission gave the green light to flexibility in the first pillar. The British felt that the Commission had finally "sold its soul" in agreeing that it was appropriate to trigger flexibility with a qualified majority vote - the guardian of the treaty had left the gate unattended. The first Dutch document on flexibility was released in February 1997. For the first time, the Presidency suggested that constructive abstention would provide sufficient flexibility in the second pillar. This was to be an important signal of Patijn's general approach

to the second pillar - as a proponent of the Atlantic alliance and as a former Secretary of Defence he did not want an enabling clause in the second pillar nor did he favour the WEU protocol, because they could provide the legal justification for creating a common defence within the treaty framework. If Patijn was strongly against second pillar flexibility, he was adamantly for the incorporation of the Schengen agreement into the treaties. From day one Patijn stressed the importance of Schengen. And indeed in the end, questions relating to the free movement of people and the Schengen agreement became one of the main achievements of the Amsterdam Treaty.

In the weeks preceding the Amsterdam European Council, the debate about flexibility slowed down. At one stage the Dutch had actually considered dropping the whole dossier but they thought that this would be politically impossible because flexibility had had such a high profile in the general debate. After the final quarrels about whether there should be a positive or negative list on flexibility, a draft treaty was produced for the European Council of Amsterdam. At the summit itself, flexibility was dealt with in seven minutes. A total of three issues were on the table: the Portuguese pushed for a stronger role for the Commission in triggering flexibility and the British asked the second pillar flexibility clause to be dropped in favour of constructive abstention. The British government also drew inspiration from an earlier idea relating to the second pillar and suggested that flexibility in the first and third pillars should be triggered by qualified majority voting only if an "emergency brake" was provided. Behind the scenes the Danes negotiated themselves an opt-out from the new title on free movement and Schengen - a protocol which was not seen by the other member states. Equally the United Kingdom and Ireland got their special protocols on the new title and Schengen - they were negotiated bilaterally a couple of weeks before Amsterdam. It is somewhat ironic that the main idea behind flexibility - that no member state should be allowed to obstruct others from pursuing further integration - did not materialise in the new treaty. Any member state using the "emergency brake" for stated national reasons will be able to obstruct any move towards a flexible arrangement. The fact that no member state objected to this at Amsterdam indicates that the flexibility debate had run out of steam. In the late spring of 1997 it was clear that flexibility was not going to be an issue over the next 10-15 years, or at least not before the long transitional periods of the applicant states expired.

1.3. From vision to practice

The problem with the flexibility debate in the 1996-97 IGC was that France and Germany (and the United Kingdom to a lesser extent), who instigated the debate, seemed to have grand visions about flexible integration, but little understanding of how it would be incorporated into the new treaties in practice. In addition it should be pointed out that the French and German flexibility positions were not necessarily the same. Much depended on who you were talking to and at which stage in the negotiations the discussion took place. In 1994, for instance, Mitterrand seemed to be opposed to a hard core, whereas Balladur advocated a number of cores around different functional areas. At this time Schäuble and Lamers were advocating a hard core around France, Germany and the Benelux countries, whereas Kinkel was vehemently opposed to any talk about cores. Towards the end of the negotiations it was clear that the French government had adopted some of the early ideas from the Schäuble and Lamers paper by arguing for loose rules for flexibility inside the treaty and indeed by forcing the establishment of the Euro-11 Council immediately after the signing of the Amsterdam Treaty. The German government seemed to push for a more inclusive form of flexibility with strict conditions and the possibility for all willing and able member states to join the boat. The problem with the Franco-German tandem was that throughout the IGC, and indeed at Amsterdam, Chirac and Kohl were never on the same bicycle.

During the course of the IGC a clear difference became apparent between the member states' policy papers and their actions in the negotiations. This was inevitable because initial policy papers had to be sufficiently vague to provide room for manoeuvre and error during the course of the negotiations. IGC negotiations are a messy and often confusing learning process and consequently positions of the member states change throughout the Conference, following the mood of the negotiations. Sometimes positions changed for no apparent reason, at other times the change was caused by an increase in information about flexibility or on the basis of assumptions about inclusion and exclusion in a given flexible arrangement. Sweden, for example, started with a positive view about enabling clauses but ended up being one of the fiercest advocates of unanimity as the trigger for flexibility. It is also important to point out that the flexibility positions of the member governments varied from pillar to pillar. Austria, for instance, supported enabling clauses in the first and third pillars, but was content with constructive abstention in the second.

This thesis has categorised the positions of the member states on the basis of their will and ability to pursue deeper integration. Nevertheless, IGC negotiations are too complex and multi-faceted to fit neatly into boxes. As such these simplified categorisations should be treated with caution. The position of a member state government is not taken by a unitary actor – it is taken by the government in power and mediated through ministers or representatives. The ministries inside a particular member state often differ more about the position than the actors on the ministerial or representative level in Brussels. During the Dutch Presidency, for instance, divisions emerged in the positions on flexibility between the Foreign Ministry and the Ministries of Finance and Social Affairs and Employment in the Netherlands. Nevertheless, the tables provided in the thesis do help to shed light on the complex policy developments which took place during the IGC.

