

The impact of the Amsterdam Treaty on justice and home affairs issues

Report for the Directorate General for Research, European Parliament

Statewatch/SEMDOC
January 2000

The report was published in two Volumes by the Directorate General for Research of the European Parliament as a Working Paper (LIBE 110 EN) in 2000. This version is the report submitted; the opinions expressed in this document are the sole responsibility of the authors.

This report was prepared by Statewatch/SEMDOC. The project team was: Tony Bunyan, editor *Statewatch* bulletin (project coordinator); Heiner Busch, CILIP, Berlin, Germany; Elspeth Guild, lawyer, University of Nijmegen, the Netherlands; Steve Peers, Reader in Law, Human Rights Centre, University of Essex, UK.

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INTRODUCTION

This report deals with the changes to the Maastricht Treaty brought about by the Amsterdam Treaty on justice and home affairs issues and the new provisions in the TEU and TEC.

Perspectives

There are a number of different perspectives which can be taken when looking at developments in the European Union, especially where the subject under review is justice and home affairs.

National governments have their view, the Council (comprised of member states's governments) has its view representing a common or compromise position, the Commission too will have a view.

This report has been prepared by a group drawn from voluntary groups and universities in civil society. The views presented, while recognising those of EU institutions and national governments, is written from the perspective of civil society paying particular attention to those who are effected by EU-wide policies and practices - the citizen, refugees and asylum-seekers.

Openness - access to documents

Any appraisal of justice and home affairs policies and practices in the European Union raises the issue of the citizens' and civil society's access to documents. Without access to primary sources they are unable to participate in normal democratic decision-making or to seek to check excesses or unaccountable practices on the part of agencies and officials.

Effective access to documents from the main EU institutions - the Council, Commission and European Parliament - is thus a prerequisite of a democratic society.

Citizens and parliaments

While the European Parliament is one of the main EU institutions its role is quite different from those of the Council and Commission. The Council and Commission exercise executive powers of government and their departments and officials - whether at the EU or national level - are responsible for the administration and practices which flow from decision-making.

The European Parliament is directly elected by EU citizens and is accountable to them. It therefore has the unique role of scrutinising new policies and the consequent practices and, above all, of representing and protecting the interests of the all the people in the EU.

Nowhere is the European Parliament's role more important than in the field of justice and home affairs which so critically effects civil liberties.

Tony Bunyan,
Statewatch/SEMDOC

Chapter 1

INTERNAL BORDER CONTROLS

The abolition of controls at internal borders has for years been a disputed area within the process of European integration. In the early 1970s members of the European Parliament declared that the dismantling of these controls had been set out in legislation on the Common Market and on Customs Union.

In the 1980s, the plans to dismantle internal border controls seemed set to become reality. This intention was documented not only in the statements of the European Council - in connection with the introduction of the European Passport - but later in the Commission's White Paper on the completion of the Single Market approved by the European Council in 1985.

The issue appeared to have been resolved in the Single European Act which came into force in 1987. In Article 14 TEC (as amended by the Amsterdam Treaty, Art. 8a TEC according to the enumeration of the SEA, Art. 7a TEC according to the Maastricht Treaty) a date was set for implementing the Single Market and with it the abolition of checks on persons at internal borders: 31.12.1992. The date is long past; the realisation of these changes is however still a long way off. To examine this subject in context, we must go back not only to the Maastricht Treaty, but to the Single European Act.

1. The Single Market, the Single European Act and the failure to dismantle border controls

Under the Single European Act, Article 14 (ex- 8a, ex 7a) TEC the Single Market comprises "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". The necessary measures were to be taken by the Community by 31.12.1992.

Even before these "four freedoms" were established in the Treaty, the Commission in its White Paper and in its regular reports on the progress in implementing the Single Market constantly reiterated the importance of dismantling border controls. In what refers to checks on goods and customs checks, the Commission followed the line which was also set out in the logic of the Single European Act.: the harmonisation of indirect taxation would mean no further need for controls. The remaining controls were to be transferred from the border to the point of departure within the country for goods vehicles from the participating Member States. This Guideline was followed by a series of Directives and Regulations adopted from 1985 onwards with the objective of realising the Single Market.

In regard to checks on persons, the Commission tried to explain not only the economic advantages of the free movement of persons, but also the symbolic meaning of a suppression of checks at internal borders for the "ordinary citizen". Since 1968, there had been community legislation first on free movement of workers, then from 1973 also on free movement for self employed people. By 1990, on the basis of the Single European Act, Directives on the right to settle were passed also for pensioners, students and other persons with independent income. Thus the most difficult legal questions for any (intra-community) migrant, the right to stay with or without work in another state, had been or were resolved.

The issue of border controls of persons was altogether a lot simpler, due to the fact that at most internal borders control in practice had been reduced to being "noddled" through. This simple issue, however, led to huge resistance amongst the governments of the Member States from the early 1980s. While the community could refer to the SEA as a clear legal basis for their measures to establish economic side of free movement, the governments of the Member States denied the Commission any responsibility for the question of checks on persons. Even minor proposals for a procedure to cut out queues, cutting border controls down to random checks and having a "green lane" for EC citizens failed because of resistance from the Council.

In fact the Single European Act is contradictory on this point: it grants to the Community the power to enact legislation on the Single Market and therefore on the dismantling of checks on persons. However, in two declarations on the same subject, the Member States declare that powers to implement measures against terrorism, crime, and drugs smuggling, and on immigration from third countries remain the prerogative of the Member States and should not be Community competencies.

Behind these statements lies an argument which is erroneous: that dismantling internal borders would lead to a loss of security. This argument is untenable because:

- * even before the mid-1980s, border checks were only random. The traffic resulting from greater integration of the EC meant that thorough checks on traffic crossing the border were only possible in exceptional cases (Such an exceptional case was the search for the kidnappers of the German industrial leader Hanns Martin Schleyer in 1978, when almost every person crossing the German- French border was checked).

- * as statistics from the Member States show, the border is useful as a search point for minor crime, but not for "organised crime" which has been at the centre of "security" campaigns since the 1980s.

This dispute between the Commission and even the Member States of the Schengen group over whether the dismantling of border controls required alternative measures or "compensation measures", meant nothing could be achieved at Community level. The Community had no mandate to stipulate measures affecting internal security or immigration or asylum law. The only possible alternative to dismantling controls at the internal borders was for Member States to adopt their own agreements.

From the mid-1980s, the Commission lent support to the negotiations of the Schengen group. The original five members of the group decided in their first Agreement in 1985 to introduce control procedures with no waiting time as a short-term measure. The aim in the long term was to negotiate compensation measures to compensate for the supposed "loss of security". The Schengen Implementing Convention of 1990 provided for the dismantling of border controls. If there are security problems, controls may "temporarily" be re-introduced. Apart from this article (Article 2), the rest of the 140 articles of the convention consists of "compensation measures" which include:

- * strengthening border controls at external borders
- * the "one chance only" rule in asylum law
- * the introduction of a common visa, and common visa policy
- * increased cooperation between police, customs and judicial authorities, including
- * the introduction of a joint information system for wanted persons and objects, the Schengen Information System.

The Schengen solution has found increasing support amongst EU States. Amongst the then 12 EU Member States, only Denmark, the UK and Ireland did not sign up to the Convention:

- * Denmark agreed in principle to dismantling internal border controls, but wanted the other non-EU Member States of the Nordic Passport Union to be integrated. In other words, the border between Denmark and the Scandinavian States was not to be made into an external border. The question was later resolved with the EU and Schengen membership of Sweden and Finland and with separate agreements between the Schengen group and the Non-EU states Norway and Iceland.

- * The UK insists on maintaining its border controls and Ireland is tied into this position because of the "common travel area" between the two states.

In practice, however, the three non-participants took part in the negotiation of the compensation measures negotiated from the late 1980s by the twelve Member States. They signed up to the Dublin

Convention. They were involved in the draft External Borders Convention which was completed in 1991, but not signed because of the dispute over Gibraltar. They were also involved in the preparations for Europol, which began to take shape from 1991 within the framework of TREVI. Negotiations between the twelve Member States continued along the same lines as had been the case within the Schengen core countries since 1985 - although without raising the issue of internal border controls. The real point of discussion was left aside.

The deadline of 31.12.1992 was adhered to neither by Schengen nor the EC.

2. From Maastricht to Amsterdam

Although the date 31.12.1992 was not adhered to, it was maintained in Article 7a of the revised version of the European Community Treaty and since then has stood as an example of the absurdities of European Law. In 1993, the European Parliament even brought the Commission before the European Court of Justice (case C-445/93), because it had not proposed legislation to abolish internal borders. The complaint was withdrawn in 1995, when the commission proposed three directives on the subject of checks on persons.¹

In Title VI of the Maastricht Treaty (TEU), once again there appeared a kind of deal - "compensation measures" on the one hand, and free movement on the other - but in a watered down form. Whole areas of policy, named in Article K 1 of the EU Treaty as fields of inter-governmental cooperation in justice and home affairs, supposedly are to serve the objectives of the European Union, particularly the "free movement of people". This link between the Third Pillar measures and the abolition of border controls of persons was even accepted by the Commission. In the above mentioned proposals of directives from 1995, the Commission bound the entry into force of its proposals to accompanying measures, as are the Dublin convention, the draft external borders convention, the draft Convention on the European Information System, and a Regulation determining that third country nationals must be in possession of a visa when crossing external borders. The deadline for this was the 31.12.1996, which was not met. The commission proposal thus once again failed. Despite the fact, that only the Dublin convention and two Visa Regulations had been adopted, the EU and its Member States have made great strides in the area of cooperation in immigration and asylum law, and in police, judicial and customs cooperation - they have in fact gone much too far as regards the rights and freedoms of the citizens of the European Union, and particularly as far as immigrants and refugees from third

¹ Proposal of the Commission for the right of third country nationals to travel within the community - COM (95) 364 final, Proposal of the Commission for a Council Directive on the elimination of controls on persons crossing internal frontiers - COM (95) 0347, Proposal of the Commission amending Directive 68/360/EEC and Directive 73/148/EEC - COM (95) 348 final.

countries are concerned. Nothing has come out of this cooperation as far as achieving the real EU objective of freedom of movement.

While the Maastricht TEU in Article K1 had mentioned the objective of free movement of persons in the context of third pillar cooperation, the Amsterdam TEU in Article 29 watered it down: The reference to freedom of movement of people was dropped in favour of an abstract "area of freedom, security and justice".

In the EC Treaty, the dismantling of internal border controls is placed once more upon the agenda. Article 62 EC Treaty requires the Council to adopt measures within a period of five years, which "in compliance with Article 14 will ensure the absence of any controls on persons, be they citizens of the Union or nationals of third countries when crossing internal borders". The reference to Article 14, which is unchanged from the Single European Act in its first two paragraphs, makes doubly clear:

* that the absence of controls at internal borders is inseparable from the notion of freedom of movement of people within the Single Market - contrary to what representatives of the Member States have claimed since 1992;

* how absurd the procedure has been: The Council has until the year 2004 to adopt measures which should have come into force twelve years earlier on 31.12.1992.

The new provisions, however, are once again weakened on account of additional protocols and declarations: the UK and Ireland can opt out of all decisions under Title IV of the EC Treaty. Moreover, they can choose to adopt selectively provisions of the Schengen Implementing Convention, if the Schengen countries accept this, which will most certainly be the case. In other words, they may take part in all the "compensation measures", but they are not obliged to dismantle border controls. The United Kingdom has stated that it wishes to proceed in this way. The "area without internal borders" is, in theory, restricted to the Schengen States.

A further problem is that the Treaty itself maintains the links between questions of internal border controls and provisions for asylum and immigration policy and external border controls. Not only is the Schengen-Acquis to be incorporated completely into the TEC and the TEU respectively, but the Schengen States in the Declaration on that acquis are also assured that the obtained level of "protection and security" shall be maintained. Concretely this means, that a further suppression of internal border controls is only accepted if the "standard" of external border controls and police cooperation is maintained. In the past, this had been the central point, if a state wanted to join the

Schengen group. To obtain the suppression of internal border controls on persons, new states had to demonstrate the effectiveness of their control system at the external borders.

What remains to be seen is whether the Council adheres to the requirement to adopt measures on opening internal borders within the five years stipulated. During the five years, in which the Council has to adopt those measures, the Parliament may only be consulted.

3. The reality of the situation concerning internal borders

It is not only Ireland and the United Kingdom who are maintaining their border controls. Within the Schengen Group also, which has committed itself to dismantling controls, the truth is that this is not yet reality.

Up until 1995 when the Convention came into force for seven states, there was much "to-ing and fro-ing". The Schengen Contracting Parties, France in particular, expressed reservations regarding the dismantling of internal border controls which was once more seen to represent a significant danger to internal security. In 1993, France successfully demanded an additional investigation into whether the countries involved would be able to fulfil their commitments with regard to strengthening external borders. Only after this investigation by "visiting teams" did the Schengen Executive Committee decide to implement the Convention between seven states.

France, however, referred to the extraordinary provision of Article 2 (2) in the Implementing Convention when it came into force, and maintained its border controls. In the summer of 1995 this "temporary" provision was once again extended. Later France dropped controls at most of its internal borders. However, controls were maintained at the borders with Belgium and Luxembourg on the basis that across these borders illegal drugs from the Netherlands would flow freely into France. Thus, for example, on trains from Luxembourg to Strasbourg, sometimes all passengers have been subject to thorough checks, not only having to show passports or identity cards, but also having their luggage searched. On occasions at border stations, passengers are taken off the train with no explanation given, although there is no later connecting train to continue the journey.

In December 1995, the Schengen Executive Committee decided that the provisions of Article 2 (2) of the Schengen Convention should be reserved for exceptional circumstances. Any State wishing to reintroduce border controls must give reasons for this requirement to the Executive Committee and a date for the probable termination of this measure. It is not however bound to adhere to this date. It may make its own decision to delay further.

Investigation of standards at external borders has become a regular procedure amongst the Schengen Group. This includes Contracting Parties, for which the Schengen Implementing Treaty is already in force, and particularly members of the Schengen group who want to join this club. The opening of the Italian border was postponed in October 1997 as Germany, Austria and France complained that Italy had not done enough to stem the flow of Kurdish refugees from Iraq. Following intensive talks, it was decided that Italy should join the SIS from December 1997, but only dismantle border controls from April 1998.

Meanwhile, the reintroduction of controls has become a kind of threat in cases where a Member State is displeased with the judicial decision of another State. In March 1997, Spain threatened to reinstate border controls with its Schengen neighbour Portugal, as Portugal's Supreme Court had refused to extradite an alleged ETA member.

Even those borders which no longer have a barrier, however, are not free from police controls. Schengen States have adopted additional bilateral agreements on establishing joint police departments, contact points for border police and for policing the border area using mobile units.

There is a trend towards transferring controls from the border to the interior of a country where legislation prohibits regular checks at the border. Thus, the Netherlands has adopted a "Southern Border Solution" - a strategy which came into being at the point when internal border controls were dismantled within the framework of the Benelux Union. The barriers and official controls have disappeared from the border. Instead, the *Marechaussee*, the border police corps, carries out random checks in streets and trains near the border, particularly targeting non-whites. In the 1980s this was intended to prevent the entry of refugees via the Brussels airport Zaventem. This practice of checks affects the Netherlands' own black population too.

Germany has "moved its borders inwards" in an audacious manner. In its Law on the Federal Border Guard (Bundesgrenzschutz), powers of control reach up to 30km within the border. Here too, there are no border controls, but there are police dotted around the hinterland carrying out checks. From 1994 this practice was extended. With the prospect of Austria entering the EU and the opening of the border, Bavaria was the first German *Land*, whose parliament gave its regional police force powers (not only within the 30km limit, but also in certain areas with heavy traffic, on regional roads and motorways and at the bigger stations near the border) to carry out "controls independent of suspicion". Meanwhile, nearly all the German *Länder* have adopted this model. Even in *Länder* such as Thuringen which does not border another country - neither a Schengen group country nor a third country - the reasons for the measures were given as the supposed loss of security due to the dismantling of the Schengen internal border controls. In mid-1998 the Parliament passed an

amendment of the Federal Border Guard which provided for controls outside the vicinity of the border and independent of suspicious circumstances. Thus, the border police obtained the right to check persons nearly on any train inside the territory.

What should be done?

According to the legislation in the revised Title IV of the EC Treaty, the Parliament has no powers of decision, but may only be "consulted". It should also move away from the argument that the dismantling of controls must be tied to compensation measures. In recent years, this argument has become a "bottomless pit", in that whenever it suits the politicians, new measures in the field of police and judicial cooperation and new tightening up of immigration and asylum legislation have been implemented without any real progress achieved on the matter of internal border controls. Any further measures should be rejected. The point at issue is to adhere to the promises made with regard to the Single Market which have been awaited since 1992.

The conception of the Single Market is that of a space without borders. If this principle is accepted on the economic side, it must also hold for the liberties of the persons inside this space. The Parliament should unreservedly adhere to classic liberal principles, to allow controls independent of suspicious circumstances only at the borders of a territory - in the case of the EU, these are the external borders - and to guarantee freedom of movement within its borders. This means, that no controls - neither at the internal borders, nor in the hinterland of the former internal borders - should be allowed without there being a concrete suspicion against an individual for having committed an offence. The European Parliament thus not only has to fight on community level to install the principle of free movement across the internal borders. It also has to look for alliances in national parliaments to counter governments trying to establish border-like controls inside of their territories under the pretext of compensating for a "loss of security".

Nor should there be any concessions from the principle of free movement of people in the process of EU enlargement. This principle already has been violated in the past enlargement processes to the southern EU states. The inhabitants of the new Member States must enjoy the same rights as the current Member States. Plans on the part of the Council of Ministers of Home Affairs and Justice to deny these rights to members in the first five years will lead to citizens of the new Member States being treated as second class citizens. This is even more problematic, as the applicant states in the process of preparation of their integration are expected to serve as new buffer states against migration from further east. They have to establish the standards of controls of external borders, as it is incorporated in the Schengen implementation Treaty and in a number of "manuals", which the

Schengen Executive Committee has adopted in the past - a process which will also lead to economic consequences, as a lot of cross border small scale commerce will be effected.

Introduction to Chapters 2-4

The following three chapters on asylum policy, control of the crossing of external borders and immigration policy regarding nationals of third countries take as their fundamental perspective the position of the individual vis a vis Community law. For over a decade, discussion at European level on these issues as regards third country nationals has focused on state interests. The concerns of the individual subject to state control have not found a voice. This state of affairs exists notwithstanding the special rights of the individual at risk of persecution which international law promises.

It is very important that the hallmark of Community law in respect of persons, the creation of direct rights upon which individuals may rely, is maintained as the perspective for the new chapter on immigration and asylum. The European Parliament has always championed the protection of the rights of individuals, whether citizens of the Union or third country nationals, within the competence of the European Union. It is very important that the European Parliament continues this fundamental role particularly as regards the new areas of competence transferred to the European Community from the Third Pillar of the European Union in respect of asylum and immigration. The framework established by the Member States within the intergovernmental pillar is almost exclusively directed towards the rights and powers of Member States to act as regards third country nationals. The change of perspective from the intergovernmental Third Pillar to the Community may be less than smooth.

There are two types of recommendations to these three sections: short term proposals on action which the European Parliament may wish to consider over the life of the new Parliament and longer term proposals which relate more to perspectives and approaches. These two types of proposal are scheduled separately at the end of these three chapters.

Chapter 2

ASYLUM POLICY

(a) Definition: What is asylum policy in the European Union? (a) Under the former Title VI TEU? (b) Under the new Title IV EC?

The first consideration relates to the scope of the concept of asylum policy. A narrow definition of asylum policy encompasses only that policy which relates directly to refugees and the recognition of individuals as such under the terms of the UN Convention relating to the status of refugees 1951 and its 1967 Protocol (the Geneva Convention). This definition is contained in Article 1A of the Geneva Convention: a person who is outside his/her country of origin or habitual residence owing to a well founded fear of persecution on the basis of race, religion, nationality, membership of a social group

or political opinion and is unable or owing to such fear, unwilling to return there. A wider definition of asylum policy covers all those areas which relate to the treatment of persons in need of international protection because of what is likely to befall them if they are returned to the country of their nationality or habitual residence. In the European context, this means persons who are covered not only by the Geneva Convention but also those in respect of whom there is a serious risk that they would suffer torture, inhuman or degrading treatment or punishment if returned to their country of origin or habitual residence and therefore their return to such a state would be contrary to Article 3 of the European Convention on Human Rights 1950 (ECHR). Internationally the same definition is to be found in Article 3 UN Convention Against Torture 1984.

The distinction between a narrow and wide definition of the Geneva Convention is by no means academic. The Member States adopted a joint position on the definition of a refugee for the purposes of the Geneva Convention² in which persecution by non-state agents is specified as not normally giving rise to a valid claim for refugee status. Therefore if the Third Pillar *acquis* is transposed to the First Pillar with this limited definition of asylum policy refugees who are the object of persecution by non-state agents will be excluded from the Community law definition of a refugee and placed in some subsidiary category (a position which the British Court of Appeal has held to be contrary to the international meaning of the Convention).³

Persons recognised as refugees under the Geneva Convention are entitled to equal treatment in a whole variety of areas by the Geneva Convention itself. Access to work, housing, employment etc, are all regulated by the Convention itself and ensure a high degree of participation by the refugees. However, persons who are granted some other status such as temporary or subsidiary protection are not covered by the Geneva Convention social rights. Their treatment is, at the moment at national discretion. Increasingly in different Member States we are seeing a "race to the bottom" as regards the reception of asylum seekers which is extending to the treatment of persons given status less than Geneva Convention refugee status.

This basis of subsidiary protection is Article 3 ECHR which covers a wider group of persons in need of protection than the Geneva Convention⁴. The ECHR has the advantage of a supra-national court, the European Court of Human Rights, which is charged, in effect, with interpretation of the rights contained in the Convention. The Geneva Convention is interpreted by national courts, the

² 96/196/JHA O J L 1996 63/2.

³ *RvSSH* exp Lul Adan and others, 23.7.99 (CA).

⁴ *Ahmed v Austria* [1997] 23 EHRR 413.

judgements of which diverge among the Member States on important issues such as whether a person is covered by the Convention where he or she fears persecution by non-state agents. The contours of this difference of definition may have consequences for the implementation of the asylum provisions of the EC Treaty to which the European Parliament will, undoubtedly, wish to have regard.

(i) Under the Pre-Amsterdam Treaty Title VI TEU

Article K1 of Title IV TEU pre 1 May 1999 set out asylum policy as an area of common interest. Article K2 provided that "the matters referred to in Article K1 shall be dealt with in compliance" with the ECHR, Geneva Convention and having regard to the protection afforded by Member States to persons persecuted on political grounds. The definition of asylum policy is not to be found in the Treaty or elsewhere. Important definitional measures adopted under the Third Pillar in the area of asylum are designed around the concept of a Geneva Convention refugee. After the entry into force of the Maastricht Treaty, the Council adopted two main documents in respect of asylum: the first was the Resolution on Minimum Guarantees for Asylum Procedures (OJ C 1996 274/13). In that document, the guarantees apply only to the examination of asylum applications within the meaning of Article 3 of the Dublin Convention. The definition in the Dublin Convention of "an application for asylum" is a request whereby a third country national seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol. The second main measure adopted under the Third Pillar is the Joint Position on the Harmonised Application of the Definition of the Term "refugee" in Article 1 of the Geneva Convention (OJ L 1996 63/2). Here the Geneva Convention definition applies.

However, temporary protection of displaced persons has also been the subject of intergovernmental measures by the Member States and measures within the Third Pillar. The first of such measures was the resolution on temporary protection of displaced persons from the former Yugoslavia (1993). This was followed by a resolution on burden sharing of displaced persons⁵ (and implementing decision). From the content of the two measures, it is uncertain what their relationship is with the European Convention on Human Rights.

The Commission proposed in March 1997 a Joint Action concerning the temporary protection of displaced persons (which was amended and re-submitted OJ C 1998 268/13). This proposal makes specific reference in its preamble both to the Geneva Convention and to the ECHR and the obligation to respect the principle of non-refoulement. Under the amended proposal the definition of persons covered are those in need of international protection. This means any third country national or

⁵ OJ C 1995 262/1.

stateless person who has left his or her country of residence and whose safe return under humane conditions is impossible in view of the situation prevailing in that country. Three specific examples are given:

- persons who have fled from areas affected by armed conflict and persistent violence;
- persons who have been or are under a serious risk to be exposed to systematic or widespread human rights abuses, including those belonging to groups compelled to leave their homes by campaigns of ethnic or religious persecution;
- persons who for other reasons specific to their personal situation are presumed to be in need of international protection.

This definition is sufficiently wide to encompass any, if not all, refugees under the Geneva Convention plus a wider group of people covered by Article 3 ECHR and Article 3 UNCAT. The proposal is still under consideration by the Council.

(ii) Under the New Title IV EC

New Article 61 includes as part of the necessary steps to create an area of freedom, security and justice the adoption of asylum measures to flank free movement of persons within the internal market and more generally measures in the field of asylum as part of the establishment of the area.

Article 63 EC defines measures on asylum as "in accordance with the Geneva Convention [] and other relevant treaties" thereby requiring these measures to conform with the Convention. Article 63(1)(a) requires the adoption of measures determining the state responsible for considering an application for asylum. Article 63(1)(b) sets out a requirement to adopt minimum standards on the reception of asylum seekers. Article 63(1)(c) and (d) both refer specifically to refugees, first in respect of minimum standards on qualification of persons as refugees and secondly on procedures for Member States for granting or withdrawing refugee status.

As regards definitions in the new Title IV EC the concepts of a refugee, an asylum seeker, a displaced person, a person otherwise in need of international protection all appear. The inter-relation between these different terms is not clarified, although it is fundamental to the scope of the Title.

The issue of the definition of asylum policy is critical to understanding the scope for activity by the European Parliament in the field. The Parliament may not agree with the analysis of the scope of the term which will be provided by the Council or the Commission. Whether a difference of definition is

more than a matter of semantics for lawyers will depend on the procedural, residence, economic and social rights which apply. Much will depend on whether in the treatment of refugees, displaced persons or those subject to subsidiary or temporary protection schemes, there is uniformity or disparity in these areas of rights.

The Parliament should consider carefully whether differing procedural, residence, economic and social rights for persons variously categorised as asylum seekers, refugees or displaced persons are acceptable bearing in mind that the same person may fall within all three categories, the categorisation being dependent on the host Member State authorities.

(b) Purpose of inclusion of asylum policy within the framework of the Union's constitution:

The constitution of the European Community is characterised by a balance of powers between the Union and the Member States. Powers transferred to the Community by the Member States are so transferred in order to achieve certain, specific goals of the Community. The interpretation of the scope of transferred powers depends very much on the reason why the power was transferred in the first place. Therefore in order to understand the scope of an area of competence transferred to the Community regard must be had to the objective at which the transfer was aimed.

Asylum policy under the old TEU lacked a clear goal, a matter which was stressed by the Parliament and the Commission in their reports to the Intergovernmental Conference. It was related to the Community objective of the abolition of intra-Community border controls on persons (Article 14 EC). It was included in Article K1 for the purposes of achieving the objectives of the Union, in particular the free movement of persons. Exactly how measures on asylum policy would do that were not spelled out.

In new Title IV EC the overarching purpose of transferring the competencies are in order to establish an area of freedom, security and justice. There is no definition of what such an area is in the Treaty. The action plan of the Commission and Council on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice⁶ examines each component separately. It states that the concept of freedom includes "freedom to live in a law abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom". This definition of freedom is something of a concern in that it would appear to indicate that there is no tension between freedom and state security measures. While security and

⁶ OJ C 1999 19/1.

freedom may be compatible, state security measures and freedom will not necessarily be. The idea of security is not coterminous with the practice of state security measures.

In the context of asylum, security more accurately means security from persecution. This type of security finds its expression in international human rights law in the right to seek asylum guaranteed by Article 14 of the Universal Declaration of Human Rights. The objective of the Community must include protection of the freedom to seek asylum by reaching the borders of a safe country, albeit a Member State of the European Union in order to do so. The Parliament should be slow to accept that state security measures necessarily contribute to the freedom of persons in need of international protection to flee persecution.

In the amended EC Treaty parts of asylum policy are specifically stated to be necessary to the achievement of the internal market as defined in Article 14 EC, but others are tied to the creation of an area of freedom, security and justice. In considering the scope of the Parliament's activity in the area of asylum policy regard must be had to the objective which each aspect of the policy seeks to achieve.

