



Civil Liberties Workshop

How the EU works and justice and home affairs decision-making

It could simply be said that there are three EU institutions:

The European Commission, the European Parliament and the Council of the European Union. But it is a bit more complicated than that, especially when considering justice and home affairs. So, let's go back to the beginning:

1. THE HISTORY

DEFENCE COOPERATION

The Treaty of Rome was preceded by the defence pact in the **Treaty of Brussels** signed on 17 March 1948 between Belgium, France, Luxembourg, the Netherlands and the UK. The **Western European Union (WEU)** was an international organisation tasked with implementing the Modified Treaty of Brussels (1954) amending the 1948 Treaty.[1]

From 1964-2009 **Western European Union (WEU)** a defence alliance had 10 member countries, 6 associate member countries, 5 observer countries and 7 associate partner countries. Ten core member states were also in NATO: Belgium, France, Germany, Greece (1995), Italy, Luxembourg, Netherlands, Portugal (1990), Spain (1990) and UK. The WEU continued until 2009 when, under the Lisbon Treaty, much of its work was taken over by the EU including CSDP Missions, European Defence Agency, an EU Military Committee (EUMC) in the Council which directs all military activity and provides advice to the Political and Security Committee. In addition the EUMC is responsible for fast-growing crisis management programmes.

The core military alliance for EU states was, and is, NATO (set up in 1949) whose HQ is in Brussels. Today its member states are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, UK and the USA. Of the EU 27 states: Austria, Cyprus, Malta, Ireland, Sweden and Finland are not in NATO.

ECONOMIC COOPERATION

The EU traces its origins from the European Coal and Steel Community (ECSC) created by the **Treaty of Paris** in 1951. The **Treaty of Rome (1957)**, officially the *Treaty establishing the European Economic Community (TEEC)*, was an international agreement that led to the European Economic Community (EEC) on 1 January 1958. It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, Netherlands and West Germany.

There were six Member States until joined by:

- 1973: Denmark, UK and Ireland (9 MS)
- 1981: Greece (10 MS)
- 1986: Portugal, Spain (12 MS)
- 1995: Austria, Sweden, Finland (15 MS)
- 2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (25 MS)
- 2007: Bulgaria and Romania (27 MS)
- 2013: Croatia (28 MS).

The **Single European Act (SEA)**, signed in 1986 came into effect in 1987. It was the first major revision of the 1957 Treaty of Rome and created the European Community and aimed to create a Single Market. The SEA also started to codify foreign policy coordination until it was superseded by the Common Foreign and Security Policy in the Maastricht Treaty (November 1993).

The **Copenhagen Criteria (1993)**: To join the European Union, a state needs to fulfil economic and political conditions called the "Copenhagen criteria" (after the Copenhagen summit in June 1993), and require a stable democratic government that respects the rule of law, and its corresponding freedoms and institutions.[2]

The **Maastricht Treaty** (agreed 1991) came into force in 1993, and was revised by the **Amsterdam Treaty** in 1997. Following the rejection of the draft EU Constitution by two Member States the Treaty on the European Union and the Treaty on the functioning of the European Union entered into force through the **Treaty of Lisbon** in December 2009.[3]

POLITICAL COOPERATION: Justice and Home Affairs

The specific developments of justice and home affairs were:

- Trevi era (1975-1993)
- Schengen era (1985-1999)
- Maastricht Treaty era (1993-1999)
- Amsterdam Treaty era (1999-2009)
- Lisbon Treaty era (2009 - ongoing)

TREVI (1975-1993) was an intergovernmental network of national Ministers and officials from ministries of justice and the interior in the European Community set up by the European Council in Rome 1–2 December 1975.

The first TREVI meeting at the level of senior officials was held in Rome in 1976 where the famous Trevi Fountain is located. It has also been suggested that TREVI stands for *Terrorisme, Radicalisme, Extrémisme et Violence Internationale*.^[4]

SCHENGEN ERA (1985-1999)

The Schengen Agreement was signed on 14 June 1985 by Belgium, the Netherlands, Luxembourg, Germany and France and the Schengen Convention was signed on 19 June 1990. The aim was to “police” the Schengen area by abolishing checks at their common borders. The Convention covered the abolition of checks at internal borders and the movement of people (Title II) and covered visa, asylum and aliens, while Title III covered Police and Security (ie: mutual assistance, extradition, drugs and firearms). Title IV covered the role of the Schengen Information System (SIS) database which became operational in 1995.