2. ASSESSING THE NEW SYSTEM - THE SUBSTANCE

The new flexibility provisions in the Amsterdam Treaty have been subject to wide analysis in the post-Amsterdam era. Commentators have looked at both the negative and the positive sides of the new clauses. There has been much speculation about areas in which flexible arrangements could be used and the implications they might have on the integration process. The aim of this section is to give an assessment of the opportunities and risks of the new flexibility provisions. In a sense the aim is to establish the “good” and “bad” news about the flexibility provisions in the Amsterdam Treaty. The good news is linked to the opportunities the new clauses provide for keeping flexibility inside the treaty framework, the tools they provide for facilitating enlargement, the conditions they require for keeping the constitutional system intact, the incentive they give to reach compromise and the possibilities they open for new integration ventures. The bad news is that the new clauses increase the complexity and opaqueness of the Union, they might lead to political and legal fragmentation, they can be seen as an “arrogant” and inconsistent new policy tool before enlargement and the conditions that are supposed to safeguard outsiders are not necessarily easy to interpret. In addition this section raises some fundamental questions concerning the new provisions and speculates about areas in which flexibility might be used as a management tool in the future. This assessment leads to the conclusion that the new provisions should be seen as

a Pandora's box¹ with a high degree of uncertainty on how, where and when the flexibility will be used.

2.1. The good news

What then is the good news about the new flexibility provisions? The first piece of good news is that the new flexibility provisions should, at least in theory, guarantee that future flexible arrangements take place inside the institutional framework of the Union. All member states are involved in the process and outsiders can join in at any time as long as they fulfil the required criteria and consequently there should be less temptation to go outside the treaty framework. It is clear that the psychological barrier against moving the cooperation outside the treaty – à la Schengen – is much higher than before the Amsterdam Treaty. However, some commentators have argued that there is no reason why future flexible solutions might not take place outside the treaty framework (Ehlermann 1997, Edwards and Philippart 1997, Philippart and Edwards 1999, Gaja 1998). This point is highlighted by the recognition that precisely because flexibility is open to all member states its value as a tool for creating an exclusive club of member states in a particular area is diminished. By the same token it is important to point out that each member state has an indirect veto power when a flexible arrangement is triggered. This, combined with a long list of conditions, might well lift the threshold for igniting a flexible arrangement, the consequence being that the cooperation takes place outside the treaty framework. The possibility for flexibility is a reality - only time will tell whether this possibility will be used inside or outside the treaty.

The second piece of good news is that flexibility could be a useful tool for managing enlargement. The argument is not that flexibility was institutionalised as an instrument for excluding the applicant states from key policy areas. Flexible arrangements have been used throughout the history of the Community in the form of transitional periods. The next enlargements will be no different. Quite the contrary, one can expect longer than usual transitional periods in, for example, agricultural policy. The new flexibility provisions might be used in the distant future, after the transitional periods have run out, to allow a limited number of willing and able member states to pursue deeper integration in a given field. Those member

¹ This description has also been used by Monar (1997).

states which do not fulfil the criteria for joining at that time will be allowed to do so later. In this sense flexibility could be seen as a new tool for managing diversity in an increasingly heterogeneous Union with divergent policy interests and differences in enthusiasm and capability to take on new policies.

The third piece of good news is that the Amsterdam Treaty allows the EU to maintain its constitutional structure because it did not institutionalise à la carte as a principle. The British, Irish and Danish cases are an exception rather than a rule. The logic behind the enabling clause approach, which was adopted in the first and third pillars, was that it was "aimed at furthering the objectives of the Union" (article 43). In other words, the aim should always be to deepen the integration process and in this sense it is a question about opting into, as opposed to opting out from, a given policy area. In addition the new clauses have an array of stringent conditions which are designed to both protect the member states that stay outside the cooperation and guarantee that the constitutional structure of the treaty remains intact. If the Commission does its job as the guardian of the treaties and the ECJ fulfils its role as the final judge of flexibility there seems, at least in theory, to be only a marginal risk for radical constitutional fragmentation.

Nevertheless, the opposing argument can also be made. It could be argued that the new system allows for too much à la carte by giving the United Kingdom, Ireland and Denmark opt-outs from the Schengen agreement and questions relating to free movement. Indeed Amsterdam does increase the number of opt-outs in comparison to Maastricht. At Maastricht only the United Kingdom was allowed to opt out from the Social Agreement and EMU; only later, after the referendum, was Denmark given its four opt-outs. The principle of "if they get it then we should get it too" prevailed at Amsterdam where three member states were given substantial opt-outs from primary policy areas. It is all well and good to say that the applicant states, for instance, will not be allowed similar special arrangements, but past experience tells us that there is no reason why the opt-out method should not snowball to an ever increasing number of member states and an ever increasing number of policy areas, causing increased fragmentation within the Union. The catch-22, however, is that à la carte is possible in the first and third pillars only through an IGC. That is, opt-outs from major areas will not be allowed within the regular Union decision-making. In the second pillar the Union can be engaged in joint actions and common positions

without all member states participating, but this will not influence the constitutional structure of the Union.