Some of the measures in respect of asylum are attached exclusively to the establishment of an area of freedom, security and justice. These are:

- minimum standards on the reception of asylum seekers;
- minimum standards with respect to qualification as a refugee;
- minimum standards on procedures for granting or withdrawing refugee status;
- promoting a balance of effort between Member States in receiving and bearing the consequences of refugees and displaced persons.

Other objectives in the field of asylum are specifically tied to the objective of ensuring free movement of persons without intra Member State border controls. These measures include:

- criteria and mechanisms for determining the Member State responsible for considering an asylum application; and
- minimum standards for giving temporary protection to displaced persons and persons otherwise in need of international protection.

Thus the Treaty ties together minimum standards for temporary protection and criteria for determining the state responsible for considering an asylum application with the abolition of intra Member State border controls. As we have seen in the operation of the Schengen Convention chapter on asylum and the Dublin Convention which superseded it in September 1997, the principle of allocating a state responsible for determining an asylum application requires minimum standards on

procedure and appeal rights for granting protection in general and minimum standards on reception. The underlying principle of the Dublin Convention that asylum seekers should, in the absence of factors connecting him or her to the state where the application is made, be returned to the first country through which he or she entered the territory of the Union, is flawed and unfair. Unless the asylum seeker has an equivalent consideration of his or her application in all Member States and where in need is given sufficient support and accommodation to live in dignity during the process, such a system of transfer is not acceptable.

Therefore, question marks arise as to which parts of the asylum competence really belong specifically to free movement of persons in a border control free Union and which to the creation of an area of freedom, security and justice. The Parliament will wish to consider whether measures on reception and procedural rights for asylum seekers are critical to determining the Member State responsible for considering an asylum application.

This is important in light of the timetable for adoption of measures. In the Joint Action plan of the Council and Commission referred to above, those two institutions have stated the objective to achieve within two years of entry into force of the Amsterdam Treaty measures on minimum standards for giving protection, measures to replace the Dublin Convention, minimum standards of reception for asylum seekers and promoting a balance of effort between Member States.

Within five years they propose to push forward measures on minimum standards with respect to qualifying as a refugee and minimum standards for subsidiary protection.

When considering measures which are being put forward by the Commission (or Member States within the first five years after entry into force) the European Parliament will want specifically to have regard to the purpose of the competence within the hierarchy of the new Title's provisions and ensure that it fulfils its objectives.

(c) The purpose of inclusion of asylum policy in the EC Treaty within the context of the Member States international commitments:

Asylum policy, perhaps more forcefully than any other area of Union activity engages the human rights obligations of the Member States. Not only is there an international convention to which all Member States are parties which specifically and solely regulates the issue of refugees (the Geneva Convention) but also the Member States' obligations under the ECHR (foremost, though not exclusively, under Article 3) are engaged. The right to seek asylum is also enshrined in Article 14(1) of the UN's Universal Declaration of Human Rights. Therefore it is not sufficient to consider the

purpose of asylum policy only from the perspective of the Community's constitution. It must also be considered in the light of the Member States' external obligations to the rest of the world⁷.

By transferring real competence to the Community in respect of asylum policy the Member States run the risk that the exercise of that power will place them in breach of their duties to the international community under their human rights commitments. In order to avoid such a possibility, it is necessary to look at the transfer of competence regarding asylum policy from the perspective of the goal which must be achieved for the international community.

With the abolition of the intra-Union border controls on persons and the creation of an area of freedom, security and justice the Member States have regulated and are seeking to regulate the movement and position of asylum seekers and refugees within the "border-less" territory. This includes for example, rules under which asylum seekers are required to seek asylum in one part of the united territory as opposed to another part. These rules have been viewed as flanking measures necessary for the abolition of intra-Union border controls. However, the rules and their practical application must not result in the Member States being in breach of their international commitments. The abolition of intra-Union border controls on persons requires harmonisation, of rules on asylum policy, so that the transfer of asylum competence to the Union level is subject to the highest standard of human rights obligations which applied to the area at national level in any Member State. Anything less would mean that some national constitutional courts of the Member States would not be able to respect Community measures in the field as these might conflict with the duty of these constitutional courts to give effect to their Member State's international human rights obligations.

To view this from another perspective then, one could say that the transfer of competence on asylum policy from the Member States to the Community is for the purpose of ensuring that in the border-control free territory of the Union the international obligations of the Member States to provide protection to persons in need are respected. Therefore the goal of the transfer of competence on asylum policy is to ensure respect not just for the Member States' commitments under the Geneva Convention but for their commitments also under Article 3 ECHR, Article 3 UN Convention Against Torture and elsewhere. Such must be the interpretation of the transfer of competence from the perspective of the international community.

This interpretation is reinforced by the introduction of the Protocol on Asylum for nationals of the Member States of the European Union which seeks to limit the possibility of a national of one Member State seeking asylum in the territory of another Member State. Such a protocol could only be valid

⁷ The transfer of an exclusive competence internally also has very important consequences for the Community's external competence. However, this is a subject beyond the scope of this paper.

vis-a-vis the international commitments of the Member States if the Union territory were in fact one unified territory equivalent to a single state (and of course subject to the highest level of human rights commitments of the Member States).

The argument in favour of the protocol on asylum which was made during the negotiations leading to the Amsterdam Treaty was that all of the Member States are democratic, abide by their international human rights commitments and hence do not give rise to genuine refugees. This position was criticised by amongst others Amnesty International and questioned as regards the principle of a geographic limitation by UNHCR. The issue becomes even more dramatic in the light of the enlargement of the European Union to include up to ten countries in Central and Eastern Europe, the Balkans, the Baltic states and Cyprus. Many of these countries have until recently been (or still are) substantial asylum seeker sending countries to the Member States of the European Union, eg: Romania, Czech Republic, Slovakia and Poland. While great progress is being made towards establishing the rule of law and fundamental human rights nonetheless this is a long term strategy. The courts, in some Member States, have continued to recognise as refugees, for instance, gypsies from Slovakia and the Czech Republic.

Within the EU's territory, a consistent application and coherent interpretation of the human rights duties in respect of asylum seekers must apply. If it does not then the territory lacks sufficient unity to justify its treatment as a single territory for the purpose of applications for asylum by its "own" citizens, and similarly lacks sufficient unity to justify moving asylum seekers from one part of the territory to another for their applications for asylum to be considered as is currently done under the Dublin Convention. Such mandatory allocation must be fundamentally flawed as the lack of consistency of application of international obligations means that the asylum seeker could be subject to differing and not equivalent treatment.

(d) What has been done in the field of asylum?

Activity in respect of asylum policy has taken place at three levels in the European Union (using that term loosely). First, at the level of inter-governmental cooperation pre-dating the entry into force of the Maastricht Treaty, a number of agreements were reached about asylum policy the status of which remains undetermined. These include the London Resolutions on "host third countries", "manifestly unfounded asylum applications" and the "Conclusions on countries in which there is generally no serious risk of persecution" (all of 30 November and 1 December 1992). In this category as well falls the Resolution on temporary protection of displaced persons from former Yugoslavia (June 1993). One convention, the Dublin Convention was signed in 1990 and entered into force in September 1997. Secondly, after the entry into force of the Maastricht Treaty, a small number of measures specifically

on asylum were adopted under the Third Pillar competence, most notably the Resolution on minimum guarantees on procedure and appeals and the Joint Position on a harmonised interpretation of Article 1 A of the Geneva Convention.

To summarise: the subject matters covered by inter-governmental or Third Pillar measures on asylum include:

- (1) State responsible for considering an application (the Dublin Convention);
- (2) Manifestly unfounded applications for asylum;
- (3) The concept of a safe third country;
- (4) The concept of a safe country of origin;
- (5) Collection of information and its exchange (CIRES);
- (6) Fingerprinting asylum seekers (EURODAC);
- (7) A harmonised approach to the definition of a refugee;
- (8) Minimum standards of procedure and appeal ;
- (9) Temporary protection and burden sharing as regards displaced persons.

Discussion took place and an initial draft produced on both reception of asylum-seekers and treatment of protected persons after the grant of status. Neither progressed to a document which was adopted.

None of the measures adopted on the above topics is in an adequate form to become binding in Community law. To start at the beginning: the most complete measure in terms of its form (an international agreement) and specific content is the Dublin Convention. It is also the first in the field of asylum to be adopted formally (in 1990). But it does not work and needs major rethinking. The attempt to move people seeking international protection from one Member State to another has been of limited success and created deep suspicion in the minds of asylum seekers who fear being moved for reasons which are not understandable to them. In their attempts to avoid being forced to move from one state to another, they retain fewer and fewer travel documents, if any, by the time they apply for asylum. Their accounts of their travel routes are vague. Member State officials have become increasingly frustrated by the lack of cooperation which they receive from asylum seekers about travel routes and documents. Asylum seekers are then categorised as unreliable and liars because, in fear of being forced to move yet again, they are unable or unwilling to reveal details of their routes and documents. The stigma of unreliability or lying is then applied to the substance of their claim for asylum: if they are unreliable about one aspect, ie the travel route, then they may be lying about their fear of persecution. The result is a system which prejudices the asylum seeker in the substantive consideration of his or her claim because of a procedural measure, the Dublin Convention, which does not even work effectively in the first case. This is not acceptable. The whole concept of

determining the state responsible for considering applications for asylum must be rethought out, with resources moving instead of people.

The other measures, adopted either inter-governmentally or in the Third Pillar, are too vague and uncertain to be transformed into Community law. Further a number of them have been the subject of UNHCR criticism. The fundamental principle of all these measures is that they are inter-state only. There is no space in any of them for the individual to assert a right either to consideration of his or her application, to a fair procedure, to access to the information on which the decision was taken or otherwise. This was typical as the Third Pillar was in essence inter-governmental.

The Commission, in a rare excursion into active participation in the Third Pillar, in the Spring of 1997 put forward a first proposal for a Joint Action on temporary protection (of persons in need of international protection) which has been reformulated, broken into two and resubmitted to the Council. This is a borderline measure which while introduced under the old Third Pillar is in fact intended for the new EC Treaty competence and will be re-introduced soon.

The new Title IV EC is completely different from the framework in which previous work was undertaken. It is Community law and in accordance with the principles of Community law on movement of persons it should be written in terms of rights for individuals. This perspective is reinforced by the international commitments of the Member States. The European Court of Human Rights has upheld the right of an individual to protection against return to a country where he or she faces a real risk of torture, inhuman or degrading treatment.⁸ This extends to the fair consideration of an asylum case. The focus of the international obligations is protection not state responsibility. The individual is not punished because his or her state is persecuting or torturing him or her but given protection in dignity. One of the substantial criticisms of the Commission's proposals on temporary protection when seen in the light of the right of the individual to protection is the Council's unlimited discretion on opening and closing temporary protection schemes. Two examples stand out which exemplify this problem.

First, in respect of the Kosovan refugees, the failure of the Council to reach a decision to create a temporary protection scheme for these persons has meant that national schemes only have applied. Europe has been facing a mass influx of displaced persons from Kosovo nonetheless the Council has been unable to respond in a co-ordinated and coherent manner by opening a protection scheme for these persons. Secondly, in respect of closing a protection scheme the situation of displaced persons from Bosnia is an example. The piecemeal approach to ending temporary protection for Bosnians

⁸ *Soering* [1991] II EHRR 439; *Chahal* [1997] 23 EHRR 413.

after the Dayton Peace Accord has come under much criticism. On the one hand, some Member States have been heavily criticised by international organisations and NGOs for seeking to close their temporary protection schemes too quickly while other Member States have abandoned altogether the application of a concept of temporary protection to those persons and permitted them to stay permanently on the territory. Open ended protection and residence is not of concern to us here where our perspective is the right to protection of individuals. However the too rapid closure of the scheme and the failure to open a scheme are serious problems. The Commission's proposal does not solve either of them.

In implementing the new competence in Title IV the principle of individual rights should be respected. The difference between inter-governmental cooperation and binding Community law must also be respected. The rights guaranteed to asylum seekers must be in keeping with the spirit and the letter of the Member States' international obligations.

(i) What must be done in the field of asylum policy?

In the Amsterdam Treaty a time limit of five years⁹ applies to the adoption of measures under a variety of provisions including some of those relating to asylum policy. These are:

- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum: Article 63(1)(a) EC (ie the subject matter of the Dublin Convention); see comments above regarding a new approach;
- minimum standards on reception of asylum seekers: Article 63(1)(b)EC; without humane standards of reception in all Member States enforceable by individual asylum seekers, no mechanism for determining responsibility for asylum seekers can work. First it is unfair to the asylum seeker that he or she should be without the protection of a reasonable means of subsistence while awaiting the state's decision on protection; secondly it is unworkable to try to keep asylum seekers in one Member State for the duration of the procedure if they are destitute there and there is at least the possibility of support in another Member State. Therefore to fail to adopt a measure in this field which ensures a common standard of dignity for the asylum seeker is to invite unregulated movement of asylum seekers across the Union territory;

⁹ Notwithstanding the two year time limits which the Council and Commission propose in their joint work programme for the new Title.

- minimum standards with respect to the qualification of nationals of third countries as refugees: Article 63(1)(c) EC (ie the subject matter of the Joint Position on a harmonised interpretation of Article 1A of the Geneva Convention. This was heavily criticised by UNHCR regarding agents of persecution). Further work needs to be done on this document to take into account the criticisms of UNHCR. As the UNHCR has repeatedly stated, the Geneva Convention is about protection of people not about state responsibilities. If an individual needs international protection, that must be forthcoming no matter whether there is a duly constituted state in his or her country of origin or not; no matter whether he or she fears persecution from non-state agents outside the control of the state authorities or state agents. These elements of protection must inform any measure on minimum standards with respect to qualification as a refugee.
- minimum standards and procedures for granting or withdrawing refugee status: Article 63(1)(d) EC (the subject matter of the Resolution on minimum guarantees on procedure and appeals which is flawed because it does not fully apply to cases categorised as manifestly unfounded). If the procedures available to and appeal rights of asylum seekers do not meet a minimum threshold across all the Member States, any system of coordination cannot work. Wherever an asylum seeker arrives in the territory of the Union he or she must be accorded a full and fair consideration of his or her asylum application ensured and guaranteed by the full force of Community law.
- minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection Article 63(2)(a) EC. It must be borne in mind that temporary protection schemes are about helping governments and administrations deal with the stresses of an unexpected influx of people seeking protection within their territory. They are not in the interest of the asylum seeker whose interests are best served by a quick and fair determination of his or her claim to protection. Therefore, as temporary protection is a mechanism to ensure that Member States fulfill their protection obligations in mass influx situations, the individuals who are the subject of such mechanisms must not be prejudiced by them. Schemes should be short in duration and permit security to the individual while the administration redeploys its resources to be able to give a rapid and just determination of the individual's claim for protection. Temporary protection schemes should not become an alternative form of protection which is

insecure and leaves the individual in suspense for years. Temporary protection is becoming a slow way to say yes - in an honest Union, people in need of protection deserve a quick yes so they can plan their lives in security and dignity. This is an important part of an area of freedom, security and justice.

The European Parliament may wish to exercise its powers with specific regard to the objective of proper implementation of the international human rights duties of the Member States. This will require careful attention not just to the relevant conventions, but also to the Decisions of the Executive Committee of the UNHCR; the jurisprudence of the European Court of Human Rights on the protection of persons from torture, inhuman and degrading treatment or punishment and their return to places where there is a real risk of such treatment; the relevant Resolutions of the Council of Ministers and Parliamentary Assembly of the Council of Europe and the opinions on individual complaints of the Committee established under the UN Convention against Torture Article 3 of which mirrors Article 3 ECHR.

A further issue arises under this section about the possibility of failure of the Council to fulfil its duties under the Treaty as regards the adoption of measures within the time limit. Where, in the past the Community has been under a duty to adopt implementing legislation within a time limit by the EC Treaty, the failure to do so has not infrequently given rise to an interpretation from the Court of Justice on the direct effect of the Treaty provision even in the absence of implementing measures. The wording of the new competencies on asylum makes it difficult to imagine how a similar solution could be reached. The provisions are worded in terms of powers which must be exercised without clarity as regards the contents to be given to that exercise. It is for the European Parliament to seek to bring pressure to bear on the institutions to fulfil their duties as regards the time deadlines under the new Title and to facilitate action in this field.

(ii) Critical concerns of a democratic society: the role of the Parliament:

(A) transparency: the European Parliament now has the right of consultation on all these measures (Article 67(1) and (2) EC). The European Parliament may also wish to bear in mind that under Article 300 EC it is entitled to consultation on international treaties, some of which may include provisions on movement of natural persons. Increasingly, such agreements between the European Community and third states include obligations on the third countries to accept back persons whether their own nationals or others who have travelled through their territory. The role of the European Parliament is therefore extremely important in this respect as well.

The Parliament must also ensure that it uses its powers of consultation so that the people of Europe have access to information on the proposals as soon as they are tabled. In exercising its powers to ensure transparency it is incumbent on the Parliament to be vigilant as regards the other side of the transparency coin: the protection of personal data of third country nationals.

(B) accountability: Article 67 EC provides that during the first five years after entry into force of the Amsterdam Treaty, most of these provisions will be subject to a right of initiative shared by the Commission and the Member States; consultation by the Parliament; and adoption by unanimity by the Council. After the end of the transitional period the right of initiative is exclusive to the Commission. In the area of asylum policy, measures must be adopted by unanimity although there is provision for this to be changed five years after entry into force to qualified majority voting under the Article 251 EC procedure subject to an unanimous decision to that effect by the Council itself and subject to consultation with the Parliament. Clearly, new inter-institutional arrangements will need to be drawn up between the Parliament and the other institutions to give substance to the Parliament's new prerogatives. During the five year transitional period when the Commission and the Member States share the right of initiative it is critical that the Parliament is provided with all drafts of any proposals tabled by the Member States as soon as they are so tabled. Proposals by the Commission are less likely to be problematic in view of the Commission's practice of advising Parliament of proposals at the same time as they are tabled for consideration by the Council.

(C) international human rights obligations: throughout this section we have stressed the importance of ensuring that the asylum competencies which the Amsterdam Treaty has inserted into the EC Treaty be exercised to give positive effect to the letter and spirit of the Member States' international human rights obligations. These obligations must be embraced as adding value to policy and law not grudgingly viewed as a check to administrative discretion. Further, in the context of enlargement of the Union, the Parliament should consider very carefully the record of applicant states' treatment of asylum seekers and indeed whether they are states from which refugees continue to flee. This consideration should be pivotal in the deliberations about whether the applicant state actually meets the Community's standards of human rights protection. Regard should be had to the number and nature of applications against such states pending before the European Court of Human Rights. The number of recent condemnations of an applicant state by the European Court of Human Rights should be given particular weight. Further, the official reports prepared by the Treaty bodies pursuant to the two Conventions against torture, that of the UN and that of the Council of Europe should be carefully considered.

(D) minimum standards maximum protection: the level of protection of persons in need which is likely to be incorporated into the implementing legislation of the new Title is the minimum acceptable

under the international obligations of the Member States. The Parliament accepts that high human rights standards are part of the European heritage and that all those resident in the Union are entitled to enjoy such high standards. It will be advocating, in the consultation process for more than a minimum standard for asylum seekers. In any event, Member States should be left a margin of appreciation to adopt provisions more favourable to persons in need of protection where they see fit. The process should not become one of levelling down protection rights in Europe.

Short Term Recommendations

No.	Proposal	Subject
1	The Parliament should consider carefully whether differing procedural, residence, economic and social rights for persons variously categorised as asylum seekers, refugees or displaced persons are acceptable bearing in mind that the same person may fall within all three categories, the categorisation being dependent on the authorities of the host state.	Asylum
2	The Parliament will wish to consider whether measures on reception and procedural rights for asylum seekers are critical to determining the Member State responsible for considering an asylum application.	Asylum
3	When considering measures which are being put forward by the Commission (or Member States within the first five years after entry into force) the European Parliament will want specifically to have regard to the purpose of the competence within the hierarchy of the new Title's provisions and ensure that it fulfils its objectives.	Asylum
4	The whole concept of determining the state responsible for considering applications for asylum must be rethought out, with resources moving, not people.	Asylum
5	It is for the European Parliament to seek to bring	Asylum

	pressure to bear on the institutions to fulfil their duties as regards the time deadlines under the new Title and to facilitate action in this field.	
6	The Parliament must ensure that it uses its powers of consultation so that the people of Europe have access to information on the proposals as soon as they are tabled.	Asylum
7	In exercising its powers to ensure transparency it is incumbent on the Parliament to be vigilant as regards the other side of the transparency coin: the protection of personal data of third country nationals.	Asylum
8	During the five year transitional period when the Commission and the Member States share the right of initiative it is critical that the Parliament is provided with all drafts of any proposals tabled by the Member States as soon as they are so tabled.	Asylum

Long Term Recommendations:

No.	Proposal	Subject
1	The Parliament should be slow to accept that state security measures necessarily contribute to the freedom of persons in need of international protection to flee persecution.	Asylum
2	The abolition of intra-Union border controls on persons requires harmonisation, of rules on asylum policy, so that the transfer of asylum competence to the Union level is subject to the highest level of human rights obligations which applied to the area at national level.	Asylum
3	Within the EU's state territory, a consistent application and coherent interpretation of the human rights duties in respect of asylum seekers must apply.	Asylum
4	In implementing the new competence in Title IV the principle of individual rights should be respected. The difference between inter-governmental cooperation and binding Community law must also be respected. The rights guaranteed to asylum seekers must be in keeping with the spirit and the letter of the Member States' international obligations.	Asylum
5	Temporary protection is becoming a slow way to say yes - in an honest Union, people in need of protection deserve a quick yes so they can plan their lives in security and dignity.	Asylum
6	The European Parliament should exercise its powers with specific regard to the objective of proper implementation of the international human rights duties of the Member States.	Asylum

7	In the context of enlargement of the Union, the Parliament should consider very carefully the record of applicant states' treatment of asylum seekers and indeed whether they are ones from which refugees continue to flee.	Asylum
8	The Parliament accepts that high human rights standards are part of the European heritage and that all those resident in the Union are entitled to enjoy such high standards.	Asylum

Chapter 3

CONTROL OF THE CROSSING OF EXTERNAL BORDERS

(a) Definition: the inter-relationship between the crossing of internal borders and that of external borders has bedevilled the Community and the Union since the Single European Act established the objective of a border-control free internal market. From the inception of a border control free internal market the concept of the abolition of intra-Member State border controls has been linked to that of external border controls. The argument of the Member States has been that if border controls on persons moving between the Member States are to be abolished then there needs to be harmonisation of the border controls on persons entering the territory of the Union from outside. It is by no means self-evident that this linkage is in fact correct. It pre-supposes that border controls on persons are the most important way in which a state controls access to the territory and residence on it. It further pre-supposes that commonality of external border controls are necessary to compensate for the loss of internal border controls. In the three border control free areas within the European Union: the Benelux, the Nordic Union and the Common Travel Area, no such formal linkage of external border controls accompanied or followed the abolition of internal border controls. Indeed the external border control checks within each of these areas remained within national sovereignty of each state participating.

The linkage of external border controls with internal border controls rapidly became characterised by the terminology of compensatory checks and flanking measures. The construct used and increasingly accepted was that the abolition of intra-Member State border controls created a security deficit which needed to be remedied by increasingly strict and consistently applied checks on persons at the crossing of external borders. Therefore in developing the discussion on intra/extra border controls, movement of persons has become linked to security risks. This approach has now permeated even the conception of an area of freedom, security and justice as defined in the action plan of the Commission and the Council on how best to implement the new title.

Four initial problems of definition arise, each responding to a different aspect of the scope of crossing external borders. First, and perhaps the easiest, is the definition of the territorial scope of external borders. The immediate image is one of the outer line around the territory of the Member States to which must then be added the international airports, train stations etc. However, the matter has not proved so simple. The status of Gibraltar for instance remains disputed: is it an internal or external border and of which states? This discussion has held up indefinitely the signing of the Draft Convention on External Borders.

Further, the question of what a control is and where it takes place has to do with the territorial scope of the external borders. In the context of the Schengen Implementing Convention and its subsidiary legislation, checks take place, for instance within a 20km zone inside the formal borders of a number of the Schengen states by police and border guards on a random basis. Such checks must clearly not constitute a form of external border control insofar as they relate to persons who have crossed an external border irregularly.

A further question arises as regards the detection of person who have arrived illegally in a Member State. Where such a person has never gone through a check at the new external border, is their detection, for instance at the offices of a Member State's public assistance authority a first external control, an internal control or an investigation unrelated to borders? As legislation is defined within the new Title of the EC Treaty, the European Parliament will wish to examine very carefully how external borders are being defined and whether that definition adopted the correct balance between the discriminatory treatment of aliens and the right of a state to regulate the admission of non-nationals is consistent with the personal liberties of the individual.

More than one Member State has sought to define third country nationals as still at the external frontier awaiting a control when those persons have been present on the territory of the Member State for not inconsiderable periods of time. France, for instance, was condemned by the European Court of Human Rights for seeking to maintain that asylum seekers within French territory but held in the "international zone" were not within French territory for the purposes of the application of the European Convention on Human Rights because the consequence was indefinite detention¹⁰.

The UK was similarly unsuccessful in seeking to persuade the European Court of Human Rights that a man who had been present in the UK for more than five years, though he had never been formally admitted to the UK in accordance with an external border control was not within the UK. The European Court of Human Rights held that a person in those circumstances was in reality within the country and the formal immigration status relating to the control of the crossing of the external frontier was irrelevant in the light of the actual reality¹¹. In drafting legislation regarding the control of the crossing of external borders the European Community should be careful that it does not offend against the reality test of the European Court of Human Rights.

¹⁰ *Amuur* [1996] 22 EHRR 533.

¹¹ *D* [1998] EHRR.

One final issue in respect of the territorial scope of the external border also relates to where that border is in reality for persons seeking to cross it. For all of those persons who are nationals of countries on the common visa list in effect the main "border" control takes place at the point where they apply for the visa. It is at that point at which an investigation is undertaken into their eligibility for admission to the territory of the Member State. Under the rules of the Schengen common visa which will now apply to the common visa under new Title IV EC, once obtained that visa is valid for admission to any Member State and across the external border in any part of the European Union (leaving aside those Member States which have opted out, Denmark¹², Ireland and the UK). As the issue of a visa gives rise to a presumption in favour of crossing an external border, in effect the assessment and decision on whether the person should be allowed to cross the external border is made in the individual's state of origin at a consular post.

For this reason, the crossing of external borders is, in fact, inextricably linked with the issuing of visas and the conditions which apply. The European Parliament will undoubtedly wish to watch closely this aspect of border controls. We will return to this later in this chapter.

The second and less clear definitional question is the personal scope: controlling whom? Nationals of the Member States who are crossing external borders into a Member State other than that of their nationality in exercise of their rights of free movement under the EC Treaty are entitled to enter in accordance with those provisions of the Treaty. Therefore the controls applicable to them must observe a different set of rules than those which apply to third country nationals. Under various agreements between the Community and third countries, nationals of those countries may, in certain circumstances and in pursuit of certain aims have rights of admission or readmission. First under the Community's Agreement with Norway, Iceland and Liechtenstein, nationals of those countries enjoy full free movement with citizens of the Union. Secondly, under the Europe Agreements, nationals of the Central and Eastern European countries who are seeking entry to pursue self-employment have a right of admission for this purpose. Turkish workers who are protected under Decision 1/80 of the EEC Turkey Association Council would have a right of readmission to a Member State after a short period abroad subject to certain conditions. Their family members also enjoy a right to return to the host Member State after an absence abroad¹³. All third country nationals protected by agreements between their state and the Community must be subject to rules on the crossing on external borders which are consistent with their rights.

¹² Denmark was participating in Schengen but has an opt out Protocol for the whole EC title.

¹³ *Kadiman* [1997] ECR I - 2133.

Another example to be found is in international law which requires special arrangements to apply to the crossing of external borders by persons in need of international protection, to give effect to the duty not to return such persons. Where the border policy of the Member States puts in place arrangements which prevent asylum seekers from reaching the external frontier of the Union in order to seek protection a question of compliance arises. For example, one of the ways in which asylum seekers are so prevented is by the introduction of mandatory visa requirements for the state of origin of asylum seekers (asylum sending states) coupled with sanctions against carriers for transporting people to the external frontier who do not have the required visa and other documentation. This means that potential asylum seekers are unable to leave their country of origin, at least not to come to the European Union, as they lack the necessary documents to board a form of transport. Already questions have been raised about the compatibility of this system with Article 12 ICCRR, the right to leave any country.¹⁴ However, if they go to another state first and seek to come to the European Union from that second state they risk being returned to the first host state on the basis that they ought to have applied for asylum there rather than continue on to a Member State.

