Assessing the Flexibility Clauses

What kind of flexibility do the treaties provide? What were the main changes from Amsterdam to Nice? As indicated in Chapter 3 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 basic treaties, since they are more closely linked to enlargement. This chapter illustrates that, contrary to the original aim, the Amsterdam and Nice treaties incorporate 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 treaties is defined. Then each article is analysed separately by looking at the conditions, decision-making and institutional implications of flexibility. The changes from Amsterdam were mainly presentational. However, four substantive changes – the removal of the emergency brake, lowering the ‘critical mass’ to eight, a new enabling clause in the second pillar, and a loosening of the strictest flexibility conditions – will be highlighted throughout the chapter.

Enabling clauses

What is an enabling clause? As argued in Chapter 3 it is the mode of flexible integration that enables willing and able Member States to pursue

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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, 43a, 43b, 44, 44a, 45), and clauses specific to the first pillar (articles 11 and 11a), the second pillar (articles 27a, 27b, 27c, 27d, 27e) and the third pillar (articles 40, 40a, 40b). As argued in Chapter 3 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.

General enabling clauses in the TEU (articles 43, 43a, 43b, 44, 44a and 45)

The general flexibility clauses, inserted as the new title VII of the TEU, provide the general conditions and institutional arrangements for the enabling clauses. Article 43 sets out the conditions (‘ten commandments’), article 43a emphasises flexibility as a last resort, article 43b outlines the participation of Member States, article 44 deals with institutional questions, article 44a with financing and 45 stresses the consistency of the Union’s policies. The aim of these clauses is to preserve the basic principles of the treaties and safeguard the interests of any Member State that is outside the framework of closer cooperation. The general enabling clauses provide an over-arching framework for flexibility in all three pillars. 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).

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 that 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 the Community, at protecting and serving its interests and at reinforcing its process of integration.* The idea behind this condition is that closer cooperation should be a way forward, towards deeper integration. This was highlighted further in the Nice Treaty through the addition of the phrase: ‘reinforcing its process of integration’. The condition also means that closer cooperation must remain within the competence of the Union.