The fourth piece of good news is that flexibility could be used to facilitate compromise in future EU work. Flexibility allows an issue to be taken further without causing a constitutional crisis (Edwards and Philippart 1997) and thus it might be used as a negotiating tactic not only in the day to day business of the Union, but also in future IGCs. Though flexibility is by no means a decision-making mechanism it could be seen as a half-way house between unanimity and qualified majority voting. When a given issue falls under the realm of qualified majority voting it is much easier for the member states to reach compromise. EU negotiations are characterised by fluid coalitions which vary depending on the issue. One of the unwritten rules of EU decision-making is that the vital interests of a given member government should never be undermined. The reasoning behind this approach is that if member state A is outvoted on a specific issue there is no guarantee that it will not happen to member state B the next time around. For this reason the final decision always accommodates the interests of all the parties involved. If there is stalemate on an issue which requires unanimity member governments can seek flexible solutions so as to avoid putting reluctant member states in a difficult situation. It is even conceivable that the target level of the project might be lowered so as to avoid a situation whereby the participation of the member states will be differentiated.

The final piece of good news is that the member states might be more willing to try new ventures. Flexibility could be used as a management device for shaping new policy and institutional developments and thus seen as a force of dynamism, not division. The new treaty opens the way to flexibility in areas that are yet to be defined. It is possible that a limited number of member states will want to use the tools of flexibility to pursue closer cooperation in, for example armament policy or taxation. They would, in a sense, be testing the waters before other member states became involved. If the proposed cooperation failed the damage would be less than if all member states had participated in the venture. Alternatively, if the closer cooperation was a success it could function as a magnet pulling the hesitant member states along towards deeper integration.

2.2. The bad news

The first piece of bad news is that the new flexibility provisions add to the complexity and opaqueness of the EU system. A potential increase in flexible arrangements means that there is likely to be an increase in different member states participating in different policy areas at different times in the integration process. Increasing complexity means decreasing comprehensibility and hence it will be difficult for even the most dedicated observer to keep track of who does what in the Union. Moreover, the complexity of the system reduces the possibility for democratic control in the EU. Democratic control requires transparency and the multiplication of frameworks of integration, aims, principles, measures and differentiated legislation makes effective control difficult and reduces transparency (Monar 1997). In addition it is important to point out that the role of the European Parliament in flexibility measures is reduced to a minimum. In the first pillar the EP is merely consulted, in the second pillar it has no role whatsoever, and in the third pillar the request for a flexible arrangement is only forwarded to the Parliament. However, it is easy to point a finger at the complexity of the system and consequently the lack of democratic control, and claim that the system is becoming increasingly difficult to understand. It is more difficult to outline a way in which to fix the problem. In a constitution-building process which has taken almost half a century and which has doubled, soon tripled, the number of players involved it is only natural that there should be an increase in complexity. The question is whether there is an alternative to flexibility, and the answer thus far seems to be no.

The second piece of bad news is that the new provisions might cause political fragmentation within the Union and as a consequence there could be a loss of solidarity and "we-feeling" among the member states. Politically the Union might develop an incoherent institutional structure. The institutions will in theory have their normal roles in respective pillars and there will be no distinction between the members in the Commission, the European Parliament and the European Court of Justice. Yet in practice it is highly likely that if flexibility provisions end up being used there will be additional strain on the institutional system. Flexible arrangements will, for instance, result in a careful separation of issues on the Council agenda, a problem which has already been experienced by the Euro-11 Council. There will also be an impact on the work of the Commission. It will be difficult for the Commission to be an objective judge of Community interest in a situation where a

limited number of member states have decided to pursue deeper integration. To a certain extent this was already apparent during the IGC where the Commission in the end took the side of the member states that were both willing and able to establish flexible arrangements in order to deepen the integration process. Flexibility could also potentially have an impact on appointments. It is highly unlikely, for instance, that the Schengen countries would be willing to appoint a Commissioner or a Director-General for justice and home affairs from the United Kingdom, Ireland or Denmark. This trend is already apparent with the ECB nominations, where the board is composed of individuals from countries within the Euro-zone.

The third piece of bad news is that the new flexibility clauses might open the door to legal fragmentation. If flexible arrangements are established it is highly likely that a separate *acquis* will emerge for the participating member states. The single market, for instance, could be a pyramid of *acquis* (Edwards and Philipart 1997). Despite assurances that flexible arrangements should be open to all member states there seems to be a real chance that a certain degree of exclusion will take place. As the *acquis* develops it will be increasingly difficult for outsiders to join the insiders and fulfil the necessary criteria. It is, however, important to point out that some observers have exaggerated this problem: after all the Community has been in existence for almost 50 years, during which time thousands of pieces of legislation have been adopted by old and new members alike. It is true that "one of the elements signally lacking in Amsterdam is any great commitment to help those Member States willing but judged unable to cooperate" (Edwards and Wiessala 1998, p.10). But this is something that will most probably take place naturally. As demonstrated by the loose interpretation of the convergence criteria relating to EMU, it is likely that where there is a will to join in flexible integration, there will somehow also be a way.