The new competence which the Amsterdam Treaty inserts into the EC Treaty on the crossing of external borders does not provide any guidance about these competing and overlapping aspects of the definition of external border crossing. When considering the implementation of legislation on the crossing of external borders the Parliament may wish to press for a wide and expansive definition of border, person, control and purpose which will give maximum democratic control over the field.

(b) Purpose of inclusion of the crossing of external borders in the constitutional framework of the Union:

The need for Community regulation of the crossing of external borders arises directly from the Member States' response to the decision to define the internal market, in the Single European Act of 1986, as an area without internal controls on the movement of persons. It was argued that in order for the Member States to agree to dismantle intra-Union border controls they needed to be assured that the same rules applied to all of them regarding the crossing of external borders.

¹⁴ See Professor Scheinen, Turku, Finland, 15.10.99.

We have already raised questions about the linkage of abolition of internal border controls with the harmonisation of external border controls. In particular, the framing of the debate in terms of a security deficit at external borders created by the abolition of internal border controls has led to a mixing of immigration issues with policing issues. To some extent a security argument has been raised which is justified on the basis of the abolition of intra-Member State border controls but which provides a foundation for much more extreme external border controls and related measures than would otherwise have been easily agreed in a democratic society.

A half way house on the crossing of external borders to achieve the dismantling of internal borders was achieved by the Member States parties to the Schengen Convention 1985 and the Schengen Implementing Agreement 1990. Provision was made like that now included in the EC Treaty on the crossing of external borders and implemented through decisions of the Schengen Executive Committee. For those outside the Schengen area, discussion began as early as 1986 on the question of crossing of external borders and a draft proposal for a treaty on the issue was published by the UK's House of Lords Committee of the European Communities in 1990. Immediately after entry into force of the Maastricht Treaty the Commission re-presented an amended version of the proposed Convention on the crossing of external frontiers of the Member States of the European Communities. It was never adopted. The formal reason given was a dispute between the UK and Spain regarding the status of Gibraltar. The content of the draft convention as regards external border controls mirrored the relevant provisions of the Schengen Implementing Agreement.

It is at this point that the history of the internal market became particularly complicated. Some Member States in the form of the Schengen states moved rapidly ahead on the agreement of detailed provisions on the crossing of external frontiers. Other Member States, finally reduced to two: Ireland and the UK, remained outside the Schengen system. Within the Third Pillar TEU they pressed for progress on various aspects flanking the crossing of external frontiers. This progress was specifically in relation to security related measures. Therefore in these two Member States all the designated compensatory measures which are restrictive of civil liberties were applied without the promised compensation for the citizen and resident: the abolition of intra-Member State border controls.

However we would point out here that on the control of internal borders, legal and physical reality have been out of step. Before the conclusion of the Schengen Agreement many intra-Member State border checks particularly at land borders had been abolished. After the signing of the first Schengen Agreement some Schengen Members stepped up border checks, and declared that they would only remove them if "compensating" or flanking measures were taken to expand police and border guard powers at the external frontier and within the states.

One substantial problem of the Schengen experiment was that it took place intergovernmentally without effective Parliamentary scrutiny in any Member State. Even though the areas covered would have substantial impact on civil liberties in Europe, as the discussions and form of agreement were negotiations towards settlement and administration of an international agreement because of its connection with state interests, state prerogative competed with democratic accountability in more than one Schengen state. The principle that the negotiation of international agreements is necessarily shrouded in a secrecy unacceptable for national legislation applied to the Schengen Agreement and Convention. This was even though the subject matter was identical to that normally regulated by national legislation and intended to operate as national legislation.

The Amsterdam Treaty amendments to the EC Treaty, are intended to regularise this anomalous situation. The intrinsic relationship perceived by the Member States between the abolition of intra-Union border controls of persons and the crossing of external borders is made explicit. Two strands are drawn together: powers are granted to the Community under the EC Treaty regarding the crossing of external borders and through the Schengen Protocol, the defined *acquis* of the Schengen Agreement, Implementing Convention and Executive Committee decisions are transformed into parts of Union law.

The Schengen *acquis* includes detailed rules on the crossing of external frontiers. While powers are granted to the Community regarding the crossing of external frontiers, the contents of those powers have already been determined by the Schengen *acquis*. After the Amsterdam Treaty entered into force on 1 May only those provisions which remained un-assigned automatically fell into the Third Pillar in accordance with the Schengen Protocol.

The constitutional framework of the Union is being rationalised as regards intra extra Union border controls. Both sides of the coin are now being included in the EC Treaty. However, irrationality is on the horizon. Because the starting point of the Schengen experiment was the abolition of intra-party border controls, the flanking measures cover a wide variety of areas not simply the crossing of external frontiers. For instance, drugs trafficking and police co-operation are included in various parts of the Schengen *acquis*. The correct legal basis for many of these aspects of the Schengen *acquis* is properly in what continues to be the Third Pillar TEU.

Under the declaration to the Amsterdam Treaty on Schengen, it is clear that there is to be no relaxation of the security related rules contained in the Schengen *acquis*. The status of declarations in Community law is most uncertain, as to whether they are merely interpretative guides or in some way binding. In any event, the Parliament will wish to consider carefully what meaning "security" should have in this context.

The Schengen Protocol presents both a challenge and an opportunity for the European Parliament. Under its provisions it is unclear that the Parliament would have any say in the quasi-automatic transposition of the Schengen acquis into Community law where the legal base was found to be in the EC Treaty. However, those parts of the Schengen acquis deposited in the Third Pillar should be subject to the provisions of the Treaty regarding the adoption of implementing measures for the new Title IV: consultation.

Further, the Parliament may wish to look closely at the allocated base for each part of the Schengen acquis to determine whether it is in fact in agreement that the legal basis is correct. In order, however, to get a grip on the Schengen acquis wherever it is found, the first step will be a document which is in a comprehensible and user friendly form and sets out the acquis and its contents. Only after such a document has been published in the Official Journal will it be possible properly to assess the Schengen acquis and the effect of the Schengen Protocol. The second step will be to determine its legal value which step must go hand in hand with determination of the correct legal base.

(c) What are the new powers: the new Treaty powers are to adopt measures on the crossing of external borders of the Member States which establish:

- standard procedures to be followed by the Member States in carrying out checks on persons at such borders: Article 62(2)(a) EC; this means that the Community will now be responsible for adopting a measure which spells out uniform procedures for persons at the external borders. This is in effect the rules on access to the territory of the Union; these rules should be drafted or adapted, in the event that a Schengen provision is deemed to cover this, to give effect to the Community's best interests in promoting movement of persons for cultural, educational and recreational activities;
- rules on visas for intended stays of no more than three months which include the list of third countries whose nationals must be in possession of visas when crossing the external borders and those nationals who are exempt from that requirement: Article 62(2)(b) (I) EC¹⁵.

¹⁵ It is important to note here that one demand of the European Parliament as regards this visa list, that it includes both a "white" list (countries whose nationals are exempt) as well as "black" list (countries whose nationals must have a visa) has been achieved through this Treaty amendment.

- the procedures and conditions for issuing visas by Member States: Article 62(2)(b)(ii) EC; this will be very important as it is here that common rules which are the background to access to the territory of the Union will be found; as the primary immigration control is moved by the Schengen arrangements to the country of origin specifically for those countries which are on the common visa list, the conditions for obtaining a visa become determinative of whether an individual will have lawful access to the territory. The Parliament may well wish to consider what degree of transparency should apply for persons seeking visas and what remedies, in event of refusal, they should have. The Parliament has already passed a resolution demanding full and consistent appeal rights in respect of refusal of a visa. It will now have an opportunity to press again and within a more favourable framework for these rights;
- a uniform visa format (subject of an existing Regulation) Article 62(2)(b)(iii) EC; the importance of a uniform format visa is that it defines the document to which certain rights attach;
- rules on a uniform visa: Article 62(2)(b)(iv) EC: these are the rules which are critical to the value and meaning of a common format visa; for instance does the common format visa does not give a right of entry to the territory from wherever the individual starts or seeks to enter the territory? If not its value is highly circumscribed.

(d) What has been done? The most important aspects of what has already been done has been so undertaken in the context of the Schengen Agreement and Implementing Convention. The history of the Schengen acquis under (a) has been set out above. By virtue of the Schengen Protocol to the Amsterdam Treaty it has been incorporated in a less than systematic manner into the EC Treaty. As it has yet to be published in the Official Journal, it is not entirely clear what the acquis contains. While the Protocol defines the acquis as including the two agreements, it also includes "Decisions and declarations adopted by the Executive Committee established under the 1990 Implementing Convention as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers." What these delegated powers and organs are remains uncertain. On this point the Parliament will wish to remain highly vigilant. In the context of the Community, other than the draft proposal for a Convention on the crossing of external frontiers, the Community has adopted a Regulation on an uniform format for visas and a Regulation on countries whose nationals require a visa when crossing external borders which was annulled by the Court of Justice on procedural grounds at the request of the Parliament but was recently readopted.

(e) What must be done? Within five years of the entry into force of the Amsterdam Treaty the Council must adopt measures in respect of all the areas on the crossing of external borders of the Member States. Because of the highly complicated arrangement contained in the Schengen Protocol it remains unclear what will remain to be done within five years of the date of entry into force. Following the Council's agreement on the legal basis of the Schengen acquis in relation to all the aspects of the crossing of external frontiers now inserted into the EC Treaty there may remain little to be done unless the Parliament should wish to mount a challenge to the legality of the "automatic" transfer of the Schengen acquis into the EC Treaty. A challenge could be explored on the basis of the exclusion of the Parliament under the Schengen acquis allocation arrangement particularly as regards those aspects of the Schengen acquis which deal with areas already under Community control (such as visa lists) and in respect of which the Parliament is entitled to consultation before the adoption of legislation. It is also worth noting that those parts of this new competence which were already within the Community's competence under Article 100(C) EC (as was) and which were already the subject of qualified majority voting (QMV), remain subject to QMV (see below).

(f) Critical concerns of a democratic society: In 1990 the Parliament recognised in its Resolution on the Schengen Agreement¹⁶ the risk that the removal of internal border checks might be accompanied by the introduction of new administrative checks which could constitute a violation of human rights. The Parliament's concern continues to be justified and important in the light of increasing legal measures to permit checks on individuals in Schengen states. Liberty and freedom from surveillance are important concerns of democratic societies. Security here may also mean that the democratic entrenchment of these rights guarantees their security. The use of the threat of illegal migration should not be permitted to undermine liberties which European societies have fought hard to achieve and maintain. A loss of freedom from surveillance justified on grounds of the risk of illegal immigration can only fuel racism and xenophobia.

We would make one final observation, the discourse on illegal immigration should never be allowed to submerge the fact that under the Geneva Convention, asylum seekers are entitled to cross borders illegally (Articles 31, 32 and 33 Geneva Convention).

(A) transparency: as in all areas of the new Title, the Parliament's role in ensuring transparency is critical. The European Parliament must take care to protect individual liberty by restricting the collection and unjustified access to personal data held under the Schengen Information System.

¹⁶ OJ C 1990 175/170.

(B) accountability: from entry into force of the Amsterdam Treaty the provisions relating to the list of third countries whose nationals must be in possession of a visa and the uniform visa format are subject to qualified majority voting in the Council and consultation with the Parliament. The Regulation on the uniform visa format has already been adopted and therefore there is little further to be done in respect of that aspect.

Two other powers contained in the new Title, the procedures and conditions for issuing visas and the rules of a uniform visa are subject to a five year time limit for the adoption of legislation, and at the end of that five year period are subject to the procedure laid down in Article 251 EC (qualified majority voting by the Council with co-decision of the Parliament). The important content of these two measures which need to be adopted are how a third country national may obtain a visa and subject to what requirements and once he or she has got that visa, what does it entitle the person to do.

(C) international human rights obligations: the first area of international human rights obligations which is engaged here and in respect of which the European Parliament has already commented is in respect of persons fleeing persecution, torture or inhuman or degrading treatment. Under the Schengen acquis all parties are required to apply sanctions on carriers for transporting to a Schengen country persons who have not got the correct documentation. It is inevitably persons fleeing persecution and torture who are least able to obtain the correct documentation in order to come to the territory of the Union. Even if they are in possession of a passport, the rules applied as regards the acquisition of a Schengen visa, including requirements of resources and intentions to leave the territory within the three month permitted period, make it impossible for them to obtain that part of the requirement documentation.

The second area of concern relates to the application of visa requirements which render it impossible or virtually so for third country national family members to visit relatives within the territory of the Union. The right to protection from interference with private and family life contained in Article 8 ECHR has not been extended so far as to require states to permit the admission and residence of family members where family life could be enjoyed in some other state. However, the application of common visa rules which have the effect of preventing short visits by close family members, particularly if the relative resident within the Union is not able to travel to the third country raises the question of whether this aspect of private and family life comes within the spirit of Article 8 ECHR.

Of particular concern regarding the issue of short stay visas is the discriminatory application of the rules based on criteria and suspicions unrelated to the personal circumstances of the individual applicant. The introduction of a provision into the EC Treaty prohibiting discrimination on grounds, inter alia, of racial or ethnic origin, religion or belief (Article 13 EC) should find expression in these sensitive areas of immigration and visas. Further, in order to avoid giving an excessive degree of discretion to officials at embassies abroad the exercise of which might appear motivated by unacceptable discrimination, clear and precise provisions need to be adopted which permit the individual to know what the requirements for the issue of a visa are and how to fulfil them.

(D) Minimum standards maximum protection: because the purpose of the introduction of the common rules on crossing of external borders is to provide assurance to Member States that the persons entering the Union at one border post are the same as would be admitted at a border crossing point on their own territory, there is a strong temptation to apply rules which encapsulate the most restrictive elements of all the Member States and do not provide for any margin to a Member State to apply a more relaxed regime. This tendency should be avoided. Member States should be permitted the flexibility to continue to issue national visas on grounds which reflect their traditions and needs. However, this flexibility must be subject to the common floor of rights. In other words, Member States should be permitted to maintain or establish regimes which provide greater rights to the individual than those required by the Community measures. In no case though should a Member State be permitted to fall below the common standard.

Short Term Recommendations

No.	Proposal	Subject
9	All third country nationals protected by agreements between their state and the Community must be subject to rules on the crossing on external borders which give effect to their rights.	Borders
10	The Parliament may wish to consider the recommendation which a former member of the European Parliament, Dr van Ouirve has proposed, that MEPs should have access to centres for co-operation at internal and external borders in order to verify and satisfy themselves of the appropriateness of procedures.	Borders

11	When considering the implementation of legislation on the crossing of external borders the Parliament may wish to press for a wide and expansive definition of border, person, control and purpose which will give maximum democratic control over the field.	Borders
12	The Parliament will undoubtedly wish to scrutinise proposals for measures amending or transferring the Schengen acquis carefully as it is clear that no Parliament has done so in respect of the totality of the acquis before.	Borders
13	The Parliament may wish to look closely at the allocated base for each part of the Schengen acquis to determine whether it is in fact in agreement that the legal basis is correct.	Borders
14	A challenge could be explored on the basis of the exclusion of the Parliament under the Schengen acquis allocation arrangement particularly as regards those aspects of the Schengen acquis which deal with areas already under Community control (such as visa lists) and in respect of which the Parliament is entitled to consultation before the adoption of legislation.	Borders
15	the European Parliament must take care to protect individual liberty by restricting the collection and unnecessary access to personal data held under the Schengen Information System.	Borders
16	In order to avoid an excessive degree of discretion to officials at embassies abroad, clear and precise provisions need to be adopted which permit the individual to know what the requirements for the issue of a visa are and how to fulfil them.	Borders

Long Term Recommendations

No.	Proposal	Subject
9	As legislation is defined within the new Title of the EC Treaty, the European Parliament will wish to examine very carefully how external borders are being defined and whether that definition is consistent with the personal liberties of the individual.	Borders
10	In drafting legislation regarding the control of the crossing of external borders the European Community should be careful that it does not offend against the reality test of the European Court of Human Rights.	Borders
11	The use of the threat of illegal migration should not be permitted to overwhelm liberties which European societies have fought hard to achieve and maintain. A loss of freedom from surveillance justified on grounds of the risk of illegal immigration can only fuel racism and xenophobia.	Borders
12	The discourse on illegal immigration should never be allowed to submerge the fact that under the Geneva Convention, asylum seekers are entitled to cross borders illegally (Articles 32 and 33 Geneva Convention).	Borders
13	Member States should be permitted the flexibility to continue to issue national visas on grounds which reflect their traditions and needs. However, this flexibility must be subject to the common floor of rights.	Borders

Chapter 4

IMMIGRATION POLICY REGARDING NATIONALS OF THIRD COUNTRIES

(a Definition: who is a third country national for the purposes of Title IV EC?

A variety of different regimes apply to third country nationals resident within the territory of the Member States and in respect of those coming to reside. There is a need to look carefully at the different categories of third country nationals whose situation may be regulated by Community law and to determine the source of that regulation in Community law. For instance, third country national family members of migrant Community nationals, in principle, are not subject to the new Title IV as their rights derive from the implementing measures of Articles 39-49 EC. Similarly special provisions apply to EEA nationals, Turkish workers and their family members and nationals of the CEECs who are self employed. Different groups of third country nationals enjoy different levels of protection under Community law in accordance with provisions of the Treaty and agreements with third countries which are outside the ambit of the new Title.

No provision in the new Title identifies a hierarchy of applicable rights: for instance its relationship with Article 39 EC regarding migrant Community workers whose rights include derived rights for their third country national family members. We take the legal view that the rights contained in the Treaty and third country agreements which are designed to benefit individuals continue to regulate the position of those persons who come within their personal scope. To the extent that their position is not regulated by such other provision of the Treaty or a third country agreement then their position may be regulated by the new Title. However, we would also take the view that should greater rights be granted under the new Title than those available to third country nationals under other provisions of the Treaty or third country agreements, individuals should be entitled to rely on the highest level of rights available.

For example, a Turkish worker who has worked lawfully in a Member State for one year for one employer will usually be able to rely on Article 6(1) of Decision 1/80 of the EEC Turkey Association Council to demand an extension of his or her work and residence permits provided that the employer still has a job open for him or her and certifies that it wishes to continue to employ the person. However, should the individual be entitled, under a measure adopted under the new Title, to greater rights than the individual should have an accumulation of rights: an entitlement to rely on either or both at the same time. This question of different rights in the same field of entry, stay, residence, employment and protection from expulsion is complicated by the difference in remedies which applies under the new Title. For instance, Article 68 of the Title only requires courts against whose decision there is no judicial remedy under national law to request a ruling from the European Court of Justice on the interpretation of the Title's provisions.

However, under all other provisions of Community law and third country agreements, national courts at any level are entitled to request rulings and courts against whose decisions there is no judicial remedy are required to do so if such interpretation is necessary to enable it to give judgment (Article 234 EC). Therefore it is clearly possible that an individual who disputes the decision of a national administration on more than one ground in Community law deriving from different parts of the Treaty may cause confusion in the national courts on whether and which courts may ask questions of the Luxembourg Court.

A survey of the different groups of third country nationals with specific admission, stay, residence and economic activity rights in Community law distinct from the new Title indicates the following groups:-

(1 family members of Community nationals: including spouses, children under 21 and over 21 when dependent on the family, all dependent relatives in the ascending and descending line of the worker and his or her spouse; there is also a duty on the state to facilitate admission of a wider group of family members who are either dependent on the family or lived under the same roof in the country whence they came;¹⁷

¹⁷ Article 10 Regulation 1612/68. The Commission has proposed amendment of this Regulation which will widen the group of family members entitled to admission, stay, residence and employment or self employment.

(2) employees of a Community based enterprise providing services in another Member State; this is the result of the interpretation of Article 49 EC by the Court of Justice culminating in the decision of *Vander Elst* [1994] ECR I-3803. This is also the subject of a recent proposal for a Directive from the Commission;¹⁸ third country nationals established in one Member State and providing services in another: a power to adopt a measure giving effect to this right was included in Article 49 EC as a result of the Single European Act but a proposal from the Commission for an implementing directive was only published in January this year;

(3) EEA nationals other than citizens of the Union exercising free movement rights: this applies to nationals of Iceland, Liechtenstein and Norway who although they remain third country nationals for the purposes of Community law are entitled to rights of entry, stay, residence and employment which are co-extensive with those of Community nationals by virtue of the agreement between their states and the EC; similarly the Swiss will benefit under the Agreement signed with that state in February 1999;

(4) Turkish workers and their family members protected by Decision 1/80 or other provisions of the EEC Turkey Association Agreement; the rights which have been clarified on a number of occasions by the Court of Justice include a right of continued employment and residence, rights of residence and employment for family members who have been admitted to the territory under national law, and protection against expulsion; as the Court has stressed on more than one occasion, first admission to the territory of the Member States remains a matter for national law (or now to be regulated by the new Title);

(5) Maghreb workers to the extent they are protected under the EC agreements with their states (Algeria, Morocco and Tunisia); these rights are limited to non-discrimination in working conditions and social security but the Court of Justice has recently held that the equal treatment in working conditions right can have consequences for the residence right where an existing right of employment continues (*El Yassini* [1999] ECR I-000);

(6) African, Caribbean and Pacific (ACP) Agreement States' nationals in so far as they are protected under the ACP Agreement; again the rights here are limited to non-discrimination in working conditions and social security and are contained in an Annex to the Agreement; the effect of the Annex has yet to be clarified by the Court of Justice;

¹⁸ COM(1999) 3 Final of 27.1.99.

(7 CEEC nationals who are self employed or workers¹⁹ protected under the Europe Agreements; these are the most recent rights to be created for third country nationals and include a right of entry, stay, residence and either self employment or employment depending on the category of the Agreement relied upon. They apply to nationals of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

In addition to these rights, third country nationals may fall in and out of the competence of Title IV. For instance third country national family members after majority or dissolution of a marriage may fall outside the protection of Regulation 1612/68. They may therefore need to look elsewhere for a right to stay. CEEC nationals admitted for self employment who take employment can no longer rely on their establishment right in the agreement between their state and the Community. The regulation of third country nationals will be highly complicated as a result of the piece meal development of Community law in the field, unless there is an upwards harmonisation to the highest standard for all the situation will continue. However, the Parliament may feel that it would premature to advocate a full upwards harmonisation which would include - for instance, the extension of a right to admission to any Member State for the purpose of self employment for all third country nationals.

Powers: What were the Pre-Amsterdam Third Pillar powers and what are the New Title IV EC powers?

Article K1 of the TEU before amendment by the Amsterdam Treaty provided that among the matters of common interest within the intergovernmental pillar were immigration policy and policy regarding nationals of third countries including conditions of entry and movement by nationals of third countries; conditions of residence including family reunion and access to employment and combatting unauthorised immigration, residence and work by nationals of third countries on the territory of the Member States.

On conditions of entry and movement by nationals of third countries for short stays, little was achieved in any part of the Union structure. This area was the subject of a proposal for a Directive by the Commission in July 1995 as regards movement between the Member States of third country nationals. It has not progressed. Conditions of entry across the external borders were the subject of the draft convention which was never signed. It is also covered in the Schengen acquis which agreement was of course, outside the Union structures. See the previous chapter on external borders for further analysis of this aspect of the competence. As regards admission for longer stays, residence and family reunion, Steve Peers has recently published in the Common Market Law Review a detailed article on the history of the Third Pillar measures covering these subjects which article we have included at Annex [].

¹⁹ Rights also apply to the key personnel of companies based in most CIS states under the terms of their agreements with the EC.

The new powers of the Community in Title IV EC are to adopt measures on immigration policy regarding:

- conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion: Article 63(3)(a) EC (the subject of a number of Third Pillar measures and the Commission's proposal for a convention on admission of third country nationals²⁰);
- illegal immigration and illegal residence, including repatriation of illegal residents: Article 63(3)(b) EC (the subject matter of numerous Third Pillar activities);
- And measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States: Article 63(4) EC (this is not the subject of any other measures but is included in the Commission's proposal for a convention on admission of third country nationals). There may be some overlap with the power contained in Article 137(3) indent four, for the Community to adopt legislation in the field of the (previous) Social Chapter on "conditions of employment for third country nationals legally residing in the Community territory". As the Court of Justice has clarified in the case of *El Yassini*, conditions of employment have consequences for conditions of residence.

The division of powers into those relating to general rights of admission pursuant to *immigration policy* and those relating to the treatment of third country nationals already resident in the territory of the Union which *define the rights and conditions* of their free movement within the Union is important. Measures on policy are not necessarily ones which have direct effect and regulate the position of third country nationals vis-a-vis the Member States.

This "policy" power could be interpreted as doing no more than setting a framework for national measures to make sure that the Member States are "pulling in the same direction". Such an interpretation would have various shortcomings. In the interests of greater integration it may well be argued that unless there are real Community rules on admission for the purpose of primary immigration which regulate the position of individuals, the Community rules on rights and conditions for movement of third country nationals within the territory of the Union cannot be effective. Unless there is agreement on who gets rights of residence and admission in one Member State it may be difficult to agree who gets to move throughout the territory of the Union, to reside and work.

²⁰ OJ C 337, 7.11.97.

Similarly the scope of immigration policy as regards illegal immigration and illegal residence, including repatriation of illegal residents is less than clear. Questions have been raised informally whether this provision actually covers the issue of expulsion at all. We will return to this question below when considering the purpose of inclusion of a power in respect of illegal immigration and residence in the context of the Treaty.

The power in respect of third country nationals legally resident in a Member State is slightly fuller. It is a power to adopt measures to define rights, therefore is addressing the relationship of third country nationals who reside in the Union with all of the Member States. It is unfortunate that it does not include express reference to the right of legally resident third country nationals in one Member State to exercise economic activities in another Member State. Such a provision regarding employment was deleted from an early draft of what became the Amsterdam Treaty.²¹ However, there is a sustainable argument that the conditions of entry and residence must include a power to regulate access to employed and self employed activities.

(b Purpose of inclusion in the constitutional framework of the Union:

As we have stressed elsewhere, the purpose of the new powers is critical to understanding how they should be exercised. As the objectives of the Title are somewhat Delphic, further assistance from Community law in general and its position in an international framework may be necessary. The provisions on third country nationals are aimed at the fulfilment of the objective of establishment of an area of freedom, security and justice. They are not aimed specifically at the abolition of intra-Union border controls. We have discussed above some of the concerns which arise as regards the interpretation of an area of freedom, security and justice. These should be borne in mind here as well. We will look at each of the powers in turn and consider how these fit into a wider framework of the objectives of the Community.

Conditions of entry and residence: these words in the context of measures on immigration policy should be interpreted as including the Community's objectives in the field of the common commercial policy. Care must be taken that measures adopted by the Community in one field do not nullify or impair the effectiveness of measures and policies adopted elsewhere. The Community's commitment under the World Trade Organisation Agreement to liberalisation of trade in services (the General Agreement on Trade in Services) includes a framework for the movement of natural persons for the purpose of service provision. Measures taken on entry and residence should facilitate this policy. Already, the Commission is taking care in proposals relating to movement of third country national

²¹ See the Dublin II Draft of December 1995.

service providers to give effect to the GATS commitments. Reference is appearing now in the third country agreements to which the Community is a party which have been entered into following the conclusion of the WTO Agreement.

In the context of the GATS, provision of services includes the establishment of a permanent presence - the Community law equivalent is "establishment" in Article 43 EC - and therefore must be understood in a larger sense than that of Article 49 EC alone. The Community's common immigration policy on entry and residence should aim to give the widest effect to the Community and Member States' commitments under GATS and their stated policy to enlarge the liberalisation of trade in services.

Standards and procedures for the issue of long term visas and residence permits: this is a very concrete power which requires more than mere "co-ordination" through a loose interpretation of immigration policy. Not least for this reason the term "immigration policy" may need to be interpreted as giving rise to a power to adopt measures which are substantive, binding and sufficiently clear, precise and unconditional as regards the obligations to give rise to rights to individuals. The creation of common standards and procedures is necessary to give effect to rights for individuals which are consistent throughout the Community. Unless the processing of applications meets common minimum procedural criteria of care, impartiality and legitimacy no matter which embassy or authority of which Member State is considering them, the common Community rules will not in fact be common. Similarly, common rights of appeal need to apply against negative decisions.