Date of Schengen implementation by Member State:

1995: Belgium, Germany, Luxembourg, Netherlands, Spain, Portugal, France (7)
1997: Austria, Italy (9)
2000: Greece (10)
2001: Denmark(*), Finland, Iceland (non-EU), Norway (non-EU), Sweden (15)
2007: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (24)
2008: Cyprus, Switzerland (non-EU) (27)
2011: Liechtenstein (non-EU) (28)

* Denmark: Although under the Amsterdam Treaty it could opt out of Title IV measures, in practice “Denmark has consistently opted into all Title IV measures building upon the Schengen *acquis*” (Steve Peers, Justice and Home Affairs Law, Oxford EC Law Library, 2nd edition, p60)

MAASTRICHT (1993-1999): The three “pillars” created: Trevi ceased to exist when it was integrated into the Maastricht Treaty as justice and home affairs (JHA) in November 1993. It was known as the “third pillar”. The first pillar was economic social affairs and the second was Common Foreign and Security Policy (CFSP). While the first pillar fell largely under co-decision – with the Council and the European Parliament having to agree on new measures - the second and third pillars fell outside of parliamentary scrutiny. The European Parliament (EP) was limited to producing own initiative reports as the Council was only obliged to inform the

parliament of discussions and “consult” on “principal aspects of activities” (Article K.6) - which meant very little in practice.

The Justice and Home Affairs Council was created with a number of Working Parties reporting to the co-ordinating K4 Committee (comprised of senior national officials) before measures were sent to the Council for adoption.

By 1995 a Commissioner, Anita Gradin from Sweden, was appointed to work with a “Task Force” (later to become the Commission’s Justice and Home Affairs Directorate) headed by the late Adrian Fortescue. He worked very closely with Charles Elsen, the Director-General in the Council Secretariat dealing with JHA. And it was Charles Elsen who took the initiative to prepare and “sell” the first five year JHA programme adopted as the Tampere Programme (1999-2004).^[5] The Programme was adopted at the highest level by the European Council (Prime Ministers) and demonstrated the special importance accorded to JHA issues.

AMSTERDAM ERA (1999-2009)

The Amsterdam Treaty, which was adopted in 1997, came into effect in 1999. The first change was to set up a Directorate-General (DG) for Justice and Home Affairs with Commissioner Antonio Vitorino (Portugal) heading it up (1999-2004). He was succeeded by Franco Frattini (Italy) in 2004 until 2008 when Jacques Barot (France) took over for one year. Following the European Parliament election in 2009 the DG was split into two with Cecilia Malstrom (Sweden) heading up DG Home (internal security and immigration) and Viviane Reding heading DG Justice.

The second major change was to see Schengen brought inside the Treaty framework - by which time it had 25 Members (23 EU Member States plus Norway and Iceland). This led to the creation within the Council of the “Mixed Committee” which means Norway, Iceland plus Switzerland and Liechtenstein now join the meetings.

Under a Protocol the UK and Ireland can opt-in to Schengen measures concerning policing and judicial cooperation in criminal matters but do not take part in immigration and border control measures.

The third major change under the Amsterdam Treaty was that after a “transitional period” of five years the European Parliament was to be given the powers of co-decision over most immigration and asylum measures (Article 67). As the initiative lay in the hands of the Council it was not until the beginning of 2005 that this was acted on – leaving policing and judicial cooperation in criminal law still being solely decided by the Council.

The JHA *acquis* covers some 1,500-1,600 measures and is comprised of the Trevi *acquis* (except where superseded) on which the parliament had no information and no say; the Maastricht *acquis* (except where superseded) on which it had little information and no say; and the Amsterdam *acquis* when it had copies of the proposed measures but was only “consulted” from 1999-2006. Only in 2006, on aspects immigration and asylum, was it given the power of co-decision.