The fourth piece of bad news is that the new flexibility approach could be seen to be extremely arrogant and indeed inconsistent towards the applicant states. Throughout the negotiations EU governments stressed that flexibility was important because of enlargement, implying that the applicant states would not be able to cope with the demands of full membership. In the final stages of the negotiations the Schengen agreement was incorporated into the new treaty and three member states received opt-outs. The arrogance of this clause has been criticised by many (de La Serre and Wallace 1997, Curtin 1997, Shaw 1997) for a number of reasons. Firstly, it seems somewhat unrealistic to expect the applicant countries to be able to adopt

the Schengen *acquis* without extensive transitional periods. Secondly, it seems unfair that mature EU members such as the United Kingdom, Ireland and Denmark should be allowed opt-outs from Schengen when new member states will be forced to adopt it lock, stock and barrel. Thirdly, it seems somewhat strange that throughout the negotiations all member states kept on emphasising the importance of maintaining the *acquis* in all flexible solutions and yet in the Schengen case this principle has been clearly breached. Indeed one of the most fundamental conditions in the general enabling clause is that any form of flexibility should "not affect the *acquis communautaire* and the measures adopted under the other provisions of the...Treaties" (article 11(1e)). And finally it should be pointed out that there is no similar declaration for the two areas of flexibility in the Maastricht Treaty – namely EMU and the Social Protocol. The enabling clauses in the Amsterdam Treaty do not mention them either. This means that the status of each acceding country will have to be defined individually for every case of flexibility which has already been established, save Schengen which must be adopted as such.

This approach does not give a positive signal to the applicant states who are first singled out as the reason for the need for flexibility provisions and then denied the possibility to opt-out from the *acquis*. It seems, however, that the applicant states are not awfully concerned at this prospect because they are willing, if not currently able, to take on the full membership of EU. The problem with the new provisions and the implicit message sent to the applicant countries is more psychological – why should some old member states, such as the United Kingdom, Ireland and Denmark, be given special treatment and that same treatment then be denied to the applicants?

The final piece of bad news is that there will undoubtedly be difficulties interpreting the conditions of the enabling clauses. A number of questions are raised by the conditions in the general enabling clause and the specific enabling clauses in the first and third pillars. How can one guarantee, for instance, that a flexible arrangement is aimed at furthering the objectives of the Union? Is it not in the nature of differentiation to serve the interest of the participating member states, not the Union? Moreover, who determines that flexibility will only be used as a last resort? If this is impossible to determine legally, as it surely will be, it will be up to those member states which are suggesting the closer cooperation to argue their case on subjective political criteria. Furthermore, how can it be guaranteed that closer

cooperation will not affect either the *acquis communautaire* or the competences, rights, obligations and interests of those member states that do not participate in a particular flexible arrangement? If and when the Commission is the first arbiter and the ECJ the final judge of these issues, it is conceivable that the judgement will most often favour those member states which are pursuing deeper integration. Finally, how can it be determined whether a given form of flexibility concerns areas which fall within the exclusive competence of the Community or not, or whether the cooperation affects Community policies, actions or programmes? It has been historically very difficult to distinguish between shared and exclusive competence in most Community areas – it will be even more difficult to do so when deciding on a flexible arrangement.

2.3. Where can the new provisions be used?

In all the interviews that have been conducted for this thesis and during all the round-table discussions with the expert group there has been one common trend in the assessment of the applicability of the new flexibility provisions – it is pure speculation to try determine where they will be used in the future. Therefore what follows should be taken at face value. Moreover, it is clear that more sector specific research is needed in the area. The conditions for the enabling clause in the first and the third pillars are very strict (less so for the third pillar), but nevertheless it seems that there is scope for flexibility in both areas. It is not, however, an issue of whether it can be done; it is more a question of whether there is the will or need to do it before the transition periods of the next enlargement run out sometime after 2015.

In the first pillar, issues relating to EMU could provide an avenue for flexibility – i.e. tax-harmonisation. Of the more traditional Community policies, transport, social policy, education, vocational training and youth, culture, public health, consumer protection, Trans-European networks, industry, research and development, environment and development co-operation could be open to flexible arrangements. Another interesting question, which no-one has addressed yet, is whether the new title on visas, asylum, immigration and other policies related to the free movement of persons falls under the flexibility umbrella. At first glance it seems to, but there would be little point in differentiating these issues if the aim is to create a true borderless area of free movement.