Family reunion: Community law has long recognised the importance of family reunion to the dignity of migrant workers and as an indispensable element to their successful integration into the host community.²² Any transfer of power to adopt common rules on third country nationals, therefore correctly should include this power to determine the standard for family reunion. Regard must be had in the exercise of this power to Article 13 EC, the prohibition on discrimination, *inter alia*, on the basis of racial or ethnic origin. Should measures adopted here have a disproportionate and disadvantageous effect on Community residents on the basis of their ethnic origin a question will arise as to their compatibility with this new non-discrimination power. The rules adopted on family reunion should have the object of diminishing the difference between the right to family reunion of migrant nationals of the Member States and migrant nationals of third countries.

²² See preamble to Regulation 1612/68.

Illegal immigration and illegal residence, including repatriation of illegal residents: first it needs to be emphasised that the existence of illegal immigration and residence are the result of restrictive immigration laws and practices. Substantial and persistent numbers of persons in irregular positions in the Member States may be seen as evidence of the inappropriateness of the laws and practices of the Member States. The logic of the EU immigration policy is that either people should be treated in such a way that: (1) they never become illegal; or (2) if this happens inadvertently they are regularised; or (3) they should be expelled. To this extent, then illegal immigration and residence are the test of whether immigration policy as expressed in law and practice is appropriate. Where illegal immigration and residence are on the increase a reassessment of policy and its manifestations needs to be undertaken. We would add here that excuses for the increase in illegal immigration and residence as the result of the activities of traffickers need to be substantiated. If the Member States allege an increase in organised trafficking activities this should be reflected in an increase in convictions of traffickers. In the absence of such evidence the justification should only be accepted with the greatest caution.

All the Member States are parties to the European Convention on Human Rights. The position of the ECHR in Community law has been strengthened further by the Amsterdam Treaty amendments. Article 8 ECHR, the right to family and private life, has consistently been held by the European Court of Human Rights to include a right to long resident foreigners not to be expelled. The adoption of a Community policy on expulsion must give full effect to the Member States' obligations under Article 8 ECHR as interpreted by the European Court of Human Rights. Indeed, the object of the policy should be to implement in a consistent and uniform manner the right to protection from expulsion expressed in Article 8 ECHR. The purpose of this power should be understood in this context.

Rights of legally resident third country nationals to reside in other Member States: the purpose of including this power in the EC Treaty should be understood as necessary to reduce differential rights between migrant nationals of the Member States and third country nationals who in many cases may have been born and lived all their lives within the Union. As the Member States are not willing to agree to harmonise their nationality laws so as to create a uniform manner in which third country nationals may become citizens of the Union, it is then incumbent to agree to extend the benefits of Community free movement rights to long resident third country nationals as a compensatory measure to reduce discrimination between persons whose objective situation is so similar. Only by such measures can a genuinely single labour market be created.

(c) What has been done? The format of the Third Pillar adopted measures in these fields does not lend itself at all to a simple transformation into Community law. New measures need to be prepared and adopted in forms which genuinely give rights to individuals and enable them to have sufficient clarity to plan their lives. The Commission's proposal for a convention on rules for the admission of third country nationals deserves serious attention as it is the first indication of the thinking in the Commission as to how this part of the new powers will be exercised.

(d) What must be done? Only measures in respect of illegal immigration, illegal residence and repatriation of illegal residents must be taken within the five year time deadline from entry into force of the Amsterdam Treaty. The other two areas are not subject to time limits. The Commission and Council's joint work programme of December 1998 promised early action in respect of these persons even though this is not required under the Amsterdam Treaty amendments. In view of the Parliament's long standing concern regarding the situation of legally resident third country nationals within the Union it may wish to ensure that the Council and Commission keep to their promise set out in the action plan.

In our view the important features for an immigration policy under this heading are:-

Regarding visas:

- there should be a presumption in favour of the issue of short term visit visas which may be displaced on the basis of contrary evidence based on the individual's personal behaviour by reference to public policy, public security or public health or that there is real evidence that he or she would seek to stay illegally on the territory or engage in prohibited economic activities; any refusal of a short stay visa should be provided in writing with reasons and subject to an appeal right or at the very least a review consistent with Directive 64/221;
- where refusal of a visa is based on the person's details appearing on the successor of the Schengen Information System, the individual should be entitled to a written statement to this effect with the name and address of the authority in the Member State responsible for putting the person's details on the information system and notice of how to seek removal of those details.

Regarding long term visas and residence permits:

- measures adopted on long term visas and residence permits need to implement an area of freedom, security and justice which incorporates the objectives of other aspects of Community policy such as the liberalisation of trade in services in the GATS;

Regarding family reunion:

- measures adopted on family reunion should reduce differential treatment between migrant citizens of the Union and third country nationals resident on a long term basis in the Union and extend an effective right of family reunion to Europe's third country nationals;

Regarding illegal immigration and residence:

- measures adopted on illegal immigration and residence should first recognise that illegal immigration and residence are indicators that immigration policy is not appropriate; secondly it should give effect to Article 8 ECHR, protecting from expulsion aliens whose links of family, schooling, residence etc mean that expulsion would be an unacceptable interference with his or her right to private and family life;

Regarding legally resident third country nationals and the right to reside in any part of the Union territory:

- the object of the power to adopt measures on legally resident third country nationals should be to reduce the differential treatment of Europe's third country nationals as regards the right to reside and engage in economic activities on the same basis as nationals of the Member States.

In this section we have included in the text of the Report the critical concerns of a democratic society. To this extent the format of this section differs slightly from the two preceding ones. The rationale for this is the different nature of the subject matter which is exceedingly wide. Comprehension of the reason for the competence can only be understood for such a large area within detailed discussion of the concerns which are fundamental to democratic societies.

Short Term Recommendations

No.	Proposal	Subject
17	The rules adopted on family reunion should have the object of diminishing the difference between the right to family reunion of migrant nationals of	Immigration Policy

	the Member States and migrant nationals of third countries.	
18	There should be a presumption in favour of the issue of short term visit visas which may be displaced on the basis of contrary evidence based on the individual's personal behaviour by reference to public policy, public security or public health or that there is a real risk that he or she would seek to stay illegally on the territory or engage in prohibited economic activities; any refusal of a short stay visa should be provided in writing with reasons and subject to an appeal right or at the very least a review consistent with Directive 64/221.	Immigration Policy
19	Where refusal of a visa is based on the person's details appearing on the successor of the Schengen Information System, the individual should be entitled to a written statement to this effect with the name and address of the authority in the Member State responsible for putting the person's details on the information system and notice of how to seek removal of those details.	Immigration Policy
20	Measures adopted on long term visas and residence permits need to implement an area of freedom, security and justice which incorporates the objectives of other aspects of Community policy such as the liberalisation of trade in services in the GATS.	Immigration Policy
21	Measures adopted on family reunion should reduce differential treatment between migrant citizens of the Union and third country nationals resident on a long term basis in the Union and extend an effective right of family reunion to Europe's third country nationals.	Immigration Policy
22	Measures adopted on illegal immigration and residence should first recognise that illegal	Immigration Policy

	immigration and residence are indicators that immigration policy is not appropriate; secondly it should give effect to Article 8 ECHR, protecting from expulsion aliens whose links of family, schooling, residence etc mean that expulsion would be an unacceptable interference with his or her right to private and family life.	
23	The object of the power to adopt measures on legally resident third country nationals should be to reduce the differential treatment of Europe's third country nationals as regards the right to reside and engage in economic activities on the same basis as nationals of the Member States.	Immigration Policy

Long Term Recommendations

No.	Proposal	Subject
14	The Community's commitment under the World Trade Organisation Agreement to liberalisation of trade in services (the General Agreement on Trade in Services) includes a framework for the movement of natural persons for the purpose of service provision. Measures taken on entry and residence should facilitate this policy.	Immigration Policy
15	The Community's common immigration policy on entry and residence should aim to give the widest effect to the Community and Member States' commitments under GATS and their stated policy to enlarge the liberalisation of trade in services.	Immigration Policy
16	Unless the processing of visa applications meets common minimum procedural criteria of care, impartiality and legitimacy no matter which embassy or authority of which Member State is considering them, the common Community rules	Immigration Policy

	will not in fact be common.	
17	Substantial and persistent numbers of persons in irregular positions in the Member States may be seen as evidence of the inappropriateness of the laws and practices of the Member States.	Immigration Policy
18	The adoption of a Community policy on expulsion must give full effect to the Member States' obligations under Article 8 ECHR as interpreted by the European Court of Human Rights.	Immigration Policy
19	the purpose of including this power in the EC Treaty should be understood as necessary to reduce differential rights between migrant nationals of the Member States and third country nationals who in many cases may have been born and lived all their lives within the Union.	Immigration Policy

SCHEDULE: RECOMMENDATIONS

Short Term Recommendations

Proposal No.	Proposal	Subject
1	The Parliament should consider carefully whether differing procedural, residence, economic and social rights for persons variously categorised as asylum seekers, refugees or displaced persons are acceptable bearing in mind that the same person may fall within all three categories, the categorisation being dependent on the authorities.	Asylum
2	The Parliament will wish to consider whether measures on reception and procedural rights for asylum seekers are critical to determining the Member State responsible for considering an asylum	Asylum

	application.	
3	When considering measures which are being put forward by the Commission (or Member States within the first five years after entry into force) the European Parliament will want specifically to have regard to the purpose of the competence within the hierarchy of the new Title's provisions and ensure that it fulfills its objectives.	Asylum
4	The whole concept of determining the state responsible for considering applications for asylum must be rethought out, with resources moving, not people.	Asylum
5	It is for the European Parliament to seek to bring pressure to bear on the institutions to fulfil their duties as regards the time deadlines under the new Title and to facilitate action in this field.	Asylum
6	The Parliament must ensure that it uses its powers of consultation so that the people of Europe have access to information on the proposals as soon as they are tabled.	Asylum
7	In exercising its powers to ensure transparency it is incumbent on the Parliament to be vigilant as regards the other side of the transparency coin: the protection of personal data of third country nationals.	Asylum
8	During the five year transitional period when the Commission and the Member States share the right of initiative it is critical that the Parliament is provided with all drafts of any proposals tabled by the Member States as soon as they are so tabled.	Asylum
9	All third country nationals protected by agreements between their state and the Community must be subject to rules on the crossing on external borders which are consistent with their rights.	Borders

10	The Parliament may wish to consider the recommendation which a former member of the European Parliament, Dr van Ouirive has proposed, that MEPs should have access to centres for co-operation at internal and external borders in order to verify and satisfy themselves of the appropriateness of procedures.	Borders
11	When considering the implementation of legislation on the crossing of external borders the Parliament may wish to press for a wide and expansive definition of border, person, control and purpose which will give maximum democratic control over the field.	Borders
12	The Parliament will undoubtedly wish to scrutinise proposals for measures amending or transferring the Schengen acquis carefully as it is clear that no Parliament has done so in respect of the totality of the acquis before.	Borders
13	The Parliament may wish to look closely at the allocated base for each part of the Schengen acquis to determine whether it is in fact in agreement that the legal basis is correct.	Borders
14	A challenge could be explored on the basis of the exclusion of the Parliament under the Schengen acquis allocation arrangement particularly as regards those aspects of the Schengen acquis which deal with areas already under Community control (such as visa lists) and in respect of which the Parliament is entitled to consultation before the adoption of legislation.	Borders
15	the European Parliament must take care to protect individual liberty by restricting the collection and unnecessary access to personal data held under the Schengen Information System.	Borders
16	In order to avoid an excessive degree of discretion	Borders

	to officials at embassies abroad, clear and precise provisions need to be adopted which permit the individual to know what the requirements for the issue of a visa are and how to fulfil them.	
17	The rules adopted on family reunion should have the object of diminishing the difference between the right to family reunion of migrant nationals of the Member States and migrant nationals of third countries.	Immigration Policy
18	There should be a presumption in favour of the issue of short term visit visas which may be displaced on the basis of contrary evidence based on the individual's personal behaviour by reference to public policy, public security or public health or that there is a real risk that he or she would seek to stay illegally on the territory or engage in prohibited economic activities; any refusal of a short stay visa should be provided in writing with reasons and subject to an appeal right or at the very least a review consistent with Directive 64/221.	Immigration Policy
19	Where refusal of a visa is based on the person's details appearing on the successor of the Schengen Information System, the individual should be entitled to a written statement to this effect with the name and address of the authority in the Member State responsible for putting the person's details on the information system and notice of how to seek removal of those details.	Immigration Policy
20	Measures adopted on long term visas and residence permits need to implement an area of freedom, security and justice which incorporates the objectives of other aspects of Community policy such as the liberalisation of trade in services in the GATS.	Immigration Policy
21	Measures adopted on family reunion should reduce	Immigration Policy

	differential treatment between migrant citizens of the Union and third country nationals resident on a long term basis in the Union and extend an effective right of family reunion to Europe's third country nationals.	
22	Measures adopted on illegal immigration and residence should first recognise that illegal immigration and residence are indicators that immigration policy is not appropriate; secondly it should give effect to Article 8 ECHR, protecting from expulsion aliens whose links of family, schooling, residence etc mean that expulsion would be an unacceptable interference with his or her right to private and family life.	Immigration Policy
23	The object of the power to adopt measures on legally resident third country nationals should be to reduce the differential treatment of Europe's third country nationals as regards the right to reside and engage in economic activities on the same basis as nationals of the Member States.	Immigration Policy

Long Term Recommendations

No.	Proposal	Subject
1	The Parliament should be slow to accept that state security measures necessarily contribute to the freedom of persons in need of international protection to flee persecution.	Asylum
2	The abolition of intra-Union border controls on persons requires harmonisation, of rules on asylum policy, so that the transfer of asylum competence to the Union level is subject to the highest level of human rights obligations which applied to the area at national level.	Asylum
3	Within the EU's state territory, a consistent	Asylum

	application and coherent interpretation of the human rights duties in respect of asylum seekers must apply.	
4	In implementing the new competence in Title IV the principle of individual rights should be respected. The difference between inter-governmental cooperation and binding Community law must also be respected. The rights guaranteed to asylum seekers must be in keeping with the spirit and the letter of the Member States' international obligations.	Asylum
5	Temporary protection is becoming a slow way to say yes - in an honest Union, people in need of protection deserve a quick yes so they can plan their lives in security and dignity.	Asylum
6	The European Parliament may wish to exercise its powers with specific regard to the objective of proper implementation of the international human rights duties of the Member States.	Asylum
7	In the context of enlargement of the Union, the Parliament should consider very carefully the record of applicant states' treatment of asylum seekers and indeed whether they are ones from which refugees continue to flee.	Asylum
8	The Parliament accepts that high human rights standards are part of the European heritage and that all those resident in the Union are entitled to enjoy such high standards.	Asylum
9	As legislation is defined within the new Title of the EC Treaty, the European Parliament will wish to examine very carefully how external borders are being defined and whether that definition is consistent with the personal liberties of the individual.	Borders

10	In drafting legislation regarding the control of the crossing of external borders the European Community should be careful that it does not offend against the reality test of the European Court of Human Rights.	Borders
11	The use of the threat of illegal migration should not be permitted to overwhelm liberties which European societies have fought hard to achieve and maintain. A loss of freedom from surveillance justified on grounds of the risk of illegal immigration can only fuel racism and xenophobia.	Borders
12	The discourse on illegal immigration should never be allowed to submerge the fact that under the Geneva Convention, asylum seekers are entitled to cross borders illegally (Articles 32 and 33 Geneva Convention).	Borders
13	Member States should be permitted the flexibility to continue to issue national visas on grounds which reflect their traditions and needs. However, this flexibility must be subject to the common floor of rights.	Borders
14	The Community's commitment under the World Trade Organisation Agreement to liberalisation of trade in services (the General Agreement on Trade in Services) includes a framework for the movement of natural persons for the purpose of service provision. Measures taken on entry and residence should facilitate this policy.	Immigration Policy
15	The Community's common immigration policy on entry and residence should aim to give the widest effect to the Community and Member States' commitments under GATS and their stated policy to enlarge the liberalisation of trade in services.	Immigration Policy
16	Unless the processing of visa applications meets common minimum procedural criteria of care,	Immigration Policy

	impartiality and legitimacy no matter which embassy or authority of which Member State is considering them, the common Community rules will not in fact be common.	
17	Substantial and persistent numbers of persons in irregular positions in the Member States may be seen as evidence of the inappropriateness of the laws and practices of the Member States.	Immigration Policy
18	The adoption of a Community policy on expulsion must give full effect to the Member States' obligations under Article 8 ECHR as interpreted by the European Court of Human Rights.	Immigration Policy
19	the purpose of including this power in the EC Treaty should be understood as necessary to reduce differential rights between migrant nationals of the Member States and third country nationals who in many cases may have been born and lived all their lives within the Union.	Immigration Policy

Chapter 5

EU DRUGS POLICY

The problem of drugs is widely discussed not just in the EU, but also at national level, and is dealt with within the framework of the EU Pillars and national authorities respectively. A "cross-sector theme", it encompasses the fields of criminal justice and police, health and social policy, development and external policy. Clearly, however, the different administrations at the national level or the different Pillars of the EU respectively do not each carry equal responsibility. While in many European states much attention is devoted to health policy issues at local level and there are also calls to decriminalise or even legalise drugs, but notions such as the fight by police against drugs and systems of criminal justice still dominate unchallenged in an international political context.

The then established division of areas roughly remained until today. From 1985, the Member States cooperated within the then European Political Cooperation (the forerunner of the later common foreign and security policy) within the framework of the TREVI programme (TREVI III) and the MAG (the Mutual Assistance Group of the customs administrations). At least since 1990, issues of health policy, money laundering and the control of chemical precursors as well as the support for the legal products of drug-producing States by means of customs privileges have been discussed at the community level. As there was a large array of working groups, the European Council constituted the CELAD (comité européen de lutte anti-drogue) in 1989, which was to coordinate the cross-sector aspect of drugs and produce the first European anti-drugs programme. The lack of coordination, nevertheless, remained a central problem for European drugs policy. The Maastricht Treaty threw little light on the matter.

1. From Maastricht to Amsterdam - the legal aspect

Under the Maastricht Treaty, the different areas of drugs policy were divided between the three Pillars of the EU. Under the then new Article 129 TEC (today art. 152 TEC), the EC was definitely given powers in the area of health. The drugs issues listed by the Article were drugs prevention and education. EC initiatives on health and the Community's coordinating role for individual Member States' programmes were now to be decided by the co-decision procedure under the Maastricht Treaty.

Within the framework of the EC Customs Union, which was completed in 1970, came issues of money laundering and the control of chemical precursors as well as corresponding international agreements or agreements with third States. The same held for the issue of customs preferences for drug-

producing States and the EC had signed the UN Vienna Convention of 1988 before Maastricht. Whereas the common health policy was decided in the co-decision procedure, the field of international agreements fell under the competence of the Council and the Commission, which receives corresponding mandates for the negotiation.

Alongside these aspects of drugs policy which were Community issues before Maastricht or became such with the Maastricht treaty, there remained areas which were exclusively the remit of Member States and were now being established as areas of inter-governmental cooperation in the second/third Pillars.

The area of drugs policy as part of the Second Pillar, Common Foreign and Security Policy (CFSP) was based on Article J1 (2) of the TEU. The Article does not classify the fight against drugs as a major area of CFSP. The activities of the Second Pillar are based instead on the notion that Common Foreign Policy should serve "to safeguard common values, fundamental interests and the independence of the EU" and promote international cooperation, thus the Council was able to bring drugs issues into the common policy arena. The Parliament had no part in this process.

The areas of cooperation stipulated in Article K1 TEU for the Third Pillar included firstly areas which can be assigned to clearly established authorities. They are:

- * judicial cooperation in the field of criminal justice (Article K1 No. 7)
- * customs cooperation (Article K1 No. 8), and
- * police cooperation.

This includes "where necessary..... particular aspects of customs cooperation" as well as the cooperation within the framework of Europol (Article K1 no 9).

Among these three aspects, only the last makes clear reference to drugs issues. Police cooperation under Art. K 1 No. 9 was to serve to "prevent and combat illicit drug trafficking and other serious forms of international crime." According to this formula, illegal drugs trafficking on whatever level of the illegal market is defined indiscriminately as serious crime. Only the Member States could take initiatives in the above named three areas of cooperation. The Commission has no right to do likewise.

Alongside these aspects which can be categorised relatively simply in institutional terms, Article K1 No. 4 presents additional aspects which are all but opaque in reality as we shall see: the subject is "combating drug addiction, where this area is not covered by clauses 7, 8 and 9." Thus the Third Pillar

is not only responsible for combating drugs trafficking, but also for the issue of drug addiction, and so for matters affecting demand and consumption. This is the case, at least, if these issues are not dealt with by the EC. With reference to No. 4, the Maastricht Treaty at least provides for the right of initiative by the Commission. Third Pillar decisions were all made unanimously by the Council. The Parliament was only informed.

As regards drugs related issues, the Amsterdam Treaty by and large maintains the division between the three Pillars: activities within the framework of the Community and the Second and Third Pillars. The Commission now has the right of initiative in all areas of inter-governmental cooperation. Whereas the Parliament under the Maastricht treaty only had to be informed, it is now consulted also in issues concerning the Second and Third Pillars. Of course, as before, decisions are made only by the Council. In the main, it takes decisions unanimously, only implementing actions can be set up by majority vote. The Parliament's position is slightly better, it does, however, not have real powers of co-decision under the Second and Third Pillars.

The unclear wording concerning inter-governmental cooperation in drugs policy in the Third Pillar in the Maastricht TEU is replaced by an equally unclear new wording. Cooperation is to serve to "prevent and combat crime, organised or otherwise, in particular illicit drug trafficking" So drugs trafficking is again the main issue, but the reference to "non-organised crime" leads one to suspect that the use of or simple possession of illegal drugs might be subject to political and police cooperation (Article 29 (2) TEU). Article 31(e) TEU makes provision for ensuring compatibility of rules and the establishment of "minimum rules relating to the constituent elements of criminal acts and to penalties" particularly in the field of drugs trafficking as an area of judicial cooperation.

So there has been no significant change either in the areas of cooperation nor in the decision-making process.

2. Drugs policy and the division of activities between the Pillars of the EU under the Maastricht Treaty

While the first Drug Action Programme adopted by the European Council in 1990 and extended in 1992, had been put forward by CELAD, it was the Commission which in 1994 came up with a new Action Plan for the period 1995-2000²³. It legitimated its initiative with the argument that the Maastricht Treaty had re-organized the legal basis of drugs policy. The Commission's proposal was

²³ Commission report to the Council and the Parliament on an EU Action Plan to combat drugs 1995-2000, Com (94) 234 final, Brussels 23.6.1994.

approved in 1995 by the European Council and the Parliament. As with the previous Plan, the new one also was subdivided into the following aspects:

- * measures to reduce demand
- * measures to combat illegal trafficking
- * measures at international level
- * coordination

Contrary to what may be suspected at the first sight, the three first aspects do not correspond with the three Pillars under Maastricht. On the question of reducing demand, the main issues lie in the fields of health and education. Also in these aspects, however, the working groups of the Third pillar claimed competencies, as is clear in the opinion of the K4 committee on the Commission's proposal: "Police prevention work, as well as that of other enforcement agencies, provides relevant experience in demand reduction, to which little attention has been paid in the action plan. The police and other enforcement agencies have roles in the overall context of prevention which arise from their special expertise, their structure and organisation and the particular task they perform."²⁴

That police "prevention" is exclusively of a repressive nature is of course not mentioned. The (police and customs) representatives of the Member States under the Third Pillar were able to base their claims in particular on the unclear wording of Article K1 (4) which also confers on them responsibility for questions concerning drug addiction. In fact the Commission was unsure as to what matters fell into the scope of the Third Pillar. The wording of the Action Plan is very imprecise and without exception lays down no firm rules. Here is another part of the opinion of the K4 committee: "It is in fact the absence of competence on the part of the Commission in the area of law enforcement that prevents the Commission's proposal from constituting a comprehensive outline of the different aspects of the fight against drugs."²⁵

Conversely, competencies in the field of prosecuting illegal trafficking are not exclusively granted to the Third Pillar, and thus the Member States. With regard to money laundering, the Community already issued a Directive in 1991. The same procedure was followed on the matter of the control of chemical precursors where in 1990, a Directive was issued and in 1992 a Regulation. Also after the entry into force of the Maastricht treaty, these questions were dealt with by the Customs Union. The operative implementation of this EC legislation, i.e. the prosecution of cases of money laundering and

²⁴ Council doc. 9870/5/94 Rev 5 Enfopol 128, 27.2.1995, p.4

²⁵ op. cit. p. 6.

abuse of precursors, however, necessarily was carried out by police, customs authorities and the judiciaries of the Member States (see chapter on customs cooperation).

There can be no doubt however that the main responsibility for prosecuting drugs trafficking offences lies with the Third Pillar. The major projects in police and customs cooperation and judicial cooperation have all been justified by the supposed danger inherent in drugs trafficking. This is so in the case of Europol, the Customs Information System, the Naples II Convention on Mutual Assistance between Customs Administrations and so on. The Parliament had no influence whatsoever in these areas. In fact the "drugs problem" serves as the ideological *leitmotif* for the conglomeration of undemocratic and unaccountable police and customs cooperation measures in the EU.

Smaller projects too, resolutions and joint actions under the Third Pillar have frequently been justified with reference to the fight against drugs. It includes almost all activities in the area of customs (major special operations, cooperation between customs and police, selection methods for specific checks ...). Of the Actions and Resolutions directly motivated by drugs policy, the following should be noted:

* Resolution of the Council of 29 November 1996 on "measures to address the drug tourism problem within the European Union" (96/C 375/ 02).²⁶ This Decision can be seen as a victory of French drugs policy, exclusively a repressive policy, against the liberal policy of the Netherlands. In the wake of liberal attitudes by the Netherlands to drug users, the Council was determined to react publicly with repressive measures only. Instead of coaxing France to take a liberal position, the Council exercised indirect pressure on the Netherlands.

* Resolution of the Council of 20 December 1996 "on sentencing for serious illicit drugs trafficking" (97/C 10/02)²⁷. In this Decision, the Council states that "Member States will ensure that their national laws provide for the possibility of custodial sentences for serious illicit trafficking in drugs which are within the range of the most severe custodial penalties imposed by their respective criminal law for crimes of comparable gravity". In other words, the executive authorities of the Member States in the Council adopt positions on which their respective Parliaments and in certain cases the courts must decide.

Along similar lines, and also agreed in December 1996 was the:

²⁶ OJ No C 375, 12.12.1996.

²⁷ OJ No. C 10,11.1.1997.

* Joint Action of 17 December 1996 "concerning the approximation of the laws and practices of the Member States of the EU to combat drug addiction and to prevent and combat illegal drug trafficking".²⁸ On the basis of this measure, there are regular reports to the Council and the European Council which detail and comment on developments in national laws and strategies of the national police and customs authorities. This measure clearly goes beyond cooperation alone and infringes on the area of national legislation. It allows the Council or the working groups of the Council to oversee the work of national Parliaments and makes this collection of national executive authorities a kind of "super legislator". The measure contradicts the recognised principle of subsidiarity. The Amsterdam Treaty later sanctioned this strategy of harmonising legislation. The new Article 31 EU Treaty, however, refers only to drugs *trafficking*, not to drug addiction. Along similar lines, but not limited to drugs issues only, is the Action of 5 December 1997 "on establishing a system for assessing Member States' application and implementation of agreed international measures on fighting organised crime" (97/ 827/ J1)²⁹. The Action subjects the national legislatures and procedures to controls via a screening mechanism. What is noticeable is how the issue of national sovereignty in the area of criminal justice and police/customs cooperation is dealt with. While the JHA Council expressly insists on guaranteeing the powers of the Member States in other areas - particularly Europol - in order to avoid controls by the European Court of Justice and other organs of the EC, national sovereign rights are systematically infringed with the aim of increasing purely executive cooperation and making national Parliaments conform.

* The Joint Action of 16 June 1997 "concerning the information exchange, risk assessment and the control of new synthetic drugs" (97/296/J1)³⁰. This includes details of the Europol competencies for analysing and comparing synthetic drugs. Europol is to work alongside national forensic institutions in identifying the origin of certain drugs and determining how they are distributed. The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) in Lisbon is also given tasks of analysis. The Joint Action is, however, exclusively under the heading of drugs repression. Instead of supporting local projects which investigate the dangers of different drugs for consumers and work in practical ways to reduce possible harm, the Council and the representatives of the police forces within it have once again favoured a repressive strategy.