But the minute that the European Parliament acquired this power of co-decision the Council, with the agreement of the parliament, introduced 1st reading trilogues – informal meetings of Council and parliament rapporteurs of which the only formal record are Council-produced reports. These are not made public as they would “undermine the decision-making process”. In effect these meetings are held in secret and from 2006 to the present with some 84% of new measures going before the LIBE Committee (Civil Liberties) are agreed in these trilogues. Once agreement is reached in the trilogues the parliament cannot make any changes when it goes back to the committee and the plenary sessions.

In May 2003, outside of formal EU structures, the “G5” group on Interior Ministers started to meet six-monthly. These were: UK, Germany, France, Italy and Spain – Poland was added later making it “G6”. After a period of simply producing press releases and statements to some parliaments the group decided not to publish anything at all near the end of the last Labour government.

There are also regular (some 20+) yearly meetings of Ministers and Senior Official with the USA on JHA. Plus the Roma-Lyon Group within G8 under a Council of Interior Ministers.

LISBON ERA (December 2009 and ongoing)

The Lisbon Treaty made a number of Treaty changes:

- The three “pillars” disappeared (but left a legacy of some 1,500 measures in the JHA *acquis*)
- The parliament finally got equal powers over policing and judicial cooperation on criminal law
- The procedure of “co-decision”, between the Council and the parliament was renamed “the ordinary legislative procedure”.

However, in the field of justice and home affairs there are a number of exceptions: in four instances there is the “special legislative procedure” where the parliament is simply “consulted” and one instance where its “consent” is required (it cannot change the text at all). There are three other instances where the parliament is “consulted” and three others where its “consent” is required. Further under fast-tracked “enhanced cooperation” in criminal law, when nine Member States or more participate in a measure, the parliament simply “notified”.

The Standing Committee on operational cooperation on internal security (COSI) was set up, as was the European External Action Service (EEAS) which reports to the Political and Security Committee of the Council (PSC).

- Other institutions and agencies

- European Court of Justice in Luxembourg
- European Court of Human Rights in Strasbourg
- European Ombudsman
- European Data Protection Supervisor
- Europol

- Eurojust
- Frontex
- Europea External Action Service (EEAS)
- European Defence Agency

- EU law enforcement databases and computer networks

- SIS (Schengen Information System), soon, belatedly SIS II
- EURODAC (database of fingerprints of asylum seekers and undocumented migrants)
- VIS (database of fingerprints and applications for visas)
- PRUM (access to national Member State databases for fingerprints, DNA and vehicles)
- ECRIS (European Criminal Records Information System, networked national criminal records databases)

- Proposed or planned systems:

- EU PNR (Passenger Name Record. National systems for screening and profiling passengers flying in EU, and possibly flights between Member States)
- EPRIS (European Police Record Index System, networked national police databases)
- ECRIS-TCN (for Third Country Nationals, a centralised EU database of foreign nationals’ European criminal records)
- IXP (Information Exchange Platform for Law Enforcement Authorities: a “portal” providing centralised access to all EU law enforcement databases and computer systems)
- TFTS (Terrorist Financial Tracking System)
- ESTA (European System for Travel Authorisation, along the lines of the US model)
- EUROSUR (European Border Surveillance System, networking and integrating national border surveillance systems)
- EES (Entry-Exit System, recording movements of people in and out of the Schengen area in order to identify “overstayers”)
- RTP (Registered Traveller Programme, voluntary vetting scheme allowing faster transit through border controls)

2. THE EU INSTITUTIONS

The European Commission comprises 27 Commissioners, including the President and six Vice-Presidents who are nominated by the 27 EU Member States and approved by the European Parliament.

The Commissioners are responsible for 33 DGs (Directorates General). For JHA there is DG Home and DG Justice. Each Commissioner has a “Cabinet” of advisers.

The European Parliament has 754 MEPs:

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| European Peoples’ Party (EPP) | 271 |
| Socialists and Democrats (S&D) | 189 |
| Alliance of Liberals & Democrats (ALDE) | 86 |
| Green/EFA | 59 |
| European Conservatives & Reformers (ECR) | 52 |
| United Left/Green United (GUE/NLG) | 34 |
| European of Freedom & Democracy (EFD) | 34 |
| Non-attached (NI) | 28 |

The centre-right and right can get a majority if they vote

together but the centre-left and left cannot (and have to rely on defections or abstentions to win a vote).