As far as the second pillar is concerned, arguably constructive abstention could be in fairly active use. The Union will proceed on a case-by-case basis, but situations can be foreseen in Africa (e.g. Great Lakes) in which only some member states would want to be waving the Union flag. East Timor or human rights in China could be other concrete areas where constructive abstention might come in useful. The bottom line, however, is that Amsterdam did not create a window of opportunity for flexible defence *inside* the treaty. Outside we will most probably continue with contact groups and flexible defence arrangements in NATO and the WEU.

The third pillar is an area where nothing needs to be excluded from flexibility. The conditions on triggering flexibility are not as stringent as they are in the first pillar. Consequently, it is easy to foresee the use of flexible measures in police and judicial cooperation in criminal matters. It would not be a surprise to see closer cooperation between a limited number of member states in the harmonisation of aspects of penal law or in the combat against crime, terrorism, drugs, etc. Some of the developments will depend on rulings of the ECJ, which is bound to come up with crosspillar interpretations on flexible arrangements. Yet it is clear that the incorporation of Schengen into either the first or the third pillar will not be without complications. Some issues might be easy. Visa requirements, for instance, will go to the first pillar, whereas police cooperation will go to the third pillar. However, finding a suitable legal base for over 3,000 pages of Schengen *acquis* will be difficult (Monar 1998, Curtin 1997, Stubb 1997, Kortenberg 1998, de La Serre and Wallace 1997, Deubner 1998). It is possible that a double legal basis will be needed for some of the provisions and indeed some issues might go unresolved all together. If no legal base is found then, as article 2 notes, they will be placed in the third pillar.

In sum, assessing the impact of the new flexibility arrangements in the Amsterdam Treaty is at best an educated guessing game and at worst pure speculation. Despite the strict conditions and inflexible decision-making mechanism there seems to be scope for the use of flexibility. But flexibility will most probably not be used to advance particular *policy areas* as such, rather flexible arrangements are more likely to be adopted in different *programmes* within a given policy.

3. IMPLICATIONS FOR EUROPEAN INTEGRATION

The aim of this thesis has not been to establish whether the European Union is an intergovernmental conglomeration of independent nation states, a neofunctional or functional entity, a federation, a system of multi-level-governance or some other form of evolving polity or network. Rather the aim has been to look at the negotiating process of the 1996-97 IGC and the substance of flexibility, a potentially important new principle in relation to European integration. The thesis, however, would not be complete without a short discussion on the implications of differentiation on the integration process and the lessons that can be drawn from examining the IGC negotiations on flexibility. How will flexibility fit into the European constitution-building process? And what can we learn about an IGC by examining the *environment, process and style* of the flexibility negotiations in the 1996-97 IGC?

3.1. Much ado about nothing?

The European Union has been described as "less than a federation, [but] more than a regime" (W. Wallace 1983, p. 403). It is a "political entity that does not fit into any accepted category of governance" (Sbragia 1993, p.24). An increasing number of academics have pointed out that the EU is anomalous as far as traditional conceptions of sovereignty and international cooperation go (Ruggie 1993, Agnew 1994). Indeed if the Maastricht Treaty was a shift from a policy generating process to an emerging polity (H. Wallace 1997), then the institutionalisation of flexible integration can be seen as a step towards a "multiperspectival polity" (Philippart and Edwards 1999). This term, first used by Ruggie (1993) and later by Lewis (1995), is used in arguments that claim that the EU has evolved into a novel post-modern international political form. It is not an ideal term, but it does highlight that the institutionalisation of flexible integration is part of a trend resulting in a complex, multi-dimensional, multi-layered collective decision-making system which has been designed to find common solutions to common problems on all levels of governance (Andersen and Eliassen 1993, Sandholtz 1993, Marks 1992 and 1993, W. Wallace 1994, Goetz 1995).

Another term which might be a useful and a more conventional description of the European system of governance is "flexible federalism"². By definition a flexible federation finds itself somewhere between a collection of independent states (for example the United Nations) and a federation (USA), but far from a unitary state (France). In an association of independent states the division of competence is clear – all policy areas belong to the sphere of competence of states. The same holds true for a unitary state. In a federal state there is a fairly clear division of tasks between the federal government and the states. The federal government might, for instance, be in charge of foreign and monetary policy, whereas the states are responsible for education and culture. In a flexible federation the division of competence is blurred. There can be a number of core policies which fall into the exclusive competence of the federal entity, for instance the single market and monetary policy. But this does not mean that all the states participate in this area – in the EU this is exemplified by the British, Swedish, Danish and Greek opt-outs from EMU.