Division of activities between the Pillars is not at all clear in the area of international cooperation. This includes issues of guaranteed customs preferences and other customs agreements, which are

²⁸ OJ No. L 342, 31.12.1996.

²⁹ OJ No L 344, 15.12.1997.

³⁰ OJ No. L 167, 25.6.1997.

areas of Community responsibility, but over which the Parliament according to art. 133 (ex-113) TEC has no influence. There is provision in the Commission's Action Plan for bilateral customs agreements between the Community and Third States to implement provisions to combat drugs which will commit the countries to repressive strategies in the fight against drugs. Sensible measures of development and trade policy, thus are accompanied by obligations regarding policing. This is all the more serious as international human rights organisations such as Amnesty International repeatedly showed that abuses of Human Rights are committed under the pretext of combating drugs.

Indeed, questions on the fight against drugs have spilled over into transatlantic dialogue as well as negotiations with the Mediterranean States and the applicant countries in central and eastern Europe. Discussion has centred principally on issues of assistance to police and customs authorities, identifying the acquis on drugs, which has mainly been drawn up in the framework of the Third Pillar, coupling together issues of membership and associate status with the fight against drugs. For CCEE States and States of the former Soviet Union, corresponding programmes on police assistance have been largely financed from PHARE and TACIS funds.

Even when these negotiations have been conducted by the Commission on the orders of the Council or under the Second Pillar, the Working Groups under the Third Pillar have always had the last word. The same can be said of cooperation with UNDCP (the UN International Drug Control Programme) and in the Dublin group, where further police assistance programmes were agreed on and implemented. The agenda of the K4 committee/Article 36 Committee regularly includes questions of international cooperation and international conferences.

3. Working Groups and their Coordination

Amidst the activities mentioned above, there is not only an array of different powers, but also corresponding Working Groups and Institutions that grow out of them. The "Draft Report on Drugs and drug-related issues to the Vienna European Council"³¹ lists some of these Working Groups:

- * the Working Group on Health
- * the Working Group on the General System of Preferences
- * the Working Group on Telecommunications, all three in the First Pillar
- * the CODRO in the Second Pillar

and

³¹ 12334/1/98 - Cordrogeu 65, CODRO 5, SAN156, PESC 272, Enfopol 117, 24.11.1998.

- * the Working Group on Drugs/Organised Crime
- * the Working Group on Police Cooperation
- * the Working Group on Customs Cooperation
- * the Working Group on Mutual Assistance in Criminal Matters, all in the Third Pillar.

In the 1994 Commission Action Plan, Coreper was assigned the role as coordinator. This function was passed to the High Level Drugs Group (HDG) in 1997, which, of course, is part of the Third Pillar. It also took over the role of reporting to the European Council.

There were further developments in 1997 in the shape of the Action Plan on fighting organised crime, which the High level Group on Organised Crime (established in December 1996) put together in only four months and which received the approval of the European Council in Amsterdam in June 1997. In accordance with its own recommendation No 22, the High Level Group became the Multidisciplinary Group on Organised Crime, which is strongly influential on the methods used in the Screening Process established under the Joint Action of 5 December 1997. This Multidisciplinary Group is also made up of representatives of Ministries of Home Affairs and Justice and police authorities of the Member States.

Alongside these Working Groups there are other important institutions:

- * the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) in Lisbon. It was set up in 1993 before the Maastricht Treaty came into force in accordance with a Regulation on the basis of Article 235 of the EC Treaty and is financed out of the Community budget. Its duties include research and information gathering in relation to

1. demand for drugs and how to reduce it,
2. national and Community strategies and policies,
3. international cooperation and the geopolitics of supply,
4. monitoring of drugs trafficking and chemical precursors,
5. problems experienced by producers, users and transit countries.

Up to now, the EMCDDA has mainly concerned itself with the first two issues and because of its liberal stance has found itself under attack both from the US-American side as well as from UNDCP.

- * Europol, with competencies that are widely known about and lacking in political and judicial controls, which is described in greater detail in the context of police cooperation.

Typically, coordination is assigned to departments responsible for justice and home affairs in the secretariat of the Council and the general secretariat of the Commission.

Alongside these structures are additional structures of cooperation, as:

- * the Schengen group and its Drugs Working Group (Schengen-Stup): one of the tasks carried out by this working group in recent years has been to compile manuals on the controlled deliveries of drugs and mutual judicial assistance in criminal matters. There have also been "pilot projects" set up since 1997, which involve specific checks particularly on the Balkans route, as well as cooperation in covert investigation. There is very little information on these discussions, which have a great influence on the operative side of the police fight against drugs as well as on the general concepts of policing in the EU. On the basis of the Schengen Protocol, Schengen cooperation has been completely absorbed into the EU. The Parliament, however, cannot give an opinion on the Schengen Acquis, nor on the practical cooperation between the police, customs and judicial authorities.

While the Schengen-cooperation as such will disappear mainly in the Third pillar of the EU, other forums and organisations will stay completely outside the institutional structure of the EU. All the EU-Member States and in part also the EU - Council or Commission - are represented in these groups. The Parliament however has no influence at all:

- * the Pompidou group of the European Council
- * the Dublin group: this "informal" Working Group includes, as well as the EU Commission and the Member States, the governments of the USA, Canada, Australia, Japan, Norway and the UNDCP. Its main function is to coordinate drug-related mutual police assistance with drug-producing and transit States.
- * the UNDCP itself, which implements many of these programmes or assists in implementing many of these assistance programmes or acquires the help international police and customs organizations (mainly Interpol, WCO) and national police and customs authorities for implementation,
- * the World Customs Organisation, which works closely with the Customs Working Group in the Third Pillar and the Directorate General of the Commission responsible for customs matters (see chapter on customs cooperation),
- * Interpol, which despite of Europol continues to play an important role in the sector of drugs repression but also in general policing questions also in Europe, and other bilateral and multilateral police and customs organisations, whose "informal" activities are controlled neither by national Parliaments nor the European Parliament.

4. The position of the Parliament

There is no doubt that until now the Parliament has had very limited powers in drugs issues - a situation which will not change substantially under the Amsterdam Treaty. The EP only has powers in First Pillar matters, especially in questions of prevention, education and health.

On the basis of the Amsterdam Treaty, the EP is now consulted on Third Pillar legislation. This does not mean, that it will have more powers of decision but at least, it will be better informed, when it comes to setting up new institutions or data banks, the enlargement of powers of Europol, or the legalisation of certain forms of cooperation, as far as this legalisation takes place in the structures of the EU. Cooperation between the member states carried out under the umbrella of other international or supranational organisations still do not fall under the parliament's powers. As Article 30 TEU states that also operational questions and exchange of information fall under the Third pillar the parliament may try to get better information on this operational side, which includes especially covert means of policing, such as controlled deliveries, (cross border) observations, the use of undercover agents, the exchange of intelligence and "soft" data, etc. These methods have been already partly legalised in the Schengen Treaty, the Naples II-Convention and also in other bilateral agreements, which are parts of the Third Pillar or the Schengen Acquis, and thus declared as fixed. The justification for these policies has been the fight against organised crime and drug trafficking, which is usually conceived as the most important aspect of organised crime. There can be no doubt, that these methods are hardly controllable, even if they receive a formally correct legal basis. It would mean an important step forward, if the European Parliament could press for more information.

The problems of the Parliament position and role, however, is not only a result of its limited official powers, but also of the limited room for manoeuvre in international debate on the drugs issue. The general approach to drugs problems is fixed in international treaties, like the three UN conventions on drugs of 1961, 1971 and 1988, which are part of the drug related acquis. All three, as well as national legislation and other conventions, which are based on the UN conventions, part from the axiom of prohibition. In other policy fields that refer to international law, like the asylum and refugee policy, it does not seem to present problems for instance for the JHA Council to completely undermine basic international treaties (like the Geneva Convention of 1951) into the debate, in the drugs policy field this seems impossible.

On the supply side of the problem, the conception of prohibition has developed into the theory, that drug trafficking is organized crime. Acceptance of this ideological position, however, leads almost inevitably to accepting all conceivable means of policing, even if they hugely undermine the State of Law and are not subject to any democratic controls, as is the case with covert policing. The change in the position of the EP on the construction of Europol is a good example: Much doubt was cast over the need for Europol as a central police authority until the end of the 1980s, not only from the side of the Parliament, but also from some national governments. In 1988, the European Council still rejected the German Bundeskanzler Kohl's idea of such a central police agency. In 1991, Kohl succeeded by referring to the allegedly growing threat of drug trafficking. The parliament also no longer make general objections to Europol. Its critique now referred to the role of the ECJ and its role. It was the dynamics of the drug discussion, that led the Parliament to call for speedier construction of the new police institution. Neither the general necessity, nor the central aspect of Europol, the use of vast amounts of soft information, was criticised. Against a background of warnings about the "drugs Mafia" and "organised crime", fundamental criticisms were dropped. Repressive measures adopted by the police against the drugs problem are only called into question by a minority within the Parliament.

The problem, that prohibition is internationally determined, is also obvious in the debate on consumption and the ways to deal with it. Only a few states have managed until today, to at least slightly change their attitude to drug consumers. The Dutch and the Swiss examples show, how difficult it is, to introduce even changes in health policy. Their political decisions have always been under great pressure from the side of UNDCP and the International Narcotics Control Board. Nevertheless, due to the enormous problems and costs caused by the prohibitive approach, there are more and more initiatives on the local level, "accepting social work", harm reduction or even distribution of heroine tolerated by national governments. These programs may be discussed in international scientific networks, however, they do not reach the international or supranational political level.

By the end of the last parliament the position of the EP was unclear. Mrs D'Ancona's report aimed to make drugs policy - as far as drugs use was concerned - the domain of health policy. Thus on the basis of experiments in the Netherlands and other European States (including non-EU member Switzerland) it would have been possible to have a system of non-prosecution of users and a tolerant drugs social policy (including the prescription of substances such as heroin). The first D'Ancona report was rejected by the Parliament. The reason for this was that MEPs - across party political divisions - voted according to the traditions of drugs policy in their countries of origin. The adopted D'Ancona report is a compromise that leaves all the questions open - it did not condemn liberal positions, nor did it foster them. The only field, where the Parliament has clearly powers of co-decision, is thus left open.

The drugs policy is subject to special dynamics: It is very easy for national governments and their police forces to go to the international level for more instruments, more personnel, more international cooperation even introducing methods, which are highly problematic for democratic and liberal states. It is however extremely difficult at international or multinational levels to change 'acquis' and rethink drugs policy. International drugs policy is therefore dominated by police and prosecution authorities.

The European parliament might consider adopting a new role regarding drugs policies and think about alternatives.

Chapter 6

JUDICIAL COOPERATION IN CIVIL MATTERS

During the "Maastricht era" of JHA cooperation, the EU adopted two Conventions: one in 1997 on the service of documents (OJ 1997, C 261) and one in 1998 on jurisdiction over and recognition and enforcement of divorce and related child custody judgments (the matrimonial, or "Brussels II" Convention) (OJ 1998, C 221). Negotiators agreed on a Convention on choice of law, jurisdiction and enforcement of cross-border insolvency proceedings in late 1995, but this Convention lapsed when one Member State declined to sign it. In addition, discussions began in late 1997 on a project to revise the existing Brussels Convention on jurisdiction over and recognition and enforcement of civil and commercial judgments as well as the very similar Lugano Convention extending most Brussels rules to Norway, Switzerland and Iceland. Finally, the Austrian Presidency of 1998 launched discussions on a possible "Rome II" Convention on cross-border conflict of law applying to non-contractual liability (including particularly tort, delict and restitution), to complement the existing Rome Convention on conflict of laws in contract.

Apart from the Brussels and Rome Conventions and the two Maastricht-era Conventions, progress has been slow in this field, whether under Article 293 (ex-220) EC or inter-governmentally. A Convention on mutual recognition of companies was agreed in 1968, but never entered into force because the Netherlands would not ratify it. A Convention on the Community Patent was agreed in 1975, but never entered into force. The Member States attempted to revive it by a subsequent Agreement in 1989, but there is no prospect of this being ratified. The Commission has now revived discussion on this topic and the incoming Commission will likely propose an "ordinary" EC Regulation creating the Community Patent shortly after taking up office. Prior to the Maastricht Treaty, the Member States agreed two civil cooperation Conventions within the framework of European Political Cooperation, on cross-border enforcement of maintenance payments and legalization of documents. There has been very limited ratification of these Conventions. In addition, in 1989 Member States agreed two Protocols to the first Rome Convention, which permit the European Court of Justice to interpret that Convention but allow Member States to opt-out of the Court's jurisdiction. Ten years later, these Protocols have still not entered into force because one of the twelve original signatories has not ratified them (even though that Member State has every right to opt-out of the Court's jurisdiction if it wishes, like Ireland has; it is only preventing ten other Member States from opting in).

There have been some developments outside the third pillar. A number of Community measures with civil law implications have been agreed or adopted over the years. Employment contracts have been affected by EC labour and discrimination law, and consumer contracts have been affected by a series of measures (directives on "doorstep sales", timeshares, package holidays, consumer credit, misleading advertising, comparative advertising, unfair contract terms, consumer guarantees and cross-border injunctions to protect consumer interests). Other contracts are affected by the EC's competition law and the proposed late payments directive and the proposed Fourth Directive on cross-border motor insurance.

While not much was accomplished during the Maastricht era, several measures were proposed shortly after entry into force of the Treaty of Amsterdam. The Commission has proposed that the Council replace the 1997 service of documents Convention with a directive and the 1998 Brussels II Convention with a regulation.³² The discussions on revising the first Brussels Convention have concluded and the Commission has proposed converting the agreed results into a Regulation.³³ This may have consequences for the accompanying revision of the Lugano Convention (which extends the Brussels rules to Norway, Iceland and Switzerland).³⁴

The Council has not yet taken any step to address problems of cross-border succession or matrimonial property disputes (except to the extent that matrimonial maintenance is governed by the Brussels Convention) or broader problems, such as translation, interpretation and access to legal aid, faced by individuals in other Member States. The Council has also taken no real interest in the fate of the two EPC Conventions on civil cooperation signed before the Maastricht Treaty. Nor have cross-border public law claims been addressed in any way.

With the entry into force of the Amsterdam Treaty, this area is now governed by Article 65 EC, which requires the Council to consult the EP before adopting any legislation. However, Article 293 (ex-220) EC still seems to allow the Member States to conclude Conventions in this area.

³² COM (1999) 219 and COM (1999) 220, 4 May 1999.

³³ Not yet published.

³⁴ Several central European applicant states might take this opportunity to agree their accession to the Lugano Convention.

Although the Council Legal Service has apparently convinced the Member States that Article 65 EC takes precedence over Article 293, the EP should take care to watch any future use of Article 293 by the Member States closely. There is a risk that Conventions might be adopted under that Article instead of Article 65 or another provision of the EC Treaty (perhaps Article 95 (ex-100a) or 308 (ex-235)), which provides for consultation or co-decision of the EP.

The Action Plan on the development of the area of Freedom, Security and Justice has suggested some elements for future work of the Council, and the Tampere European Council looks set to add further detail to these plans. The initial proposal for Tampere suggests that the Community should develop its action in five areas:

I. access to justice, particularly by: providing information on the legal systems of other Member States; making use of modern technology to assist cross-border contacts; facilitating direct contact between individuals and judicial authorities; establishing national ombudsmen and other dispute settlement bodies; developing uniform multilingual documents and forms for use in judicial proceedings; establishing codes of good practice and "certain minimum standards in arranging the access for individuals"; addressing legal aid; and enhancing the rights of crime victims (presumably the civil law aspects of such rights);

II. removal of technical, administrative and legal obstacles, in particular: developing the European Judicial Network further, extending it to enforcement authorities, ombudsmen and dispute settlement bodies; improving the training of practitioners; introducing simplified mutual legal assistance procedures; speeding up mutual legal assistance; defining the "essential interests" which will allow Member States to refuse legal assistance to other Member States; simplifying cross-border proceedings in small claims or money payment order cases; and facilitating tracing of debtor's assets;

III. encouraging mutual recognition, including: extending the Brussels/Lugano principles to new areas; establishing a "Single European Judicial Title" for matters within the Brussels/Lugano or similar systems; simplifying cross-border enforcement; and promoting uniform conflict of law rules in new areas;

IV. harmonizing national law, including such procedural law as service of documents, taking of evidence, provisions measures, legal aid, enforcement of judgments, orders for money payment and the right to appeal, and such substantive law as perhaps specific fields of the law of contract; and

V. cooperation with third states and international organizations.

This is an extremely ambitious agenda,³⁵ and it raises several important issues. First, one can certainly ask whether or not the Council actually has the resources to tackle so many topics even in the next five years, given the history of very tortuous negotiations on civil law matters. Second, There is no distinction in these proposals between the urgent matters that should be tackled by the Council very shortly and the topics that should wait. Third, there is no indication that any assessment has taken place to indicate which of these topics really need to be addressed. Fourth, the paper suggests no criteria for choosing between the most and least important matters. Should the Community concentrate on matters that most affect individual citizens, or EC businesses, or the activities of governments?

Fifth, some of the specific topics suggested are very vague. In referring to "certain minimum standards in arranging the access for individuals", is the paper referring to national rules on standing? What exactly does the EC aim to tackle as regards legal aid: national levels of legal aid applying to national disputes, or national legal aid rules applying to foreign nationals or foreign residents?

EU developments in this area, while important, have thus been relatively limited in scope and have not addressed certain difficult problems faced by ordinary members of the public, such as cross-border succession issues. There some not yet seem to be any coordinated strategy by the Council to decide on criteria for future work and to apply those criteria. The EP should therefore take the opportunity to press for a "citizens" first" approach to civil law, stressing in particular issues of standing, legal aid, treatment of victims, cross-border access to ombudsmen, access to justice by non-governmental organizations, and interpretation issues.

³⁵ The above is a summary of Council document 9576/99, 23 June 1999.

Chapter 7

JUDICIAL COOPERATION IN CRIMINAL MATTERS

The EU has been considering harmonizing two different aspects of criminal law: substantive law and procedural law. The former includes the harmonization of national law defining the range and scope of criminal offences and attached penalties. The latter includes the movement of persons and evidence, particularly in the context of extradition and mutual assistance. During the Maastricht era, harmonization was largely discussed in the Council working group on criminal law and Community law (with certain specialist issues like drug trafficking left to various working groups on drugs), while procedural harmonization was allocated to *ad hoc* groups which addressed specific procedural topics when negotiating a particular instrument. For example, a working group on extradition was set up after the Maastricht Treaty entered into force purely to negotiate an extradition Convention (it was disbanded after its goal was completed), while a mutual assistance group was established in 1995 to negotiate a Convention on that subject.

There have been changes to this system. In 1997, in accordance with the Action Plan on Organized Crime (OJ 1997, C 251) the Council established a high-level Multi-Disciplinary Group (MDG) on Organized Crime. With the entry into force of the Amsterdam Treaty, the Council restructured its working groups so that there are now two general groups addressing substantive and procedural criminal law respectively, working in parallel with the MDG, which will continue to focus on operations.

A number of the EU's criminal law measures address the investigation of crime as well as its definition and punishment. This takes account of the investigative role of the judiciary in many Member States. This section examines the different types of criminal law issues which the EU has addressed, with the exception of Europol, customs, fraud and drugs (all covered in separate sections).

In addition, two other aspects of EU criminal law harmonization should be kept in mind. First, much harmonization of substantive and procedural criminal law is taken forward at international level, through the United Nations and the Council of Europe. This has historically been the case with UN Conventions on sexual exploitation and drug trafficking, and with Council of Europe Conventions on extradition, mutual assistance, and corruption. Indeed, much EU criminal law activity has concerned itself either with harmonizing Member States' application of these existing international measures or with coordinating Member States' positions in negotiations for future international measures (see Common Positions on the Council of Europe corruption and cyber-crime negotiations, the OECD corruption negotiations and the UN negotiations on an organized crime convention).

Second, much important harmonization in this area was agreed as part of the Schengen Convention and subsequent implementing measures (the "Schengen acquis"). This acquis has now been allocated to legal bases in the EU Treaty (OJ 1999, L 176). While at present the Schengen acquis does not apply to the UK and Ireland, the UK has applied to opt in to all the criminal law aspects of the acquis and Ireland is expected to follow suit. If these requests are accepted, then there will be no distinctions between the Member States as regards participation in the criminal law portions of the acquis.

Substantive criminal law

Although this issue is addressed separately from procedural criminal law, there is a close link between them. This is because of the "double criminality" restriction applying to some types of cross-border procedural assistance. For example, unless a particular alleged act constituted a crime in both the state which wishes to prosecute (the "requesting state") and the state to which a fugitive has fled (the "requested state"), the fugitive cannot normally be extradited. Therefore any measures which make Member States' national criminal laws identical or more similar have the effect of reducing the "double criminality" restriction in practice, even without any amendment to extradition law. In addition, several EU criminal law measures have contained provisions addressing both the substantive and procedural aspects of harmonization.

There is also a close link between "first pillar" (Community) law and substantive criminal law. In effect, Community law has two opposing effects upon national criminal law. On the one hand, EC law often restricts or prevents entirely the application of national criminal law, where national criminal law seeks to criminalize or restrict the exercise of free movement rights guaranteed by the EC Treaty or secondary legislation. On the other hand, EC law often requires Member States to "prohibit" certain activities which are deemed to be so objectionable that Member States should all require their abolition. Community acts require Member States to impose a large number of prohibitions. The most important are the bans on money laundering, insider trading and firearms possession, and the imposition of economic sanctions on third states (by means of a combination of first and second pillar acts).

However, there is a continuing dispute over whether the EC can impose criminal prohibitions itself or (via a Directive) require Member States to impose criminal sanctions. Most or all Member States argue that the EC does not have the competence to do either. Therefore it is up to Member States to determine whether to give effect to Community "prohibitions" by civil sanctions, criminal sanctions, or a mixture of both. The Court of Justice has repeatedly upheld the view that Member States have a choice in this matter, and furthermore that Member States have an option whether to apply

subjective or objective criminal liability.³⁶ In other words Member States can criminalize only intentional or reckless acts, or they can also criminalize negligent behaviour. But in making this choice, Member States must follow certain standards: they must penalize breaches of Community rules equally with breaches of national rules, and the measures to penalize breaches of EC rules must be effective, proportionate and dissuasive.³⁷

In addition to these structural connections between the first and third pillars, a number of third pillar acts make specific or implicit reference to first pillar acts. A good example is the Convention on Protection of the Communities' Financial Interests (PIF Convention), discussed in more detail in the next section. Implicitly, the Convention refers back to innumerable Community acts which detail the rules for collection of the Community's revenue and expenditure. Explicitly, the Second Protocol to the Convention requires Member States to criminalize money laundering related to fraud and corruption against the EC budget, with money laundering defined by reference to the EC directive.

Nonetheless, many third pillar acts concerning substantive criminal law have little connection to the first pillar. The main third pillar acts, in addition to fraud and drug trafficking measures considered separately, are:

- the Joint Action harmonizing law on racism and xenophobia (OJ 1996 L 185);
- the Joint Action harmonizing law on sexual exploitation (OJ 1997 L 63);
- the Joint Action harmonizing the definition of "private corruption" (OJ 1998 L 358);
- the Joint Action agreeing a very broad definition of an offence of participating in a criminal organization (OJ 1998 L 351); and
- the Convention on national corruption law (OJ 1997 C 195).

Some of these measures were preceded by a detailed public debate (for example, the special Council group that reported on racism and xenophobia in the EU, following the detailed work of the EP). However, most were preceded by a hurried consultation of the EP and national parliaments and are substantively problematic. For example, what is the justification for criminalizing private corruption, instead of leaving it to Member States' competition law to decide whether criminal or civil sanctions would be most effective at combatting such action? Both the Joint Action on private corruption and the Joint Action on criminal participation are drafted extremely broadly, violating the principle that criminal law should only impose liability for clearly defined acts (see Article 7 ECHR). Moreover, the

³⁶ See in particular Case C-326/88 Hansen [1990] ECR I-2911.

³⁷ See Case 68/88 Commission v. Greece [1989] ECR 2965.

latter is so broad that many persons only marginally associated with organized crime could be caught within its scope.

Indeed, the Joint Action on criminal participation could be abused to bring persons connected with political protest activities within its scope, as seen during the 1997 Amsterdam European Council where hundreds of peaceful protesters were wrongly detained under similar pre-existing national legislation. This measure is clearly intended to grant broad prosecutorial discretion with limited checks on its exercise. Furthermore, it is troubling that the Council has stated in its Press Releases that this Joint Action will allow the prosecution of persons giving legal or financial advice to criminal organizations. This interpretation is not clear from the Joint Action, and it suggests a serious risk that EU measures are failing to respect the independence of the legal and financial professions.

Procedural Criminal Law

The Council has agreed two conventions on extradition law. The first, from 1995 (OJ 1995 C 78), sets out rules governing the extradition of persons who consent to their extradition. The second, from 1996 (OJ 1996 C 313), attempts to abolish between the Member States a number of exceptions to extradition found in the Council of Europe 1957 Convention and its Protocols as well as in the Schengen Convention rules governing most Member States. However, a number of exceptions to extradition nonetheless remain in force, most notably the bar on extradition of nationals which most Member States retain (although the Scandinavian states have agreed to narrow their definition of "national"). The EP was not consulted on either proposal in advance, but in its analysis of the second Convention (after signature by the Member States), the EP criticized the continued existence of a number of these possible bars to extradition. Neither Convention allows the European Court of Justice to interpret its provisions, but the 1996 Convention provides for consideration of this issue one year after the Convention's entry into force. However, now that the Schengen Convention has been integrated into the EU legal system after entry into force of the Amsterdam Treaty, the Court is able to interpret that Convention's extradition provisions, which partly overlap with those in the 1995 and 1996 Conventions. It thus seems essential to confer jurisdiction upon the Court to interpret the EU Conventions as soon as possible.

In addition, Member States have not made efforts to propose that their parliaments adopt these Conventions within a reasonable period. In particular, this damages the position of suspects under the 1995 Convention who are willing to stand trial in another Member State but are being detained in the requested state pending their transfer for purely bureaucratic reasons. A lengthy delay in detention during extended extradition proceedings might result in a Member State breaching Article 5 of the European Convention on Human Rights, as the European Court of Human Rights found in Scott v.

Spain. Additionally or alternatively, such lengthy delays might breach national constitutional or statutory rules. It is thus essential to ensure that uncontested transfers are agreed extremely speedily, while protecting suspects' rights to object to contested transfers.

The Council has not agreed any form of regular review of the two Conventions. In order to assess whether the Conventions (and the Schengen rules, to be incorporated into EU law) are functioning effectively while still ensuring respect for criminal suspects' rights, such a monitoring procedure must be established. This will enable informed discussion on the possible need for and content of future amendments to the EU extradition system.

The Amsterdam Treaty has addressed extradition issues by attaching a Protocol to the EC Treaty on asylum of EU citizens. This prevents EU citizens, in principle, from applying for asylum in other Member States, but it is likely to have little effect because of the declaration which one Member State has attached to it.

The Council has spent much time discussing a Convention on mutual criminal assistance, and the Parliament was consulted on a draft of this Convention in early 1998. Since that date, important new provisions have been added: cross-border interviews with suspects, as well as witnesses; cross-border use of undercover police officers; and the ability to intercept telecommunications in another Member State. Apparently, the EP will shortly be reconsulted on the text. A Protocol to the draft Convention, addressing such matters as additional forms of police cooperation and the elimination of "double criminality" exceptions to search and seizure rules, will likely also be drawn up.

The proposed mutual assistance Convention would have a great impact on civil liberties of suspects. This is particularly true of the amendments to the Convention added after the first consultation of the EP. The provisions on cross-border interviews with suspects do not provide for any form of protection of defence rights and the provisions on cross-border bugging run a serious risk of lowering the standard of human rights protection which citizens enjoy under national law, with increasing difficulty in determining whether Member States even observe the minimum standards of protection under Article 8 of the European Convention on Human Rights. Member States should also be required to provide information on whatever bilateral arrangements they reach to implement the Convention's provisions on cross-border use of undercover agents, in order to ensure that such police actions remain accountable despite the cross-border element, and to make certain that the merits of this type of police operation are fully discussed. It will also be essential to scrutinize the planned Protocol carefully to determine whether any further role for cross-border policing and any change to the current system for processing cross-border requests for search and seizure are really necessary, given

the difficulties in ensuring cross-border police accountability and the importance of established national limits upon searches and seizures.