The Council is comprised of two bodies: the European Council (Prime Ministers) which meets about twice a year (except during crises when additional meetings are held) and the Council of the European Union.

Within the Council of the European Union there is the Council of Ministers eg: The Justice and Home Affairs Council. Beneath the JHA Council is - COREPER (the permanent Brussels-based representations, or “Permreps” for short). JHA issues are discussed at COREPER II, then 24 Working Parties plus the Standing Committee on Immigration, Frontiers and Asylum (SCIFA) and CATS (police and criminal law). Over the last few years another “player” has entered game and they are known as JHA Counsellors. Drawn from the “Permreps” in Brussels rather than from national capitals – they now intervene on all major legislative measures and set the direction of the discussions in the Working Parties.

The Agendas of the Justice and Home Affairs Council comprise:

- “B” Points Agenda for discussion including a “Mixed Committee” Agenda;
- “A” Points Agenda: Legislative (adopted without discussion)
- “A” Points Agenda: Non-legislative (adopted without discussion).

The Council can adopt Council Decisions (often on foreign policy or international relations), ie: the Agreement with the EU-USA on the exchange of PNR (Personal Name Record). It also regularly adopts “Conclusions”, these are non-binding and are “soft law”. “Conclusions” have two purposes: they set policy guidelines for future Commission proposals and they enable joint action to be taken by two or more Member States (ie: “Itinerant travellers”, aka Roma).

3 THE DECISION-MAKING PROCESS

Most proposals for new measures come from the Commission. The Commission has an annual work programme on JHA issues, closely mirroring the Stockholm Programme.

A new measure usually comes first in the form of a Communication accompanied by Staff Working Papers and an Impact Assessment. The Commission may consult on a Proposal for a: Directive (implemented by Member States) or a Regulation (applicable to institutions or agencies EU-wide) before they are finally agreed by the full College of Commissioners and formally sent to the co-legislatures (the Council and the European Parliament).

It can also make a proposal for a Council Decision and under “comitology” can propose and adopt Commission

Implementing Decisions

Under “comitology” there are two main procedures: there are Delegated Acts, which supplement or amend so-called non-essential elements of EU legislation, and Implementing Acts which set out uniform conditions for implementation.

In the parliament a Rapporteur and Shadow Rapporteurs will be appointed from the members of the LIBE Committee (Civil Liberties). The Rapporteur may circulate Working Papers before presenting a draft Report. These will be discussed in the LIBE Committee which may agree an “Orientation vote” – this recent innovation is to be welcomed as it sets out an agreed negotiating position for 1st reading trilogues with the Council.

In the Council Working Parties are comprised of representatives from all 27 Member States who maybe be operational officers, police or immigration and/or Interior/Justice officials. The Working Parties seeks to find agreement between the 27 Member States on a “General approach” to the proposal which, after being agreed by COREPER II is its basis for negotiating with the parliament.

When both sides have reached a position they meet in 1st reading trilogues where they seek to make “compromise amendments”. If agreement is reached in the trilogue then it is formally agreed by the LIBE Committee and passed on to the plenary session – where a simple majority of MEPs in attendance can agree it.

But note the earlier comments on the secrecy of the negotiations in 1st reading trilogues which make it almost impossible for civil society and others to follow what “compromises” are being discussed let alone having the time to intervene. And because the text agreed in trilogues is binding there can be no amendments in committee or plenary sessions.

However, if no agreement is reached at 1st reading the process moves to 2nd reading, which may also involve trilogue meetings. But at 2nd reading, the powers of the parliament are more limited. A simple majority can agree the “compromise” but to reject or amend the Resolution requires what is called an “absolute majority”, that is, a majority of the whole house whether in attendance or not (ie: 377 MEPs). If a proposal is rejected or amended at 2nd reading the process then moves to “Conciliation” with a firm timetable. However, for the LIBE Committee 84% of measures go through at 1st reading and the rest at 2nd reading.

Footnotes

1) http://en.wikipedia.org/wiki/Treaty_of_Brussels_1948

2) http://en.wikipedia.org/wiki/Copenhagen_criteria

3) <http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>

4) <http://www.statewatch.org/news/handbook-trevi.pdf>

5) This was to be followed by the Hague Programme (2005-2009) and Stockholm Programme (2010-2014)

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