The aim here, however, is not to try to put a label on a flexible European Union. The question that follows, in the light of what has been argued above, is whether the new flexibility clauses will be of decisive importance in the future development of the EU. In assessing the implications of flexibility on the integration process it is not really relevant to determine whether the Union is a supranational or an intergovernmental entity. It is more important to try to establish the implications the institutionalisation of flexibility might have on the integration process in general. In the aftermath of Amsterdam flexibility needs to be examined both as a principle within the integration process and in terms of the scope it might offer for resolving problems of practice (H. Wallace 1999). The argument here is that in the near future flexibility will be of greater theoretical than practical value. In the short term flexibility should be seen as a management tool, but in the long term it could become a constitutional device (Scott 1997). Thus the short term implications of the new flexibility provisions in relation to the general evolution of the Union is limited. Flexibility is, after all, "only one device among many to meet future demands for change" (Philippart and Edwards 1999). As argued above, there is scope for the use of the flexibility clauses, but it is highly unlikely that they will be used in the immediate future. There might be some minor use of flexible arrangements in the management of

² The term "Flexible Federalism" has been used, in a different context, by Metcalfe (1997a).

Community programmes, but major policy areas will stay clear of differentiation until the transitional periods of the next enlargement have run out.

Nevertheless, in the long term flexibility presents a paradigm shift because traditional approaches to European integration such as federalism, functionalism, neofunctionalism and intergovernmentalism are all based on the traditional rigid model of integration (Giering 1997, Nomden 1997). The flexibility debate is diametrically opposed to these analytical tools, because it concentrates on concepts that depart from traditional rigidity. Thus the importance of flexibility is not only its contribution to the debate on concepts and organising principles which takes distance from tradition models of European integration (Philippart and Edwards 1999), but also in its long-term effects on the shape and direction of the integration process. The original French and German ideas on the hard core were intended to make flexibility into a constitutional device through which willing and able member states could pursue deeper integration without having to call an Intergovernmental Conference. Amsterdam fell short of the original Franco-German vision of creating a European core or cores, but it did institutionalise flexibility as a management tool and there is no reason why the next IGC could not loosen the strict criteria of the current system and make flexibility more appealing to the willing and able member states in the future. This supports the idea that the "constitution" of the EU is an evolving rather than a fixed entity (Shaw 1997) and that flexibility reinforces the open-endedness of the European polity (Philippart and Edwards 1999).

3.2. Three IGC lessons - environment, process and style

This thesis has analysed one topic of the 1996-97 IGC by looking at the negotiating *environment*, the negotiating *process*, and negotiating *styles* of the participants. In the conclusion of the thesis it is important to highlight what this study teaches us about EU IGCs in general. From participant observation, the interviews and publicly available Conference documents, three general lessons emerge.

The first lesson relates to the negotiating *environment*. The empirical evidence of the thesis suggests that the representatives level is the most important level of negotiation in an IGC. The broad ideas are usually launched by politicians, whereafter the issue is "downgraded" to the civil servants who are asked to make sense of the often vague and open-ended visions. This was the case with flexible

integration which emerged on the IGC agenda as a consequence of a debate instigated by politicians in Germany and France (and the United Kingdom), and was finally institutionalised in the new treaty as a result of long and detailed deliberations by the representatives. One of the consequences of substantive negotiations taking place at this lower level is that the issues which are launched on the political level often change character during deliberations on the civil servant level. As shown in the flexibility negotiations, after some twenty months of contemplation by representatives, both in the Reflection Group and the actual IGC negotiations, flexibility was served back to the Heads of State or Government as a completely different dish. The original idea of an *avant garde* had turned into a complicated flexibility formula which was unlikely to be of much use to those wishing to establish a hard core inside the treaty framework.

The second lesson relates to the negotiating process. The negotiations examined suggest that, by providing the Council Secretariat with the opportunity to play a decisive role in shaping EU treaties, IGCs promote the visibility and enhance the power of the Council Secretariat. The evidence suggests that the Council Secretariat is slowly becoming the Commission's partner as the "guardian of the treaties" and the "second engine" of the integration process³. The role of the Council Secretariat in an IGC is similar to that of the Commission in regular EU decision-making – it helps the Presidency, provides initiatives and hammers out compromises. The 1996-97 Conference was the third IGC in ten years. As the propensity for holding IGCs increases, the Council Secretariat's role in the decision-making process becomes increasingly important. However, the possibility for the Council Secretariat to influence the IGC debate is dependent on the level of involvement of the Presidency. The more the Presidency engages in the preparation of the documents, the less the Council Secretariat can steer the debate, and *vice versa*.

The final lesson relates to the negotiating styles of the participants. The empirical evidence of the thesis suggests that IGCs in general are characterised by participants who are "principled" negotiators steered in their actions by the notion of bounded rationality. This has both positive and negative effects. On the one hand, given that IGC negotiators are not fully rational actors means that it is impossible to

³ There is a clear lacuna in mainstream integration literature about the Secretariat's role in IGCs.

predict the outcome of an IGC. On the other hand this very same factor is the essence of an IGC – the complexities of EU affairs and member state interests mean that without the sometimes unpredictable path of negotiation, it is unlikely that a solution which took all relevant factors into account and satisfied all parties would be possible. The IGC negotiators aim to look for mutual gains wherever possible. When interests conflict, as was the case with the flexibility debate, the participants insist on fair standards independent of the will of the other negotiator. The negotiators are quasi-rational actors acknowledging the broad guidelines of their positions, but more often than not reacting to the flow of the negotiations.