The Council has not taken any definite steps to encourage ratification of earlier EPC Conventions on transfer of sentences, transfer of sentenced persons, or transfer of criminal proceedings.

A number of important Joint Actions have been adopted: establishing a European Judicial Network (OJ 1998 L 191); providing for a system of liaison magistrates (OJ 1996 L 105); allowing for more effective confiscation, tracing, and seizure of the proceeds of crime, including widening of the offence of money laundering (OJ 1998 L 333); the "Grotius", "Falcone" and in part, the "STOP" programmes for practitioners (OJ 1997 L 7, OJ 1998 [L 00], and OJ 1996 L 322). So far the Judicial Network is apparently limited to the exchange of information on general issues, such as legislation applicable in Member States and contact points for investigations. Another Joint Action requires the adoption of best practice rules for judicial assistance requests (OJ 1998 L 191).

Finally, there are several important "soft-law" measures in this field, most notably the Resolution on witness protection and the Resolution on the use of informers (OJ 1995 C 327 and OJ 1997 C 10). The latter encourages the use of a controversial method of investigation without in any way acknowledging the risks that might result from its use.

It remains to be seen how effective some of the more recent measures will be, and it is difficult to assess the effectiveness of measures and any advisable reforms without a regular monitoring and reporting system.

Finally, it should be emphasized that the Council has not at any time addressed explicitly the difficulties faced by victims of crime or by criminal suspects charged in another Member State, although the proposed mutual assistance Convention could assist the latter group somewhat.

Future Developments

The post-Amsterdam agenda in this area has been set in the Council and Commission Action Plan on development of the Area of Freedom, Security and Justice (OJ 1999 C 19). Presently the Council is also discussing aspects of criminal law harmonization for the upcoming Tampere European Council, as well as a new version of the Action Plan on organized crime, due to be adopted in 2000.

First of all, these documents suggest an ambitious substantive law agenda. The Action Plan states (para. 18) that corruption, terrorism, trafficking in humans and organized crime should be defined by

minimum common rules across the Union and that such rules should be enforced with vigour. Paragraph 46(a) is more precise: it suggests that within two years, the Council should consider whether to harmonize the law on terrorism, drug trafficking, trafficking in human beings and sexual exploitation of children, offences against drug trafficking law, corruption, computer fraud, offences committed by terrorists, offences against the environment, offences committed by means of the Internet, and money laundering connected to any of these crimes. Paragraph 46(b) suggests work (also within two years) on counterfeiting the euro and on counterfeiting non-currency forms of payment. Paragraph 50(c) suggests a follow-up to this initial work within five years.

Procedurally, the Action Plan suggests that there could be coordinated prosecutions in areas where the Union has already agreed harmonized rules, notably environmental crime, high-technology crime, corruption, fraud and money laundering. Human rights will be protected largely by reference to the ECHR, but there is some acknowledgement that the ECHR is only a minimum standard: it can be supplemented with standards and codes of good practice in areas such as interpretation, confiscation, reintegration of offenders and victim support. This suggests a move toward the "free movement of criminal justice". The Action Plan also suggests reducing barriers to free movement of prosecutions, notably by adopting common documents, multilingual forms, networks for assistance, and considering legal aid issues (see paras. 18-20). In more detail, the Plan suggests (within two years): the implementation and further development of the Judicial Network; limiting grounds for refusal of mutual assistance; improving cross-border cooperation between ministries and judicial authorities; mutual recognition of criminal decisions and connected enforcement; connections between the Judicial Network and Europol; and the possibility of allowing judges and prosecutors to operate in another Member State (para. 45). Within five years, the Plan suggests: allowing for extradition after in absentia convictions; transfer of criminal proceedings and enforcement of sentences; formalizing the exchange of criminal records; establishing a register of criminal proceedings to avoid multiple prosecutions; and coordinating investigations to the same end (para. 49). Greater use of bugging, confiscation and seizure is also suggested (para. 50).

The proposed Tampere plans and proposed new Organized Crime Action Plan build on this Action Plan and also update the 1997 Action Plan on Organized Crime. The criminal cooperation paper in preparation for Tampere (Council document 9611/99) suggests that:

The development of the area of justice seems to require adopting a similar approach as applied in the development of the internal market, i.e. a combination of removal of technical, legal and administrative barriers and - where it is considered more appropriate - harmonisation of legislation and application of the principle of mutual recognition. Furthermore, better conditions for trust should

be created in each others" legal systems, e.g. by setting of minimum standards and evaluating best practices.

This should be supported by a common and comparable data basis concerning the cross-border crime and also the functioning of practical level co-operation between authorities. The protection of privacy and data shall always be respected and taken duly into account.

The reference to common data basis is apparently a reference to harmonized national data bases, rather than a reference to Europol. The paper focusses on operational elements of crime-fighting, notably further weakening of most Member States' ban on extraditing their own nationals, increased possibility of automatically recognizing other Member States' criminal judgments, identifying areas for harmonizing law, "enhancing the reporting and investigating of crime by improving the position of the victims and witnesses", and increasing crime prevention efforts. These measures will largely constitute an extension and intensification of Maastricht-era efforts, although there has been no prior measure on victims' rights. There is only a brief mention of criminal suspects, but no discussion of the difficulties that they often face in foreign countries (interpretation problems, imperfect access to an adequate defence, extended discriminatory detention before trial or disproportionate sentences), suggesting that the effect of Tampere European Council may backtrack from the broader agenda set out in the 1998 Action Plan. The definition of witnesses takes no account of defence witnesses. There is no consideration of possible decriminalization or alternative approaches to crime-fighting.

The 1997 Action Plan is to be replaced by a new plan, which already exists as a first draft prepared by the Finnish Presidency (Council document 9423/99, 21 June 1999). The new Action Plan would update the 1997 Plan, incorporate and elaborate upon the 1998 Resolution on crime prevention and the 1998 Action Plan on creating the area of freedom, security and justice, and add a number of entirely new proposals. This contains several Chapters. Chapter 2.1 on improving data incorporates the prior idea of harmonizing national data on crime and adds a proposal to "benchmark" effectiveness of prosecutions, investigations and adjudication. Chapter 2.2 concerns links between civil society and law enforcement agencies. Notably it suggests banning persons linked to organized crime from public tenders, subsidies or licences (from the 1997 Action Plan) and establishing an EU-wide database on persons linked to organized crime. Chapter 2.3 addresses prevention, updating the proposals in the Council Resolution and adding a panel to assess the effect of new EU proposals on crime and a scheme to exchange information on trends in specific crime categories. Chapter 2.4 concerns reviewing and improving legislation at EU level. It suggests in particular a schedule for harmonizing national criminal law (see further below) and broader proposals on national corruption law and the liability of legal persons. Chapters 2.5 and 2.6 deal with police cooperation generally and Europol in particular, and so are discussed separately.

Chapter 2.7 concerns tracing, freezing, seizing and confiscating crime assets, and suggests in particular that: the Council agree treaties with third states to restrict the use of "fiscal paradises"; Member States exchange information at EU level on suspected money laundering; Member States extend criminalization of money laundering; the Council adopt a measure on minimum standards for tracing, freezing, seizure and confiscation of assets of crime; the Commission should propose amending the money laundering directive in several respects (since implemented); the Commission should propose a measure to prevent use of cash from covering up conversion of the proceeds of crime; the Council should reverse the burden of proof on the source of assets where a person has been convicted of an organized crime offence; a measure should allow for confiscation of assets despite the death or disappearance of the offender; and confiscated assets should be shared among Member States. Chapter 2.8 addresses inter-disciplinary action against organized crime. It suggests that the European Judicial Network should be given a secretariat and a role in telephone tapping and special investigative techniques; the Commission propose a measure on informers and witness protection; a specific measure should address "modern" investigative methods like the use of undercover agents and bugging; Member States must ratify various international and EU Conventions by a certain date; implementation of EU extradition treaties should be subject to mutual evaluation; the Council should consider whether "the abuse of judicial remedies can affect or delay co-operation; for example the right of asylum"; legislation on counterfeiting outside the euro and payment systems should be considered; the Council should aim to agree mutual recognition and enforcement of criminal decisions; and the Council should harmonize evidence law to allow the "free movement of evidence".

Chapter 2.9 concerns the applicant countries. They should be granted access to the SIS and the Member States should agree bilateral treaties with them regarding stolen vehicles, controlled deliveries and undercover operations. Chapter 2.10 concerns other third countries and international organizations. The recommendations here largely address coordination of EU positions, but also raise the prospect of Europol relations with countries such as Russia and Ukraine and EU assistance to third states who wish to ratify the proposed UN Convention on organized crime. Finally, Chapter 2.11 addresses the implementation of the revised Action Plan, largely following the existing system for implementation.

Separately, the Finnish Presidency has proposed two more detailed work programmes, on substantive and procedural criminal law (Council documents 9959/99 and 9958/99, 19 July 1999). The former paper sets out criteria to decide the EU's priorities. These include differences in constituent elements of offences which hamper investigation or prosecution of offences; lenient sentences which attract offenders; seriousness of the offence; lack of existing or proposed rules on the matter in the EU or another forum; and political reasons such as common interests (protection of the euro and of the EC's

financial interests). Each of the crimes which the 1998 Action Plan commits the Council to consider harmonizing (except the counterfeiting crimes) is considered in light of these criteria. The paper then examines the issue of sanctions, noting that Member States' penalties for various criminal acts are designed to function in conjunction with a broader system of criminal law, with corresponding differences in minimum or maximum penalties, or no minimum penalties at all. In addition, statutory penalties may not reflect practice. Finally, the paper suggests examining harmonization of at least one crime per Council Presidency beginning in the second half of 2000, in the following order: drug trafficking offences; trafficking in human beings; terrorism-related offences; money laundering; tax fraud; sexual exploitation of children; environmental crime; corruption; computer fraud; and offences committed by means of the Internet (with separate deadlines applying to counterfeiting).

The work programme on procedural criminal law addresses only one aspect of the issue: mutual recognition of decisions and judgments. It suggests wider signing and ratification of the Council of Europe and EPC Conventions on this subject; expediting responses to requests for mutual legal assistance; expediting extradition responses (notably by abolishing the double criminality requirement and the "political offence" exception and by transferring proceedings where Member States refuse to extradite their own nationals); expediting recognition of arrest warrants and convictions (notably fast-track extradition, easier enforceability of warrants; and quicker extradition of convicted persons and/or persons who have fled while on bail); development of a standard system of "Euro-warrants"; recognition of fines and withdrawal of licences imposed abroad; and recognition of orders for tracing or freezing of assets.

As criteria for ranking these objectives, the Presidency suggests: judgments and decisions whose enforcement is urgent to prevent flight or destruction of evidence; seriousness of the offence; lack of existing or proposed rules on the matter in the EU or another forum; and political reasons such as common interests. The objectives are not considered in light of these criteria; rather the Presidency refers only to the new draft Action Plan, with its stress on tracing, freezing, seizure and confiscation of assets of crime and bank accounts.

These proposals raise certain problems. First, the Council should consider very carefully whether each of the fields listed for substantive criminal law harmonization actually needs to be the subject of EU-level harmonization, in light of existing EU measures, other measures agreed internationally, and the extent of problems which actually result from divergences in Member States' laws. It may be the case that some areas of law need not be harmonized at all, or that only very limited areas of law need be harmonized. The EP should press the Council and/or Commission to prepare and release to the public a detailed analysis of each of these issues before considering of harmonizing each area of law. In each

case, six months may be too short a period to consider the merits and demerits of harmonization properly.

The EP should also insist that the Council live up to its initial plan to adopt measures concerning interpretation, confiscation, reintegration of offenders and victim support. These measures should not just be "soft law" measures but should be binding, and they should not merely reiterate the "minimum standards" of the ECHR but should build upon them. In addition, the EP should press the Council to consider what steps can be taken to reduce extended detention of foreign nationals (EC nationals and non-EC nationals alike) pending trial in a Member State. Such extended detention is particularly questionable in light of the Conventions simplifying extradition procedures and the plans to extend mutual recognition of judgments.

As for reducing reasons for refusing mutual assistance, there will have to be a careful and detailed consideration of the differences between national criminal systems. Given the sensitivity of the subject and the careful balance struck between different elements of each national criminal justice system, any reduction in the reasons for refusing mutual assistance will have to be carefully considered. Any simplification or extension of the mutual recognition of criminal decisions should contain the right to resist enforcement of the decision on grounds that a person did not have an adequate opportunity to defend himself or herself, as seen in the agreed Convention on mutual recognition of driving disqualifications.³⁸ It should be further specified that such an argument can be raised by the accused, not just by the requested authorities, for otherwise there might be a breach of Article 6 ECHR.

Any move to link the European Judicial Network to Europol would have to respect both the different traditions of Member States which do not grant their judiciary any form of investigatory powers and the importance placed by every Member State upon the independence of the judiciary, particularly in relation to the police. This is all the more necessary given the very limited accountability of Europol.

Any proposal to allow judges and prosecutors to operate in another Member State will have to consider carefully whether such a measure is actually necessary. Given the separate initiatives to facilitate extradition, mutual assistance, transfer of proceedings and transfer of sentences, is there a need to arrange for costly and convoluted movements of judges and prosecutors? Such a proposal would also have to address in detail which law will be applied by the prosecutors and judges who move to another Member State.

³⁸ Article 6(1)(e) of Convention (OJ 1998, C 216).

Extradition after in absentia convictions obviously raises substantial human rights problems and the EP should subject any such proposal to the most careful scrutiny. The Council will have to explain in great detail why such a measure is necessary. Why not simply suspend the trial in the absence of a defendant and extend the period for bringing charges when a defendant has absconded? Any formal exchange of criminal records will of course have to contain extensive rules on data protection. Since criminal records do not concern investigations under way, there is no justification at all for refusing full access to a file. Moreover, there must be immediate full recognition of any correction of error, amnesty or pardon. Member States must ensure that any use of their criminal records can be fully "traced" so as to ensure that all private and public databases erase records of criminal convictions after corrections, amnesties or pardons. A register of proceedings and coordinated decisions on prosecutions would be highly welcome but the EP should ensure that an accused person has the right to submit observations on which Member State should have jurisdiction and to contest a subsequent decision. Finally, the Council should have to justify in detail why greater use of bugging is necessary, given the frequency with which Member States violate Article 8 ECHR in this area.

Any move to set up an EU-wide database on persons linked to organized crime raises great civil liberties concerns. Such a database would obviously overlap with Europol to a considerable extent and so one can question its cost-effectiveness. In addition, if the new database were used for broader purposes than Europol, not merely to serve as intelligence for investigations but also as grounds for refusing residence, establishment or licences to persons, then the EP will have to consider its merits very seriously. Would it be compatible with the ECHR or the free movement provisions of the EC Treaty to impose such bans except where persons had been convicted of organized crime offences or (provisionally) where they had been charged with such offences? The EP will also have to give close consideration to the data protection provisions of such a database.

There are similar concerns with regard to extended exchange of information on suspected money laundering. Where will the personal information connected to such exchanges be stored and will effective data protection rules apply to it? The EP should also take care to ensure that any measure to reverse the burden of proof concerning assets where persons have been convicted of an offence stays within reasonable limits. Such measures should never extend to situations where persons have not yet been convicted of offences and should at most only apply provisionally if a conviction is being appealed. Furthermore, the presumption in such cases should not be made effectively impossible to rebut.

As for an extended role for the European Judicial Network, any proposals should be subject to very strict scrutiny. National judges have a role in authorizing tapping and special investigative techniques because of their special role within national legal systems, but there is no system of accountability or

legitimacy at present for the Judicial Network. If the Network is closely linked to Europol, in accordance with other proposals, then its independence and impartiality may be compromised and the combined effect of such measures will be to render Europol even less accountable.

Any new proposal on informers or on bugging and special techniques will need to explain why the provisions in the current Resolution or the proposed Mutual Assistance Convention on these matters are not sufficient and should take full account of the widespread criticism of the reliability of informers. As for the "abuse of judicial remedies", the EP should press the Council and Commission at an early stage to spell out which criminal procedural protections they regard as "abuses". Defence lawyers will obviously have different views from prosecutors on what constitutes an abuse and the EP should not allow itself to become a forum for populist assertions about "loopholes" without a detailed discussion of the legislation in question. The EP's concerns on this point should increase given the assertion in the draft Action Plan that the right to asylum constitutes an abuse of the criminal justice system. The UNHCR Handbook on asylum procedures makes clear that in many circumstances criminal prosecution or convictions can form part of a case for a claim for asylum and in any event, the Protocol on asylum for EC nationals will restrict consideration of any claims made by EU citizens in other EU Member States. Furthermore, asylum is now a matter for the first pillar and so a third pillar measure restricting or affecting the right to claim asylum would be legally invalid. Finally, as Article 63 EC makes clear, EC measures concerning asylum must be adopted in compliance with the Geneva Convention, and so any attempt to restrict the right to claim asylum on the grounds of "abuse of criminal procedure" may be invalid for incompatibility with the Convention.

Earlier moves to agree "free movement of evidence" foundered because of huge differences between national law on admissibility of evidence, and those differences have not dissipated. The national rules of admissibility are closely connected with national standards of human rights protection, and any move to weaken them, or allow them to be circumvented by acquiring evidence in Member States with "lower" standards, would be problematic. In light of this, the EP will have to examine any moves in this area very closely.

Finally, any move to agree treaties between Europol and third states, or to agree SIS agreements with third states, will have to be scrutinized very carefully indeed. What is the standard of data protection applied in each of these third states and is the general standard of human rights protection and the rule of law sufficiently high to justify signing such a treaty? The EP should not be reluctant to set high standards before it will approve such agreements and to oppose them vigorously if necessary.

Chapter 8

FRAUD

After failed attempts in the 1960s and 1970s, the Council agreed a Convention on Protection of the Community's Financial Interests in 1995 (OJ 1995 C 316), followed by two substantive Protocols (OJ 1996 C 313 and OJ 1997 C 221), and a Protocol on references from national courts to the ECJ (OJ 1997 C 151). However, most Member States did not even begin ratification procedures for these measures until 1998, and final ratification seems some time away. The parent Convention defines fraud against the Community interest, including damage to EC revenue as well as expenditure, and sets out rules on penalties and procedures. The First Protocol governs corruption against the EC's financial interests, requiring Member States to establish defined offences of "passive" and "active" corruption (taking/accepting and offering/giving bribes) along with rules on procedure and penalties. Finally, the Second Protocol requires an offence of money laundering related to the aforementioned fraud and corruption, with connected confiscation obligations; requires that Member States establish the criminal liability of corporations; and sets out rules governing the Commission's cooperation with national investigations. These third pillar measures have been supplemented by first pillar law, notably Regulation 2988/95 (OJ 1995 L 312) governing administrative sanctions for breaches of Community law affecting EC financial interests.

These instruments have made little impact on the fight against fraud because of difficulties at Member State and Community level. First, Member States have made only marginal efforts to propose ratification of the Fraud Convention and its Protocols in their national parliaments. One must conclude that Member States consider that regular expressions of concern about EU fraud are a priority, but that actually taking measures to prevent and prosecute such action is not. Second, deficiencies in the operation of UCLAF, the previous body set up to investigate fraud within the EC institutions and to assist in coordinating national investigations, prevented that body from playing a very effective role in the fight against fraud.

The situation has changed with the entry into force of the Amsterdam Treaty. Article 280 EC now gives the EC the power to adopt legislation to implement the fight against fraud, by a qualified majority vote in Council and the co-decision of the EP, although such legislation cannot affect the operation of national criminal law. Previously Article 209a EC only repeated some of the principles from the Commission v. Greece (Greek maize) case (see previous section) concerning Member States' responsibility to combat breaches against the EC's financial interests; there was no power to act other than then-Article 235 EC (now Article 308). This meant a unanimous vote of the Council and

consultation of the EP, despite the importance of the subject and the EP's extensive role in adoption and discharge of the EC budget.

There was an early use of Article 280 shortly after entry into force of the Amsterdam Treaty. Concern about the level of fraud rose in late 1998 and early 1999, and the Commission proposed legislation for a new system for coordinating the fight against fraud, after UCLAF had been repeatedly criticised by the Court of Auditors and the EP's budgets committee. Ultimately concern about fraud culminated in the resignation of the Commission to stave off a censure vote by the EP. Separately, the EC institutions agreed on a revised version of the Commission's proposals. This took the form of a Commission Decision establishing the new Office (called OLAF); an Inter-Institutional Agreement between the EP, Commission and Council, determining how the OLAF would operate, with an Annex including agreed rules on how each institution would collaborate with OLAF; and a Council Regulation detailing the powers of OLAF (all at OJ 1999 L 136). The latter Regulation was agreed pursuant to Article 280 EC.

The EP's budgets committee has been considering far-reaching proposals to establish common Community criminal law and centralized prosecutors ("Corpus Juris"). Such proposals would have a huge impact on the very diverse systems of criminal law and criminal procedure in the EU. It should be kept in mind that all criminal procedural law measures agreed by the Council will have an impact on fraud against the EC's financial interests, by making it easier to extradite alleged fraudsters, and to transfer proceedings, recognize judgments, and agree mutual assistance in fraud cases. In light of the very new agreement on OLAF, the pending ratification of the PIF Convention and Protocols, and the effect of other criminal law legislation, the EP will have to make a very careful case for additional measures at this point, because it is not yet known whether the other measures will have an impact. The best strategy may be to select the elements of "Corpus Juris" that could be agreed relatively quickly because they are less complicated and would not result in the creation of new institutions or substantial changes in national law, and press for their adoption.

Chapter 9

EUROPEAN CUSTOMS COOPERATION

As a rule, customs authorities fulfil two roles: they act as fiscal authorities, with responsibility for customs clearance and levying excise duties and customs tariffs. At the same time they have functions similar to those of the police, with responsibility for investigating and prosecuting customs offences and often also general tax offences. Furthermore, in this capacity, their role implies the investigation of import/export offences, regardless to whether those are regulated in the criminal laws or any other law: smuggling and trafficking in illegal drugs, protected flora and fauna, national treasures, nuclear materials, hazardous waste, illegal pornography etc. "Strong" customs authorities are endowed with the same powers in criminal justice procedure as the police, not just at the border, but also in the interior of the country. "Weak" customs authorities must often hand over responsibility for investigations within the country to the police. In practice the administrative and the prosecuting roles undertaken by the customs authorities cannot be clearly separated. Despite this fact, cooperation between customs authorities within the EC and EU - in legislation as in practical work - has been developed on the basis of a formal division between the two roles.

By the end of the 1960s, customs cooperation in the then EEC States came, at least partially, within the framework of the Community. The concept of the E(E)C as a customs union was already contained in the Rome Treaties. The Customs union was completed in 1968 for industrial products and in 1970 for agricultural products. The Community thus had powers to legislate on common customs and agricultural regulations. In the Single European Act, the EC's powers to harmonise tax in the context of the Single market were clarified and extended. Powers of legislation for "non-harmonised bans and restrictions", particularly in the area of customs criminal law remained within the competence of Member States.

Powers of enforcement of customs regulations remained entirely with the Member States. The customs authorities of the Member States as administrative authorities have to enforce Community customs regulations and any remaining national restrictions. At the same time they act as prosecuting authorities, where the respective criminal laws have been drawn up exclusively by the Member States.

European cooperation has been extended over a number of years in both of these areas. In preparation for customs union, the then six Member States of the European Economic Community signed the 1967 Naples Convention on Mutual Assistance in Customs Matters: The co-operation established by this convention referred both to Community and national customs law. Only in 1981 was the Convention supplemented with a Community legal instrument, EC Regulation 1468/81 on

Mutual Assistance in Customs Matters. This concerned violations of the Community customs and CAP rules only. It provided not only for mutual assistance between Member States as does the Naples Convention, but also between Member States and the Commission. In the Maastricht Treaty, customs cooperation in criminal matters formally became the subject of inter-governmental cooperation.

The formal division between a Community area of cooperation (First Pillar) and an area of cooperation within the sole competence of Member States (Third Pillar) has remained.

1. From Maastricht to Amsterdam ~ First Pillar

With the Amsterdam Treaty a new Article 135 was inserted into the Treaty establishing the European Community. This provides that the Council "within the scope of application of this Treaty" shall take "measures in order to strengthen customs cooperation between Member States and between the latter and the Commission". The EC has already taken such measures, yet the fact that the TEC now clearly states community competencies to contribute to customs cooperation changes the decision-making procedure over such measures.

The scope of application to which the new Article refers is the common commercial and agricultural policy and tax harmonisation in the single market, a field in which the Community already had legislative competencies. Article 135 excludes the community from cooperation in investigating contraventions to the criminal law of the Member States or to non-harmonised restrictions, which the Member States are allowed to maintain "on grounds of public morality, public policy or public security, for the protection of health or life of humans, animals or plants, national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property" according to Art 30 (ex-36) TEC or for military equipment according to Article 296 (ex-223) TEC.

The legislative powers of the community were mainly established before the Maastricht Treaty and remained unchanged in the Amsterdam version of the TEC. With the new Article 135 TEC, however, the Amsterdam Treaty resolves the issue over procedure under which measures to develop cooperation in customs affairs are decided. This procedure had concerned particularly the new Regulation on Mutual Assistance in Customs Matters as well as the decision over the Customs Strategy 2000; the passing of both suffered a delay of some years simply because of the dispute over the decision-making procedure. On this matter, the Parliament had insisted that these decisions should be made under the co-decision procedure, as provided in articles 95 and 251 (ex-100a and 189b). The Council considered that both matters were not Single Market questions. According to the Council, the Community had no express legal competence in the area of extending customs cooperation, which is

why only Article 308 (ex-235) was considered to be a legal base for a decision. According to this, the Council must vote unanimously on the basis of a proposal from the Commission. The Parliament had only to be consulted, but had no right to co-decision.

2. From Maastricht to Amsterdam – Third Pillar

There was already cooperation between customs authorities of the Member States in the field of criminal justice before the Maastricht Treaty. Within the framework of the Naples Convention, the Mutual Assistance Group (MAG) was set up and regular meetings were held. Cooperation between customs authorities was based partly on the Naples Convention, and partly on further bilateral agreements on mutual assistance between customs authorities.

The Maastricht Treaty states in Article K 1.7 that customs cooperation is an area of common interest "without prejudice to the powers of the European Community". In other words: insofar as customs cooperation was not already in place in the context of the community, it was to become the subject of governmental cooperation between the Member States on the basis of the Maastricht TEU.

Article 29 TEU-Amsterdam maintains this structure in principle. Customs cooperation as well as police and criminal justice cooperation should serve the objective of an "area of security, freedom and justice" which should include the "prevention and combating" of crime, organised or otherwise. The wording establishes that the objective of cooperation should be criminal justice in the broadest sense. For the rest, the area of cooperation remains open for definition by the Member States executives involved: The concept of "organised crime" lacks legal limits. The inclusion of "non-organised" crime theoretically even would allow cooperation in the field of more minor offences. The concepts of "prevention" and "combating" not only refer to clearcut criminal prosecution, but also embrace cooperation in areas based on supposition or even before an offence has occurred. The concepts used in Article 29 illustrates that no limitation of cooperation was intended.

Article 30(1) expressly states that intergovernmental cooperation includes operational aspects and the exchange of information. In Article 31, the "progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties," that is: the at least partial "harmonisation" of criminal law of the Member States affects particularly the areas of drug trafficking and "organised crime", the field where the customs authorities work.

The object of governmental cooperation, as pointed out in title VI of the Amsterdam TEU is only new on paper. In reality, already under the Maastricht Treaty, opinions, measures and agreements

referred to operational cooperation and exchange of information, as well as to the harmonisation of criminal law – the latter particularly in the field of illegal drugs.

The enlargement of the legal instruments in Article K 3 – now in Article 34 – applies to the whole of Title VI TEU and also to the area of intergovernmental customs cooperation. The provision in Article 34 (2d) whereby conventions enter into force once approved by at least half of the Member States was already practised in regard to the Convention on the use of information technology for customs purposes (CIS convention). This model developed in the case of the CIS-convention to speed up proceedings is now enshrined in the Treaty on European Union.