CONCLUSION

The end of every negotiation is the start of the next one. There has been an inherent logic in the three last IGCs. With the SEA the laborious process of finalising the single market was kicked off - some of it was achieved through flexible measures (some internal market directives), but eventually everyone came aboard. The Maastricht Treaty institutionalised EMU through flexible measures because member states realised that it was impossible to achieve a single currency with everyone's agreement. The achievement of the Amsterdam Treaty was that, through flexible measures, it incorporated the Schengen Agreement and transferred a number of issues relating to the free movement of people from the third to the first pillar. It is highly possible that the next IGC will see the flexible incorporation of defence into the treaties. The new security umbrella will revolve around the EMU countries, which by the next IGC will most probably be 15 member states. The interesting question for the next IGC is to see who will be willing and able to join the new defence structure.

Flexibility was an idea whose time had come. The negotiators of the Amsterdam Treaty seized a window of opportunity and decided to institutionalise the principle. "The EU is an inherently conservative entity...which moves from one package-deal compromise to the next with a good deal of inertia, with determined efforts to defend entrenched advantages, and a built-in reluctance to address strategic issues" (H. and W. Wallace 1995, p.24). It does not really matter that the clauses are conditional. The main point is that the principle has been installed in the treaties. Though there might be scope for the application of flexibility in all the pillars it is

unlikely to be applied very often in the near future: a legal instrument does not work as a substitute for political will. Flexibility will still be informal and revolve around the 11 core countries which joined the single currency from the start. Formal flexibility is a little bit like a nuclear weapon, it can be used as a threat but it is unlikely to be used in practice. However, institutionalising flexibility is only a first step. The strict conditions are there because whenever new subjects are introduced to the legal framework of the treaties, the member states and the institutions exercise caution and want to establish checks and balances. At the end of the 1996-97 IGC some governments were of the opinion that flexibility in the first pillar was not possible, that it was not desirable in the second and that in the third it was not necessary since everything had been taken care of by pre-defined clauses. It is clear, however, that the debate was politically so important that the Conference had to have something in the Amsterdam Treaty.

Flexibility is both a political tool and a legal instrument. Amsterdam should be seen as a useful second best solution to the Wallaces' "flying geese" analogy in which no-one is left out and the prospect of subgroups is avoided (H. and W. Wallace 1995)⁴. But this is not the most likely scenario because the member states do not seem to have a common sense of direction, nor do they seem to be able to maintain the momentum of pursuing deeper integration. "What is achieved by the Treaty of Amsterdam...follows a dialectic evolution where elements conducive to more order cohabit, sometimes uneasily, with elements bringing more flexibility" (Edwards and Philippart 1997, p.35). Edwards and Philippart (1997) talked about flexibility as a concept designed to meet both immediate needs and long-term problems. In the shorter term flexibility was designed to overcome recalcitrant member states such as the United Kingdom and in the longer term it was meant to offer a device for managing enlargement. In the end the new flexibility clauses ended up being less ambitious because there was no short-term need for flexibility after the British election and even the long-term need for flexible arrangements was diminished because it seemed evident that a new IGC would be arranged before the next enlargement.

⁴ The "flying geese" metaphor is attractive because it "allows for variable numbers of members of the flock and repeated variation in leadership, as well as for sub-sets of members with a close group identity, which nevertheless remain dependent on the collective process and rules governing their behaviour. Different member states or the Commission may take a turn at the front. The tired laggards also vary and can hope for a more comfortable flight on some parts of the journey. The members of the flock have a sense of direction and common interest in maintaining momentum by sharing responsibilities" (p.29).

The European Union will become larger and more heterogeneous and thus it is unrealistic to expect all the member states to be willing and able to commit themselves to the same degree of integration. In the 1996-97 IGC there was a strong case for creating a mechanism which would allow the willing and able to deepen the integration process, without marginalising the slower or more reluctant member states. The new institutional provisions in the Amsterdam Treaty might not provide all the instruments needed to manage diversity and size in the Union, but they do provide mechanisms which aim to avoid marginalisation within the treaty framework. The idea of an exclusive hard core of member states being able to drive the integration process forward is dead, at least until the next IGC.

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Hufvudstadsbladet (HBL)

Independent

Le Monde

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The Times

List of Interviews

Alvargonzález, Fernando Member of the Spanish negotiating team in the 1996-97 IGC, Ministry of Foreign Affairs of Spain.
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Fonseca, Francisco	Member of the Commissions IGC Task Force 1996-97, European Commission. (18 February 1998, Brussels)
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Silberberg, Reinhart Member of the German negotiating team in the 1996-97 IGC, Ministry for Foreign Affairs of Germany.
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Ungerheuer, Marc Member of the Luxembourg negotiating team in the 1996-97 IGC, Ministry for Foreign Affairs of Luxembourg.
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2. HEARINGS AND PARTICIPANTS

2.1. Hearing in The Hague, 27 January 1998

Brands, Maarten	Director, Germany Institute, University of Amsterdam, Amsterdam.
de Bruijn, Thomas	Director, Department of European Integration, Ministry for Foreign Affairs, The Hague.
Demmink, Joris	Director-General, Ministry of Justice, The Hague.
Kuipers, Sjouke	Director, European Department, Ministry of Economic Affairs, The Hague.
Rood, Jan	Head of Research, Netherlands Institute for International Relations, Clingendael.
Szàsz, André	Former Director, The Bank of Netherlands, Amsterdam.