Similarly, the limited jurisdiction of the Court of Justice was accepted as it had been already fixed in conventions and additional Protocols based on the TEU in the Maastricht version. The CIS convention grants the court jurisdiction over disputes between the Member States or the Member States and the Commission concerning the content of the Convention. An additional protocol extends the jurisdiction to preliminary rulings, if the Member States opt in to such a jurisdiction. The Naples II-convention contains essentially the same provisions on dispute settlement and preliminary rulings. This model in Article 35 is now taken over not only for conventions under title VI TEU, but also for decisions and framework decisions. It is possible, however, that Member States such as the United Kingdom will refuse in future to opt-in in accordance with Article 35(2), as it was the case already before.

The decision-making procedure will as in the past remain largely in the hands of the Council. The Council under the Amsterdam Treaty is required to achieve a unanimous vote for its decisions. It must only consult the Parliament and may then allow an extended period of time for the Parliament to produce an opinion. It is not however obliged to take the Parliament's recommendations into account. Unlike the Maastricht TEU which makes provision for customs cooperations on the initiative only of the Member State, the Commission may also make proposals as it has done in the past in the field of Community customs cooperations.

The decision-making procedure for customs cooperation in the field of criminal justice is thus similar to what took place in the field of Community customs cooperation before the Amsterdam Treaty. While the Community customs cooperation is now subject to the co-decision procedure, the Parliament is largely excluded from the intergovernmental cooperation aspect.

3. Division between First and Third Pillars

a technicality in terms of customs cooperation practice

In terms of the practical cooperation between customs authorities, the division between Community affairs and those exclusively within the competence of Member States is a mere technicality. Nor is this surprising. On the one hand, the practical administration of EC customs regulations is the responsibility of the authorities of the Member States, as are the national customs regulations. On the other hand, EC regulations and directives extend far into the field of criminal law, theoretically the preserve of Member States. This is the case particularly in the fight against drugs, by far the most important area where customs authorities cooperate in the field of crime. The EC passed a directive in 1990 and a regulation in 1992 on the control of chemical precursors used to make drugs. A directive was also issued by the Community on the subject of money laundering in 1991.

The entry into force of the Maastricht Treaty made few changes in the area of customs cooperation within the EC/EU. As mentioned above, the MAG arose out of the 1967 Naples Convention. From the end of the 1980s, a sub-committee of the MAG – MAG '92 – was in charge of preparations for the single market. The Customs Directorate-General of the Commission was involved in all the discussions. The main subjects under discussion amongst others from the early 1990s were the setting up of a Customs Information System (CIS) and the restructuring of the system of mutual assistance between customs authorities. For some time there had existed a division of labour between the MAG and the World Customs Organisation (WCO), a system which was then further developed. This affected – as will be explained in greater detail – the field of information technology particularly, special controls, cooperation with private enterprises. Jochen Meyer, chairman of the Enforcement Committee of the WCO, stated in 1994: "If something is already underway within the MAG, then we do not attempt to re-invent the wheel. We take it up in our routine discussions so as to be able to keep people informed... But we have never had reason to say: the EC has carried out checks on air passengers. Off we go then – we'll carry out a similar operation two weeks from now... When all is said and done, if you look at the list of participants in all the meetings, those who go to MAG meetings also come to our meetings."

3.1. Customs Information System

When the Maastricht Treaty came into force, the MAG was incorporated as the Customs Working Group within the Third Pillar and continued its work on the project which had already been started. The parallel nature of the First and the Third Pillar is most clearly recognisable in the legal establishment of the Customs Information System. According to the legislation there are two information systems: one concerns cooperation and mutual assistance between national customs authorities in implementing customs regulations of individual States and any associated prosecutions. Its legal base is enshrined in the "Convention on the use of information technology for customs

purposes", signed in 1995.³⁹ This was agreed "on the basis of Article K 3 of the Treaty on European Union", that is on the basis of the Article of the TEU (Maastricht version), which lists the legal instruments of the Third Pillar. Data on drugs smuggling and other offences provided for in national legislation may be entered into the Customs Information System.

The second Customs Information System (in legal terms) is a part of the First Pillar. Its legal base is the revised EC Regulation on Mutual Assistance in Customs Matters of 1981, the Council Regulation on mutual assistance between authorities of the Member States and their cooperation with the Commission with regard to the correct application of customs and CAP legislation.⁴⁰ In the First Pillar CIS, alongside data on offences against Community regulations on general goods traffic, information may also be stored relating to the diversion of precursors for drugs production. The two systems are distinct in three ways:

* in their objectives – the mutual assistance regulation refers to offenses against community customs regulations, while the convention refers to offenses against the Member states customs and criminal law provisions

* in naming the Commission as a partner for the CIS in the First Pillar, and its absence in the Third Pillar, and finally

* in the role given to the European Court of Justice. As the Regulation is an EC legal instrument, the Court of Justice automatically has jurisdiction over the Community part of the CIS. In the sphere of intergovernmental customs cooperation, i.e. for the Third pillar CIS, Article 27 of the CIS-Convention rules, that disputes which have not been settled by the Council within six months may be referred to the ECJ. The additional protocol allows the Member states to opt in the possibility of preliminary rulings by the ECJ, when the national court of last instance or another national court asks for such a ruling. This uneasy compromise, which in a similar way was found for Europol and was by the Amsterdam treaty included in the TEU, is all the worse as the CIS is in reality a single system which is to be subject to different mechanisms of control in the First and the Third Pillar.

³⁹ Convention on the use of information technology for customs purposes, Abl. EC 1995, No. C 316 v.27.11.1995, S 33-43. On p. 58-60 of the same Official Journal is an "arrangement" between the Member States, whereby the Convention comes into force, after being ratified by all Member States, if eight States are in a position to implement it.

⁴⁰ EC Regulation No. 515/97 of the Council of 13 March 1997, in: Abl. EC 1997, No. L82 v. 22.3.1997, p. 1-15. The original proposal for this Regulation was made in 1992 to which there were few modifications in the final version. The reason for which the delay in passing it is not a dispute on methods of customs cooperation, but a dispute between the European Parliament and the Council over the consultation procedure. The Parliament wanted it passed on the basis of the co-decision procedure as provided for in Article 189 a of Maastricht. According to this Article, the Council decides on the basis of a proposal from the Commission and in co-decision with the Parliament with a qualified majority needed. The Council based its Regulation on Article 235 Maastricht which requires unanimity within the Council. This procedure is very close to that used in the area of governmental cooperation in the field of home affairs and justice. The dispute shows how cautious national governments were and are to keep a tight rein on the matter and to clamp down on any further integration.

For the rest, the fifth Title of the Regulation has almost identical wording to the above Convention.

Technically, the two systems are one and the same. They are administered centrally by the Commission and authorities of the Member States have access. The national customs authorities and the Commission could already contact each other via the Mailbox System SCENT. Certain communications took place via screen masks set up by the Commission. This communication system is now being completed by a central data bank, which is the CIS. The CIS is thus considered as the customs counterpart to the Schengen Information System (SIS). The single market was supposed to require "harmonising measures" in the field of customs. While the SIS provides a support network for police checks on persons, the CIS, in the main, simply checks on goods. Goods, vehicles, businesses and persons may be entered in the system. Data on persons is held in a similar way to the SIS: alongside the person's name, date of birth etc. there may be added "permanent and objective physical features", a warning code concerning possible use of violence, weapons or danger of escape, the official vehicle description, the reasons for entering the alert and proposed measures.

The proposed measures include, among others, "discreet surveillance" (Article 27(1) and 28 Regulation, Articles 5(1) and (6) of the Convention). During this procedure, the object of the surveillance is supposed to be followed without them noticing. The data recorded during the course of an operation on place, time and purpose of the control, the vehicle used, any objects involved and accompanying persons as well as the route and destination are passed on to the authorities, and the official/agency which put the respective person on the system. These various details are designed to provide a network of the person's contacts and a record of their movements. The same procedure may be used for goods, vehicles, container traffic etc. If surveillance of this kind is not permitted under the law of a Member State, in its place there should automatically be a "specific check". Surveillance measures of this kind are comparable to those possible within the SIS (art. 99 Schengen implementation treaty). While in the context of the SIS discrete surveillance is one measure among a variety of others, they are the main purpose of the CIS. Not without reason, SCENT/CIS is used in special control and surveillance operations.

3.2. Mutual assistance between customs authorities

The Regulation not only sets out the basis for the CIS, but also stipulates greater cooperation than was possible under the previous Regulation of 1981. This is not merely for mutual assistance on request, but also "spontaneous" communication of information. This stipulation is part of the second major

treaty on customs in the Third Pillar. The Convention on Mutual Assistance in Customs Matters⁴¹ replaces the Naples Convention of the same name of 1967 and is referred to as "Naples II" for short. As in the original Naples convention, Naples II makes provision for two types of mutual assistance between customs authorities: for judicial assistance (incorporating sometimes also judicial authorities) and for assistance required on the pure administrative channel. Within the framework of the latter, documents transferred between customs authorities - even if they are reported "spontaneously", i.e. without previous request - acquire immediate validity as judicial evidence (Articles 14, 18, 19(7)). Requests are not confined to reporting information, but also to carrying out investigations and the surveillance of persons and vehicles. In the future requests for surveillance may be mainly dealt with via SCENT/CIS. As before, any request may be communicated between subordinate authorities on local level. Nevertheless, the Convention provides for the establishment of national coordination centres and the exchange of liaison officers.

The coordination offices should undertake the coordination and planning of "special" forms of cross-border cooperation (Articles 19-24). These special forms of coordination are permitted "for purposes of prevention, investigation and prosecution" of certain offences considered as serious. These include professionally committed cases of "normal" customs and subsidy fraud, illegal trafficking in weapons, protected national treasures, poisonous waste, and radioactive substances as well as, as would be expected, illegal drugs - including precursor substances. The Naples II Convention thus also provides for particular forms of cooperation in areas, such as ordinary customs fraud and the diversion of precursors for drugs production, covered by EC law.

These special forms of cooperation are hot pursuit across borders, cross-border observation, controlled deliveries and the use of covert investigators and, within certain limits, the establishment of joint investigation teams. In comparison with the Schengen Convention, the list of special methods in the Naples II Convention is far broader. It is the first international agreement which regulates the use of covert investigators outside national territories. Considerable room for manoeuvre is left to the States concerned: the law of the particular State on whose territory the action takes place takes precedence. If the special methods are not covered by national law, the State in question may opt out. In individual cases the measure may also be refused by the competent judge, if according to the respective national law they has to approve the operation.

With the exception of hot pursuit, where the police or customs overtly follow a person, who was spotted in the very act of committing an offence, the special forms of cooperation mentioned in the convention have long been common practice. As in the Schengen Convention, the Naples Convention

⁴¹ Convention based on Article K3 of the Treaty on European Union on Mutual Assistance in Customs Matters *Abl. EC* 1998, No. C24 v. 23.1.1998, p1-22.

legalizes *a posteriori* already established practices. The special forms of cooperation are thus taken from a "grey area", and become legally standardized. The legalization, however, does not alter the fact that these special forms of surveillance are (with the exception of hot pursuit) quasi secret intelligence methods, where those affected are not aware and which are not made accountable under any system of scrutiny - be it by a parliament or by judicial authorities. The Naples II Convention is thus a further dangerous step in the normalisation of covert i.e. secret methods of policing. The fact that this step was taken within a customs convention, meant that it received very little publicity. The European Parliament was not consulted on the Naples II convention, despite the fact that the treaty was agreed after June 1997, when the Council began consulting the EP on most Third Pillar measures.

What was not included in the Convention was the establishment of a joint customs records data bank or intelligence work files. This proposal was contained in the draft convention and would have led to a Euro-Customs alongside Europol. The issue of a further customs data system besides the CIS was raised again under German presidency in the first half of 1999. The customs authorities are represented with liaison officers in Europol. These officers normally have access to national customs information systems. CIS access for Europol is under debate.

3.3. Special controls

Cooperation between the customs authorities in the EU was not restricted under Maastricht to preparing Conventions. One of the main fields of practical cooperation was the special controls already undertaken within the framework of the MAG. The MAG was very pragmatic as regards the participants. Non-EC-States on the basis of bilateral customs mutual assistance agreements had taken part in special operations and in joint data systems set up by the MAG since the mid 1980s. The circle of participant customs authorities was the same both for special operations and joint data systems set up within the framework of the WCO for western Europe. Both organisations - the MAG and the WCO - merely provided different means for cooperation between more or less the same authorities.

Looking more closely at the joint control and surveillance operations and information systems demonstrates the interchangeable of the respective structures. Cooperation developed mostly in the fight against drugs: while within the WCO, a Balkans information system was set up (for HGV checks on the Balkans route) and the CARGO information system (for air freight traffic), in the framework of the MAG, the MAR information system was for data referring to commercial shipping traffic and the Yacht information system for private craft. The German Customs Criminal Investigation Office

(Zollkriminalamt - ZKA) in Cologne takes the role of a central unit for all four systems mentioned.⁴² The lists of participating States are very similar.⁴³ Of the information and communication systems in place in the field of customs at the beginning of the 1990s, only the System Customs Enforcement Network (SCENT) was specifically for EC customs authorities. They were able to send information to each other via mailboxes. Non-EC customs authorities were linked up to SCENT only via telex. In the context of Operation Octopus in summer 1993, SCENT was used for the first time for "operational purposes".⁴⁴

A similar division of activities is found in the special operations. While the WCO focused on HGV traffic on the Balkan route, special maritime operations were coordinated by the GAM. The GAM working group on airports specialised in checks on passenger flight traffic, while air freight traffic received attention from the WCO.

The new structure under the Third Pillar introduced by the Maastricht Treaty was seen by officials in the German Zollkriminalamt in 1994 as a bureaucratisation of cooperation. Before the Maastricht Treaty came into force, such operations were organised directly between the relevant customs authorities. Each national customs authority would have had to bear the costs arising out of the operation. Unlike the original procedure, under the Third Pillar, financial burdens today are distributed among the countries, which – as the head of the drugs section of the German ZKA, Peter Zimmermann, states – benefits the poorer customs units of the EU. The involvement of the then K4 Committee (now Article 36 Committee) to whom the relevant plans and costed proposals must be put, however slows down the decision-making, he says.

In November 1996 it seems that the Council reacted to this. Instead of requiring a single proposal for each operation, it decided on having a mandate for several years.⁴⁵ Six months later, there followed a Council decision, an introduction to common customs controls.⁴⁶ Instead of the Article 36 Committee, it is now the Customs Working Group itself which decides on the operations and which is responsible for the planning. The group must deal with these issues in the course of at least two meetings a year.

⁴² The Balkan Information System was divided into two further systems – South and North -, the German criminal investigation police oversees the northern part. See (*Zollkriminalamt*) *Massnahmen der Zollverwaltung zur Bekämpfung des Rauschgiftschmuggels, Stand: August 1994, p. 14-18.*

⁴³ The fact that Switzerland and Luxembourg are not a part of the MAR and Yacht information systems is not for any political motive, but for the simple reason that these countries have no coast.

⁴⁴ Keller, Peter/Fröhlich, Harald: *Die Octopus Coordination Unit – Basis für Eurozoll*, in: *Der Kriminalist 1994*, H.3,p. 139-142, here: p. 141

⁴⁵ *Mehrjahresmandat vom 29. November 1996 für gemeinsame Zollüberwachungsaktionen*, unpublished.

⁴⁶ Decision of 9 June 1997 on an introduction to common customs controls, *Abl. EC 1997*, No. C 193 v. 24.6.1997. p. 4-6.

The operations mandate will establish how SCENT/CIS back this up. The coordination of an operation is either left to the twice-yearly meetings of the rotating Presidency of the working group, or to a specially nominated national authority. For the sake of uniform coordination, the other States taking part send appropriate liaison officials. The cost of meetings and travel is partially financed by the OISIN programme.⁴⁷ In October 1997 it was stated in the draft of a strategic customs action programme for the Third Pillar, that the Member States should take part in at least four major operations a year.⁴⁸ Where the operations take place within the framework of the Third Pillar of the EU, the integration of third States is said to be strongly desirable. Interestingly, the draft document lists not only EU operations, but also those that take place under the auspices of the WCO.

3.4. Cooperation between customs and industry

In a similarly pragmatic way, the EU Customs Working Group advanced the programme in a Memoranda of Understanding between the WCO and private industry. A joint action of November 1996⁴⁹ expressly refers to the work of the WCO and requires the EU States to reach comparable agreements on a national level between their customs authorities and businesses/business associations. Closely connected to these agreements are questions concerning "risk analysis", a prominent issue since the mid-1990s for customs authorities.⁵⁰ Surveillance by customs should be efficient, but according to the objective stated interfere with legal trade and goods traffic as little as possible. In order to avoid such interference, selection criteria should be drawn up to enable targeted checks. Specialist centres are being established for particular types of transport/types of trade. Such centres already existed in 1997 for container traffic at the customs offices of the harbours of Hamburg, Le Havre, Felixstowe, Rotterdam and Antwerp. The existing information systems and databanks should be used for purposes of risk analysis and also in the context of special controls and in the course of ordinary duties.

While in the Third Pillar of the EU, a corresponding joint action was passed, practical systems of risk analysis were implemented at least for maritime traffic within the framework of Schengen customs

⁴⁷ Joint measure of 20 December 1996 on establishing a common programme for the exchange, training and further training and cooperation of criminal justice authorities (OISIN Programme), *Abl. EC* 1997, No. L 7 v. 10.1.1997, p5.

⁴⁸ Draft Council decision on a strategic action programme for customs authorities of the Member States of the European Union, Council document 10988/97. ENFOCUSTOMS 51, Brussels, 9 October 1997, p. 17f. It appears that this decision has not yet been published in the Official Journal.

⁴⁹ Joint measures of 29 November 1996 on the cooperation between customs and the economy in combatting the illegal drugs trade, *Abl. EC* 1996, No. L322 v. 12.12.1996, S. 3-4.

⁵⁰ see draft decision ... on a strategic action programme..., a.a.O.S. 7f., compare with joint measures of 9 June 1997 on specifying criteria for specific checks, methods of selection etc. and optimisation of the recording of police and customs authorities information. *Abl. EC* 1997, No. L 159 of 17.6.1997, p. 1f.

cooperation. In March 1997, a Schengen seminar took place on the subject. Whether further cooperation on the issue has been taken over by the Customs Working Group of the Council remains unclear.

3.5. Cooperation between customs and police

In November 1996 there was an additional decision of the Council on cooperation between customs and police, particularly with regard to the fight against drugs.⁵¹ In the document, the Council called on the Member States to enter into agreements at national level and, if necessary, at local level between both police and customs authorities. According to this, on the one hand, the fields of activity were to be clearly divided as far as possible. However, cooperation envisaged ranges from an exchange of information on training initiatives to joint patrols and investigation teams. The latter had already been established to some extent since the 1970s in the Federal Republic of Germany.

What is important about these joint investigation teams is that the police authorities can benefit from greater opportunities for cross-border customs cooperation. As seen above, customs authorities cooperate not only in the framework of mutual judicial assistance but also on an administrative channel, which is more rapid and does not involve judicial authorities.

4. The Parliament

Under the Maastricht Treaty, the Parliament had only limited powers in the area of customs cooperation. As far as customs cooperation under the First Pillar was concerned, it only had to be consulted, and under the Third Pillar, it had no rights. Regarding the activities of customs cooperation between the Member States, taking place under the umbrella of the Schengen Group or the WCO, it did not have any powers at all.

Under Amsterdam, the customs cooperation under the First Pillar, will fall under the mechanism of co-decision. The Third Pillar with the newly integrated Schengen cooperation, however, will not even form part of the parliament's remit. Consultation will depend on the Member States' governments. About the activities, which are developed in the context of the WCO, the European parliament will not even be informed. Under the Amsterdam treaty, the EP's possibilities to control customs cooperation and cross border activities will be very limited. Opportunities for influence will only arise, if projects of cooperation are developed in parallel both under the First and the Third pillar.

⁵¹ Resolution of 29 November 1996, Abl. EC 1996, No. C 375v. 12.12.1996, S.1f.

To exploit these limited opportunities, the Parliament must develop a consciousness on the quasi police character of customs work. The conflict with the Council on the Regulation on mutual assistance on customs matters and the CIS as part of it, only concerned the formal question of legislative procedure. There was no opposition from the Parliament to the structure of the CIS and methods of discreet surveillance. The Parliament has not as yet expressed an opinion on the methods of "special cooperation" in the Naples II Convention. On those matters concerning criminal justice, particularly illegal drugs, it largely goes along with the concepts of prohibition and "war on drugs" set out by the national administrations as well as by the Commission. Alternative non-repressive options in criminal justice policy, policies of decriminalization, which are not only more democratic, but generally also cheaper, have not been developed. On this question the European Parliament has fallen behind the debate at national level.

Once the CIS and Naples have left from the political arena, a basic political critique of this problematic issue of customs cooperation will only receive attention where it deals with practical effects. The Parliament should therefore demand regular detailed information and thus set the foundation for public debate on the subject.

Chapter 10

EUROPOL

Origins

Throughout the 1980s the idea of a European-style FBI was put forward by a number of police chiefs in the UK, Germany and elsewhere. The creation of Europol was first formally considered at the European Council meeting in Luxembourg on 28-29 June 1991. The European Council meeting of Heads of State on 9-10 December 1991 formally agreed on the creation of Europol as part of Title VI of the Maastricht Treaty.⁵²

The issue, on the table since 1988, of whether Europol should be seen as a fully-fledged EU police force (favoured by the then German Chancellor Mr Kohl) or an intelligence-gathering agency (favoured by the UK) was never formally resolved. The "idea" of creating Europol, decided in 1991, owed more to cooperation through the Trevi group (founded in 1976) than the "threat" of organised crime.⁵³

In June 1993 the Europol Drugs Unit (EDU) was created by Ministerial Agreement to deal with drug trafficking (later a Joint Action, March 1995).

The Europol Convention was signed on 26 July 1995 by the 15 governments of the EU without deciding on the role of the European Court of Justice (ECJ) - this was signed later, in July 1996, allowing the UK an opt-out.⁵⁴

The Europol Convention was drawn up in secret by members of the Working Group on Europol comprised of police officers and interior ministry officials from the 12 (later 15) member states.

Despite the fact that there were at least six or seven substantial drafts of the Convention dating from 1993 the European Parliament was not "consulted" under Article K.6 of the Maastricht Treaty at any stage during the negotiations over its content.

⁵² In this Chapter references are mainly given to Council documents, rather than OJ references (which contain the final adopted versions), as these are a better guide to tracing policy development.

⁵³ For an in-depth analysis of international police cooperation see "Polizeiliche Drogenbekämpfung - eine internationale Verstrickung", Heiner Busch, Munster, 1999.

⁵⁴ See, *The Europol Convention*, by Tony Bunyan, Statewatch, 1995.

Article K.6 of the Maastricht Treaty explicitly stated that the Council should "consult" the European Parliament "on the principal aspects of activities" and ensure its "views" are "duly taken into consideration". At the meeting of the Council of Justice and Home Affairs Ministers held in Luxembourg in June 1994 it was decided that the European Parliament should only be given a copy of the draft Convention "informally" so as not to formally "consult" it.

The powers given to the European Parliament under the Convention are minimal, it will simply receive an annual report. It will only be consulted if there are amendments to the Convention while the Council of Ministers is empowered to extend the list of crimes covered by Europol indefinitely without reference to parliaments (European or national) (Article 45.3)⁵⁵.

Concerns

Although the drafts of the Convention were not considered by the European Parliament they were obtained by NGOs and voluntary groups and the UK House of Lords Select Committee examined them.

In evidence to the UK House of Lords Dr Neil Walker, of Edinburgh University, argued that "suspected" organised criminals have rights. As the groups to be targeted by Europol - drug traffickers, money launderers, clandestine immigrant networks - are unlikely to get sympathy from the public: "it is particularly important that a package of accountability measures is developed which is vigilant...".

This aspect also bears on later concerns over the breadth of the definition of "serious crime" in the Joint Action on making it a criminal offence to participate in a criminal organisation.⁵⁶

Data protection too was a concern. When police agencies are given powers to hold information ("hard" and "soft") on citizens the issue arises on the right to find out what is being held and the right to have incorrect information changed or deleted. The provisions on data protection in the Convention are highly complex as they have to cover two different existing sets of data protection laws in EU member states.

Among the concerns on the data protection provisions are that: 1) Europol only has to "take into account" the Council of Europe Convention 1981 (rather than having to comply with); 2) The Joint Supervisory Body, set up to oversee data protection, has no powers of enforcement; 3) data can be included on the databases from "third countries and third bodies" on which the Meijers Committee has

⁵⁵ This article says that the definitions of the forms of crime in the Annex to the Convention may be amplified, amended or *supplemented*.

argued: "Since Europol could store data received from non-Member States or through circuitous channels, there were serious risks of inaccuracy, and the right to information might well be illusory"⁵⁷. Moreover, if equivalent standards of data protection were expected of states or bodies putting in or receiving information this would exclude many non-EU states.

Implementing measures

After the Convention was signed a number of contentious issues arose in the implementing measures. These include: the Protocol on the Privileges and Immunities of Europol, the Rules applicable to Europol analysis files, the Rules of procedure of the Joint Supervisory Body, the rules of the exchange of data with non-EU states and organisations (EUROPOL 26, EUROPOL 27, EUROPOL 29, EUROPOL 38) together with the Model Agreement for cooperation with Third States (EUROPOL 51).

The issue of the linking and/or the exchanges of data with Interpol (see for example, EUROPOL 53, 7879/98), the Schengen Information System (and SIRENE), the Customs Information System (CIS), Eurodac and any new agencies created require scrutiny and control.

So too do other forms of cooperation with non-EU states and organisations such as "Memorandum of Understanding" (MoUs) (the "Memorandum on the legal interception of telecommunications" (ENFOPOL 112, 10037/95) and the proposed "Mutual Legal Assistance Agreements" (EUROPOL 41, 6950/2/98). These areas of concern remain and may present significant problems for Europol's legitimacy in the future.

The Nassauer report

The report on "Europol: reinforcing parliamentary controls and extending powers" from the Civil Liberties Committee is very pertinent and raises central issues for the future of Europol (Rapporteur: Hartmut Nassauer, A4-0000/99, PE 229.270).

The report recognises that Europol is not an EU but an international organisation and that parliamentary supervision of "Europol under the present system" must remain in the hands of the national parliaments of the Member States. However, it argues that where Europol is involved in cross-border operations (under Articles 30 and 32 of the Amsterdam Treaty) such operations should be taken out of the intergovernmental context and a "Community solution" found. The report further argues for the long term that a European police unit with investigatory powers should be placed under

⁵⁶ OJ L 351, pp1-3. Similar legislation in Belgium was amended, as a result of public protests, to exclude political and trade unions organisations and organisations whose goals are solely charitable, religious or philosophical from the very broad definition referring to "more than two persons". See *Statewatch*, "Belgium: Defining a criminal organisation", vol 8 no 3 & 4).

⁵⁷ *Europol*, House of Lords, p17.

the direction and supervision of a Commissioner, who in turn would be fully answerable to the European Parliament.

The report's Recommendations call for twenty aspects or implementing decisions taken by the Council concerning Europol should be referred back to the European Parliament under the then K.6 provision. They also call for national parliaments to call to account national representatives on the Management Board and the Joint Supervisory Body and, for the creation of a European public prosecutor's office.

The report recognises the difficulties of national parliaments supervising intergovernmental agreement, such as Europol.

It should be noted that many national parliaments currently lack the powers or ability to supervise the Management Board and the Joint Supervisory Body. EU national parliaments still face a number of obstacles in supervising justice and home affairs issues. Among these are: the provision of full copies of all reports (not just ministerial summaries) before adoption and in time to exercise scrutiny; the powers of the committees to require governments to send them reports not provided; adequate expert staff to analysis and comment on reports; limited powers of scrutiny.

In general many national parliaments are still grappling with gaining access to documents and exercising or extending their powers of scrutiny over *proposed new measures* - which, together with Commission initiatives, now represents a formidable workload. For these same committees to exercise, in addition, proper scrutiny over the *practice* of the growing number of EU created agencies, of which Europol is just one, requires the attention of all national parliaments.

The formal position

Europol became operational on 1 July 1999. Although the Europol Convention came into force on 1 October 1998 a number of ratifications and decisions were outstanding - the Rules of procedures of the Joint Supervisory Body were not adopted by the Council until 29 April 1999.