2.2. Hearing in Bonn, 17 February 1998

von Dewitz, Wedige	Head of Department, Ministry of Economy, Bonn.
Eisel, Horst	Head of Department, International Cooperation in Police Affairs, Ministry of Interior, Bonn.
Jekewitz, Jürgen	Head of Department, Ministry of Justice, Bonn.
Lautenslager, Hans-Werner	Secretary of State, Ministry of Foreign Affairs, Bonn.
Lamers, Karl	Foreign Policy Spokesperson, CDU/CSU Party Coalition, German Bundestag, Bonn.

Nanz, Klaus-Peter **Head of Special Unit, Ministry of Interior, Bonn.**

Pillath, Carsten Head of Unit, Ministry of Finance, Bonn.

Schweppé, Reinhard Head of Department, European Affairs, Ministry of Foreign Affairs, Bonn.

2.3. Hearing in Madrid, 25-26 May 1998

Arguelles, Pedro Cabinet Director, Ministry of Defence, Madrid.

**Asiaín Sanchez,
José Angel** President, Fundación BBV, Madrid.

Montoro, Cristóbal Secretary of State for the Economy, Madrid.

de Miguel, Ramón Secretary of State for Foreign Policy and the European Union, Madrid.

Pisonero, Elena Director, Ministry of Economy, Madrid.

2.4. Hearing in Copenhagen, 30 September 1998

Alslev Christensen,
Thomas Head of Division, Ministry of Economic Affairs,
Copenhagen.

Antonsen, Charlotte Member of the Danish Parliament, the Liberal Party,
Copenhagen.

Bartholdy, Niels	Assistant Head of International Division, the Central Bank of Denmark, Copenhagen.
Bay Larsen, Lars	Under-State Secretary of State, Ministry of Justice, Copenhagen.
Bierring, Peter	Barrister, Law Firm Poul Schmidt, Copenhagen.
Buksti, Jakob	Member of the Danish Parliament, the Social Democratic Party, Copenhagen.
Ersbøll, Niels	Personal Representative of the Minister for Foreign Affairs of Denmark in the negotiations of the 1996-97 IGC, former Secretary General of the Council of Ministers, Copenhagen.
Friis, Lykke	Research Fellow, DUP, Copenhagen.
Gade, Steen	Member of the Danish Parliament, the Socialist Peoples Party, Copenhagen.
Grube, Claus	Under-Secretary of State, Ministry for Foreign Affairs, Copenhagen.
Nehring, Niels-Jørgen	Director, DUP, Copenhagen.
Nilas, Claes	Director, the Danish Immigration Service, Ministry of Interior, Copenhagen.
Petersen, Friis Arne	Secretary General, Ministry for Foreign Affairs of Denmark, Copenhagen
Pettersson, Preben	Head of Division, Ministry of Business and Industry, Copenhagen.

Søndergaard, Carsten Head of Division, Ministry for Foreign Affairs, Copenhagen.

Sørensen, John Bæk Head of Division, Danish Environmental Protection Agency, Copenhagen.

2.5. Hearing in Warsaw, 1 October 1998

Jesien, Leszek Adviser, Office of the Prime Minister, Warsaw.

Karasinska-Fendler, Maria Secretary of State, Committee for European Integration, Warsaw.

Kleer, Jerzy Professor, Warsaw School of Banking, Finance and Management, Warsaw.

Konopka Nowina, Peter Secretary of State, Office of the Committee for European Integration, Warsaw.

Kutyla, Małgorzata Official, Ministry for Home Affairs, Warsaw.

Reiter, Janusz President, Centre for International Relations, Warsaw.

Sidwa, Elzbieta Official, Ministry for Justice, Warsaw.

2.6. Hearing in Brussels - the Commission, 1 December 1998

Brok, Elmar Member of the European Parliament, Brussels.

Burghardt, Günter Director General of DG IA, Brussels.

Dewost, Jean-Louis Director General of the Commission Legal Services, Brussels.

Fortescue, John Adrian Director General of JHA, Brussels.

Morley, John Adviser to Director General of DG V, Brussels.

Petite, Michel Head of the 1996-97 IGC Commission Task Force,
Brussels.

Sapir, André Adviser to Director General of DG II, Brussels.

Thébault, Jean-Claude Head of the CdP, Brussels.

Zepter, Bernard Deputy Secretary General of the Commission,
Brussels.