Mandatory provisions

Before Europol became operational it was necessary for the Europol Management Board and the Council to adopt a number of measures. Under the Convention (Article 45) provisions under Article 5.7 (rights and obligations of liaison officers), 10.1 (Rules applicable to analysis files), 24.7 (Rules of procedure of the Joint Supervisory Body), 30.3 (staff regulations), 31.1 (rules on confidentiality), 35.9

(Financial Regulation), and 41.1 (privileges and immunities) and 41.2 (agreement with the Netherlands) had to be in place before it became operational.

Forms of crime - in the Convention

Under the Convention Europol is empowered to act concerning the following forms of crime (Article 2.2.para 1):

- unlawful drug trafficking
- unlawful trafficking in nuclear and radioactive substances
- illegal immigrant smuggling
- trafficking in human beings
- motor vehicle crime

Article 3 provides that Europol has powers over "money-laundering activities" and "related criminal offences" connected to the above forms of crime.

Each of the above terms is defined in the Annex to the Convention. For example,

""illegal immigrant smuggling" means activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States of the European Union, contrary to the rules and conditions applicable in the Member States"

Thus, Europol is not empowered to act where "illegal immigrant smuggling" does not involve financial gain - where, for example, person(s) enter the EU through family/friendship networks which do not involve organised criminal networks.

Forms of crime added since the Convention was signed

Two additions have been made to the forms of crime. First, Europol's remit has been extended to cover terrorist activities (as provided for in the Convention Article 2.2.para 2).⁵⁸ Second, it now covers counterfeiting of currency and other means of payment.⁵⁹ In addition, the definition of "traffic in human beings" in the Annex of the Convention has been amended to cover child pornography.⁶⁰

⁵⁸ OJ C 26, p22, 1999. Doc nos 12643/2/98 EUROPOL 115 REV 2, 12913/98 EUROPOL 118.

⁵⁹ doc no 10708/4/98 EUROPOL 80 REV 4.

⁶⁰ OJ 26, 1999, p21. Doc no 12367/2/98 EUROPOL 111 REV 2, 12902/98 EUROPOL 117.

The Tampere Summit decided that money-laundering as a general offence should be added to Europol's remit (as distinct from the present situation where money-laundering is only considered where it relates to one of the currently specified offences).

Extension of Europol's mandate on forms of crime

To extend Europol's mandate requires, under Article 2.2, para 3, the "Council to instruct the Management Board to prepare its decision and in particular to set out the budgetary and staffing implications".⁶¹ If Europol is to be empowered to deal with new forms of crime this procedure has to be followed. Moreover under Article 43.3 the Council, acting unanimously, can "amend or supplement the definition of forms of crime contained in the Annex".

Any amendment to the Convention requires the Council to consult the European Parliament under Article 39 of the TEU and ratification by national parliaments.

However, the European Parliament may wish to examine any proposals to "amplify, amend or supplement the definitions of crime listed in the Annex" or "new definitions of the forms of crime.

Powers to exchange data

The Council has also acted on provisions in the Convention concerning the exchange of data and external relations. These measures are:

- Rules concerning the receipt of information by Europol from third parties⁶²
- Rules concerning the transmission of personal data by Europol to third countries and third parties⁶³
- Rules governing Europol's external relations with third states and non-European Union related bodies⁶⁴

⁶¹ For example, the extension of Europol's remit to cover terrorism and counterfeiting/forgery led to the creation of four extra posts for the former and three for the latter. Justice and Home Affairs Council, 27.5.99.

⁶² OJ C 26, p17-18, 1999. Doc no 10884/98 EUROPOL 89.

⁶³ Doc no 8032/8/97 EUROPOL 27 REV 8.

⁶⁴ OJ C 26, p19-20, 1999. Doc no 10889/98 EUROPOL 94.

- Act of the Management Board of 15 October 1998 laying down the rules governing Europol's external relations with European Union-related bodies⁶⁵

The rules covering the transmission and receipt of data from non-EU states and non-EU-agencies has been the subject of much concern from voluntary groups and NGOs (see below).⁶⁶

The putting in place of agreements with third countries, agencies within these countries, and other non-EU bodies **should be the subject of the most rigorous scrutiny by the European Parliament.** One issue is data protection, for which some provision is made, but of greater concern will be the means by which the information is gathered - a civil liberty issue for which no provision is made. An associated measure, as yet not adopted, provides for "Model-agreement(s)" with Third States.⁶⁷

In addition, *the EP should asked to be consulted over any "Mutual Legal Assistance Agreements" (MLAAs) or "Memorandum of Understanding(s)" (MoUs) reached with non-EU states and bodies on justice and home affairs issues.*⁶⁸

Databases not be linked

Article 6 of the Convention says:

"The computerised system of collected information operated by Europol must under no circumstances be linked to other automated processing systems, except for the automated processing systems of the national units."

Any amendment to this position would require the European Parliament to be consulted under Article 39 of the TEU and ratification by national parliaments.

A number of reports refer to Europol having access to data held by other EU agencies. For example, the new "strategy" on organised crime (see below) refers, in Recommendation 36 to: "Access to the SIS

⁶⁵ OJ C 26, p89-90, 1999. This Act of the Management Board is based on doc no 8031/5/97 EUROPOL 26 REV 5.

⁶⁶ See for example, "Europol: Third country rules", House of Lords Select Committee on the European Communities, HL 135, 29th report 1997-98, 21.7.98.

⁶⁷ "Draft Model-agreement cooperation with Third States", doc no 7856/98, EUROPOL 51, 28.4.98; later "Draft Model-agreement cooperation with third states", Europol Management Board, The Hague, file no 3710-01r1, 13.8.99; "Draft Council Decision instructing Europol to start negotiations with third states", Europol Management Board, The Hague, file no 3710-07r6, 12.10.99. At its meeting in Luxembourg the JHA Council failed to agree on the list of countries with whom negotiations should be started for the exchange of data.

⁶⁸ See Doc no 6950/2/98, EUROPOL 41 USA 5, 8.4.98. This document discusses meetings between Europol and: the US Justice Department, the FBI, the US Secret Service, and US Border Facility. Reference is made to "mutual legal assistance treaties and agreements" and "MLAAs".

and EIS data should be provided by 31 December 2001: Priority 2".⁶⁹ The same Recommendation 36 refers to "a review being conducted on the conditions under which Europol could have access to the Customs Information System".⁷⁰

Whether Europol having "access" to data held by the SIS(EIS) and the CIS constitutes being "linked" remains to be seen. Access to data, "linked" or not, could present major issues for citizens civil liberties and for data protection. *The European Parliament should not only insist on being consulted but should examine the safeguards, checks and accountability in any proposal from the Council or Commission - and, if they are not, to insist on their inclusion.*

Tackling "organised crime" and roles assigned to Europol

In addition to the formal tasks given to Europol under the Convention a large number of roles have been assigned to it. For example, under the draft programme "The prevention and control of organised crime: A European Union strategy for the beginning of the new Millennium" Europol would be assigned a number of roles.⁷¹

The organised crime "strategy" is based on i) following up the work under taken under the 1997 Action plan on organised crime;⁷² 2) the Action Plan agreed in December 1998 on "establishing an area of freedom, security and justice"⁷³; and 3) on the new Amsterdam Treaty provisions.⁷⁴

This "strategy" plan on organised crime would give roles to the Council, the Commission, Member States and to Europol. Europol will thus *contribute to and operate under* the terms of the "strategy". A few example are given here.

Under Recommendation 1: "Europol should adopt a more proactive approach identifying emerging trends" and under Recommendation 2 Europol: "to prepare [with the Commission and Council] a proposal for closer alignment of the data gathered by national law enforcement and security agencies

⁶⁹ This reference to the "SIS" (Schengen Information System) and "EIS" (European Information System) is confusing. The SIS will become the EIS when all EU member states are in the Schengen arrangement - whether the UK's application to join *part* of the Schengen Protocol and Ireland anticipated application will meet this requirement remains to be seen. Currently 13 of the 15 EU member states are in Schengen.

In the 1998 Action Plan establishing an area of security freedom and justice it says: "Examine Europol access to SIS or EIS investigation data" (para 43(c)). By June 1999 "examine" became "should".

⁷⁰ See also para 48.a.v in the 1998 Action Plan.

⁷¹ Doc no 9423/99 CRIMORG 80, 21.6.99.

⁷² Doc no 7412/97, JAI 14, 21.4.97.

⁷³ "Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice", 13844/98, JAI 41, 4.12.98.

⁷⁴ Article 30 and 31 of the TEU.

on suspected offences and offenders, where there is a reasonable suspicion that organised crime is involved." The looseness of the terms "suspected offences", suspected "offenders" and "reasonable suspicion" are causes for concern especially in view of breadth of the definition of a criminal organisation.⁷⁵ Moreover, there are no measures governing the role of "security agencies" in the EU.

Recommendation 23 proposes "greater flexibility in the use of EU funds to support joint investigative teams, where appropriate with the involvement of Europol..".

A top priority of "1" is given to tackling "illegal immigration networks" in which Europol has a role. As noted above tackling "illegal immigrant smuggling" falls within Europol's formal remit. However, the term "illegal immigration networks", which is not the same as "illegal immigration smuggling", is often used to cover cases where financial gain is involved and where it is not.

In this context it is worth noting the "1998 Annual Report on police cooperation under the Schengen Convention" which reports that during a pilot operation in 1998 of "5,000 people [who] were detained either on illegal entry, in attempting illegal entry or when illegally resident on the territory. Approximately 500 of these were proven to have been smuggled in."⁷⁶ This operation was carried out after careful planning by Schengen states to target known routes. Although it is not possible to extrapolate these figures it will come as some surprise that *only 10% of "illegal immigrants" detained were "smuggled" in.*

Recommendation 35 says that "a legal instrument should be prepared on the extension of Europol's powers to the activities referred to in Article 30(2) TEU, with a greater focus on Europol's operational powers.." (see below).

Recommendation 38 says that a study should be carried out on "the possibility of setting up a system of exchanging fingerprints electronically between Member States" to which Europol will contribute.

Europol is not named in Recommendation 49 but would clearly be involved in its effect. It says that the work of the European Judicial Network "should begin in the field of the interception of telecommunications and of special investigative techniques".⁷⁷

⁷⁵ Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 29.12.98, pp1-3; Doc no. 10407/1/97, CRIMORG 6, REV 1,2.10.97.

⁷⁶ Doc no 8744/99, ENFOPOL 39 COMIX 34, 2.6.99.

⁷⁷ It is interesting to note that the European Judicial Network is to be given proper resources to undertake its work - unlike the Joint Supervisory Body.

The European Parliament should examine this strategy paper in detail and call for detailed reports on its operation.

Europol has been assigned many other roles, for example, in the Action Plan on Iraq and at meetings of CIREFI.⁷⁸ A comprehensive survey of Europol's roles requires further study.

The "operational" character of the EDU

The Amsterdam Treaty raises the issue of extending Europol's powers from intelligence-gathering to "operational" tasks (see below).

However even under the Europol Drugs Unit (EDU) "operations" were organised. These "operations" were not formally undertaken by the EDU itself but by the national liaison officers seconded to its headquarters in the Hague. From the EDU's own reports it is possible to conclude that during 1994 around 30 cross-borders "operations" were set up by these means. In 1996 there were 123 such "operations" and in 1997 a total of 158.⁷⁹ Moreover, within 1996 figures there were 33 controlled delivery "operations" and in the 1997 figures 62 controlled delivery "operations".

Extension of Europol's tasks under the Amsterdam Treaty

The Amsterdam Treaty, through the revised Title VI of TEU (Articles 29-42), retains the intergovernmental basis for police cooperation.

The main provisions are set out in Article 30 covering "common action in the field of police cooperation (30.1) and "cooperation through Europol" (30.2).

Article 32 says the Council will lay down "conditions and limitations" for the competent authorities operating in the territory of another Member State. Provisions are already existent in the Schengen acquis.

Article 34 sets out the new decision-making structure: 34.2.a: common positions; 34.2.b: framework decisions; 34.2.c: decisions for any other purposes; 34.2.d: conventions.

Article 39 says that the Council shall "consult" the European Parliament before adopting any measures under Article 34(2)(b), (c) and (d).

⁷⁸ Action plan on Iraq, 5573/98 ASIM 13 EUROPOL 12; 9595/98 CIREFI 46 EUROPOL 66.

Also worthy of attention are:

i) Article 38: which refers back to Article 24, under Common foreign and security policy. It allows the Council to conclude, unanimously, agreements with "one of more States or international organisations". There is no obligation to even inform the European Parliament of such agreements.

ii) Articles 40, 43 and 44, allow for "closer cooperation" where it concerns "at least a majority of Member States" (43.1.d). There is an obligation to "regularly inform" the European Parliament on cooperation generally - the EP has to be consulted on individual measures.

In the revised TEC Article 286 says that the principles of the EC data protection Directive applies to all data held by EC institutions and bodies and that a supervisory body should be set up. There are no provisions for data protection in the TEU.

Article 30 of the TEU sets out four objectives concerning Europol to be completed within five years. The Action Plan establishing an area of freedom, security and justice (December 1998) sets out the steps to be taken within two years (para 43 and 44) and those within five years (para 48).⁸⁰ A further report concerning Europol's new roles under the Amsterdam Treaty was produced in February 1999⁸¹ and the draft programme "The prevention and control of organised crime: A European Union strategy for the beginning of the new Millennium" is also relevant⁸² as in the draft Convention on Mutual Assistance in Criminal Matters.⁸³

The Amsterdam Treaty provisions a) calls for Europol to facilitate, support and prepare specific investigative actions in the Member States including "operational actions of joint teams comprising representatives of Europol in a support capacity" (30.2.a); b) would allow Europol to request the authorities in Member States to "conduct and coordinate their investigations in specific cases" and allow Europol to "develop specific expertise"; c) allow for liaison arrangements to be set up between prosecuting/investigating officials "in close cooperation with Europol"; d) provides for the establishment of a "research, documentation and statistical network on cross-border crime".

⁷⁹ See, "Polizeiliche Drogenbekämpfung - eine internationale Verstrickung", Heiner Busch, Munster, 1999, p272).

⁸⁰ Doc no 13844/98.

⁸¹ "Implementation of the Treaty of Amsterdam and the Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice with a view to Europol", doc no 6245/99, EUROPOL 7, 26.2.99.

⁸² Doc no 9423/99 CRIMORG 80, 21.6.99.

⁸³ Doc no 9636/99, COPEN 11, 13.7.99. This has been submitted to the European Parliament.

The 1998 Action Plan establishing an area of freedom, security and justice in para 43.b. raises the central issue in need of scrutiny:

"One of the priorities stated by the Treaty is to determine the nature and scope of the *operational powers* of Europol.." [emphasis added]

It is apparently the intention that when operations are mounted in a Member State(s) the arrest, charging and prosecution process will be carried out by the police and officials of that state, and that it would be these officers who would appear in any subsequent trial. However, all the preparatory work in mounting an operation, prior to the point of arrest, may well have been carried out by Europol - and this might include the surveillance of telecommunications and covert undercover operations (provided for under the draft Convention on Mutual Assistance in Criminal Matters).

Member States have always been quick to state that Europol is not a police force with the powers of arrest. But this distinction between initiating, pursuing and setting up arrests (Europol) and the actual arrest (national police) is irrelevant when it comes to the rights of suspects on trial.⁸⁴

Europol: exchange of data with non-EU states and bodies

The capacity of the Europol Computer Systems (TECS) is extensive with the ability to run 5,000 analysis work files (each of which can hold several thousand records each) and the "information system" can hold up to one million records.⁸⁵

TECS has to cope not just with suspected crimes and criminals generated by the national criminal intelligence centres of EU member states it will also include the creation of records and analysis files as a result of data and intelligence coming from non-EU states and bodies.

The report of the UK House of Lords Select Committee on the European Communities, "Europol: Third Country Rules", expressed a number of concerns over the exchange of data by Europol - both the receipt of data on suspects and the handing over of data on suspects to non-EU third states and non-EU organisations and agencies.⁸⁶ Their report examined four reports governing such exchanges.⁸⁷

⁸⁴ In the UK the analogy would be in espionage or official secrets cases where MI5/Special Branch would carry out the "Europol" role and the police would make the arrest and appear in court. MI5 can thus be said not to have the operational power of arrest.

⁸⁵ CILIP 61, pages 52-53.

⁸⁶ HL Paper 135, 21.7.98.

⁸⁷ Documents EUROPOL 26, 27, 29 & 38.

Subsequently EDU/Europol submitted a report to the Europol Working Party setting out a "Draft Model-agreement cooperation with Third States", dated 28 April 1998.⁸⁸ Following Europol becoming operational on 1 July 1999 the Europol Management Board issued two reports - one containing the draft model-agreement with Third States and the other setting out the first wave non-EU states to set up agreements with.

The first phase is to include the applicant states plus those which have applied - Malta and Turkey - the "Schengen cooperation partners", Norway and Iceland, and Interpol. The second phase will include the USA, Canada, the Russian Federation, Switzerland, the World Customs Organisation (WCO), and UN offices and bodies "active in the areas falling in the Europol remit."

The checks on the use of data supplied by Europol and on the means by which data given to Europol with regards to civil liberties, legal processes and data protection provisions give rise to substantial concerns.

Once in place these agreements, which will cover agencies within Third States, will lead to a flow of data to and from Europol. Moreover, the Europol Convention allows for a file to be opened on an individual as a result of data - which may be "hard" and "soft" information - received from a Third State or an agencies in a Third State.

It can only be recommended that the European Parliament:

- 1) **Insists that all such agreements are submitted to it before adoption;**
- 2) **That regular, quarterly, reports on the implementation of such agreements be submitted to it. These reports to include, by state/agencies, the inflow and outflow of data, the offence to which it relates, and what action has been taken as a result of the data exchange.**

Access to documents and accountability

Soon after the Europol Convention came into operation a major issue concerning the status of Europol as an international, not an EU, organisation arose. The Council refused requests for access to the

⁸⁸ This document, 7856/98, dated 28.4.98 and Europol Management Board, file no 3710-01rl, 13.8.99 plus Draft Council Decision, file no 3710-07r3, 9.7.99 are available from SEMDOC.

agendas of the Management Board of Europol by applicants.⁸⁹

The European Ombudsman, quite independently, took up this issue with Europol. The Ombudsman's interpretation of the Amsterdam Treaty was that Europol was subject to its provisions in respect of having to adopt a code of access to documents. On 28 September 1999 Europol, though its Director Mr Jurgen Storbeck, accepted the Ombudsman's view and agreed to adopt a procedure by the end of 1999.⁹⁰ Despite this move other problems remain.

The Council contends that Europol is not an EU police agency. The consequence is that Europol regularly prepares reports for Council working parties, represents the EU on policing matters at meetings with third states and bodies, is to have access to data from EU databases (like the CIS system) and is assigned numerous roles in EU action plans but is not under the direction of, nor accountable to, the Council. The officials of Europol are accountable to another group of officials, the Management Board. The tenuous line of "accountability" back to national parliaments lacks credibility as national parliaments do not have mechanisms in place to scrutinise Europol's practice (not the practices of other EU agencies).

The European Parliament clearly has to recognise that this is the present legal position and seek to establish accountability.

Accountability to the European Parliament

Under the Europol Convention, Article 34.1, the Council has to send the European Parliament an annual report. This is the only formal obligation.

Clearly, in this respect, the European Parliament will want not just to receive an annual report but to receive and examine the proposed annual budget. In addition, the parliament may choose to use its influence to get access, in order to examine, the agendas of the Europol Management Board and all reports considered by it. The parliament will also wish to consider the annual report of the Joint Supervisory Body and invite its members to give it their views.

Over and above examination of the formal powers of Europol the European Parliament will have to consider how it is going to subject Europol's practices to scrutiny.

Accountability: monitoring Europol's practice

⁸⁹ Requests by Tony Bunyan and Steve Peers.

"Accountability" in democratic societies is not limited to the examination of annual reports by parliaments. "Accountability" has to be a reality for people in their daily lives - in the street, at work, at home or when held in custody.

Recourse to legal remedies - whether to national or European courts - is one essential check on the abuse of power. Only a select few number of cases involving the abuse of power find their way to the courts. These cases are important and often set new standards for procedure or behaviour.

Data protection authorities also afford protection for the individual within the confines of their remits and the resources at their disposal.⁹¹

Member states have, at the national level, other mechanisms for complaints. In the UK this is the Police Complaints Authority (PCA). Fully justified criticisms can be made of the PCA's limited powers and the use it makes of its existing powers and it is not a model for EU situations.⁹² However, a channel for the citizen to formally register their complaints, for these to be investigated and findings enforced should be built into every EU agency.

"Accountability" will only truly be in place when all officials (police, customs and immigration) can be shown not to be racist, sexist, homophobic, and not discriminating against people on the basis of their sexual orientation, class, religion or political views. Until then mechanisms have to be put in place to ensure that citizens, refugees and asylum-seekers are not subject to abuse and that agencies and their officials do not become "self-regulating" and outside of democratic control and scrutiny.

Summary of recommendations

1. The EP should pursue the Nassauer report and the reference back of the twenty aspects or implementing decisions for its consideration.
2. The EP should request the Council to be consulted over any extension or amendment to forms of crime in the Europol Convention

⁹⁰ See European Ombudsman press release, no 11/99 of 28.9.99.

⁹¹ One of the major complaints of the Europol Joint Supervisory Body and the Schengen Joint Supervisory Authority is that they have little or no resources or staff for their work. Despite their representations there seems to be an adamant refusal to act on this issue by the EU member states through the Council.

⁹² The primary criticisms are that it is a process which allows "the police to investigate themselves" and that the PCA has no powers to enforce its rulings.

3. The EP should ask to be consulted on every agreement for the receipt and transmission of data to non-EU states and bodies
4. The EP should set up a scrutiny mechanism (maybe a sub-committee) to examine the implementation of measures
5. The EP should establish its right to examine all agreements with non-EU states and bodies concerning the exchange of data and, establish a mechanism for monitoring their use.
6. The EP should establish its right to be consulted over any "Mutual Legal Assistance Agreements" (MLAAs) or "Memorandum of Understanding(s)" (MoUs) reached with non-EU states and bodies on justice and home affairs issues.
7. The EP should insist on being consulted on any linking or exchange of data between Europol and the SIS, Customs Information System, EURODAC or any future EU database with regard to the safeguards, checks and accountability in any proposal from the Council or Commission - and, if they are not, to insist on their inclusion.
8. The EP should examine and monitor the "roles" (outside of its formal powers) assigned to Europol.
9. The EP should insist on the right to be consulted on any agreements made under Article 38 TEU concerning justice and home affairs
10. The EP should insist on the provision of all agendas and reports considered by the Europol Management Board
11. The EP should review the annual report of the Joint Supervisory Body and invite its members to give evidence
12. The EP should insist that the Europol Joint Supervisory Body be provided with its own staff and resources
13. The EP should prepare a report on the creation of an EU Europol Complaints Authority with the powers to enforce its decisions

14. The EP should ensure that it has sufficient resources to carry out its roles of scrutinising and monitoring of Europol

Chapter 11

THE NEED TO CONTEXTUALISE MEASURES - the EU-FBI telecommunications surveillance system

The purpose of this chapter is two-fold:

- a. to emphasise the need for placing measures in context. That is to identify preceding reports and/or reports on associated subjects of direct relevance.
- b. to draw the European Parliament's attention to the potentially grave threats to civil liberties posed by the EU-FBI telecommunications surveillance system.⁹³

This is a classic example of the need to contextualise measures forwarded by the Council (or Commission) for consultation. The Civil Liberties Committee produced a report which was adopted at the plenary session on 7 May 1999.⁹⁴ The adopted Resolution, "Lawful interception of telecommunications", approved the Council draft and asked for the parliament to be consulted again if any "substantial modifications to the draft" are made.

The report from the then Civil Liberties Committee was just over half-a-page and made no reference to any other reports or documents (except the Council Resolution of 17 January 1995 on the lawful interception of telecommunications). An Opinion from the Legal Affairs and Citizens' Rights Committee took an entirely opposite view calling for the Council's proposal to be rejected.⁹⁵ This Opinion alluded to wider issues without taking them up in any depth.

A. Contextualising

The report adopted on 7 May 1999 concerned 1 document submitted by the Council for scrutiny, 10951/2/98 ENFOPOL 98 REV 2 (dated 3 December 1998). The first report, 10951/98 ENFOPOL 98, was dated 3 September 1998 and the first revised version 10 November 1998 (10951/1/98 ENFOPOL REV 1).

⁹³ This issue was raised in the STOA report: "An appraisal of technologies of political control", 1998.

⁹⁴ "Draft Council Resolution on the lawful interception of telecommunications in relation to new technologies" (10951/2/98 - C4-0052/99 - 99/0906(CNS)). Report: A4-0243/99.

⁹⁵ A4-0243/99 PE 229.986/fin.

The proposal concerned the extension of the "Requirements", laid down in the 17 January 1995 Resolution on the lawful interception of communications, to cover internet communications (service and network providers) and the new generation of satellite phones.⁹⁶ The first report (42 pages) in September was crucial to an understanding of the issues involved as was the revised November version (14 pages) - as distinct from the second revised version of just 6 pages. By 15 March 1999 ENFOPOL 98 REV 2 had been replaced by ENFOPOL 19, 6715/99.

There were significant differences between ENFOPOL 98 REV 2 and ENFOPOL 19. In the latter it said that in addition to an obligation to provide the "law enforcement agencies" with a person's/organisation "IP address" and "E-mail address" they also had to provide details the "credit card number". ENFOPOL 98 REV 2 said that access to "IP connections are not included", whereas the later ENFOPOL 19 says: "IP connections are not excluded" (emphasis added).

The proposal before parliament could not be properly understood unless consideration was taken of its origins in 1993, at the FBI headquarters in Quantico, USA attended by a number of EU member states. ILETS (the International Law Enforcement Telecommunications Seminar) was formed at this meeting and it was ILETS which proposed the extension of surveillance to internet services and satellite phones.

Even more crucially the development of EU-wide "Requirements" to be placed on service and network providers to provide data and interception of telecommunications cannot be understood without considering a parallel measure - the draft Convention Mutual Assistance in criminal matters also being discussed in the Justice and Home Affairs Council.

The first drafts of this Convention contained no mention of the interception of telecommunications (nor of covert operations). By 1997 new clauses were inserted and revised and revised, then revised again after ENFOPOL 98 was prepared. The reasons for these changes were obvious, even to the officials drafting measures. In April 1997 the EU Presidency presented a report to the K4 Committee summarising the proposed changes in the Convention.⁹⁷ Their report said there was a need to:

"provide a legal basis for the cooperation between the Member States" on the interception of telecommunications and the "real-time monitoring of satellite telecommunications".

The problem for EU policymakers was that:

⁹⁶ The 17 January 1995 Resolution was adopted by "written procedure" and never discussed by the Justice and Home Affairs Council, and not published for 18 months.

"Traditionally persons located on the territory of a certain state, fall under its jurisdiction. Their freedoms.. are guaranteed under the law of that state. Likewise the infringements on this freedom should be allowed by the laws of that same state.. Exceptions to the principle of sovereignty can only be regulated by a Convention."

Thus to understand 10951/2/98 ENFOPOL 98 REV 2 it is necessary to understand the influence of non-EU bodies (ILETS) and the revisions to the draft Convention.⁹⁸

B. The EU-FBI telecommunications surveillance system - a threat to civil liberties

The threat posed by the EU-FBI plan - so-named after the meeting in Quantico and the provision of two contact addresses: FBI HQ and the Council of the European Union in Brussels⁹⁹ - was revealed in 1997 a *Statewatch* report and in a book by Thomas Mathiesen, Oslo University.¹⁰⁰ These disclosures aroused major media interest in Europe and then in the US, from MEPs, and voluntary groups and NGOs.

The reason for the interest was clear. The EU-FBI plan was only one of many developments - there was, and is, a hot debate over the encryption of telecommunications and there were other revelations concerning "ECHELON" (a military-intelligence telecommunications surveillance system).¹⁰¹ There was

⁹⁷ "Draft report to the Council on the draft Convention on mutual assistance in criminal matters, Presidency to K4 Committee, 7350/97, JUSTPEN 31, 14.4.97.

⁹⁸ For example, the following sources were used in a feature in *Statewatch* bulletin, vol 9 no 2, March-April 1999; Report on the draft Council Resolution on the lawful interception of telecommunications in relation to new technologies, Committee on Civil Liberties and Internal Affairs, Rapporteur: Gerhard Schmid, and Opinion from the Legal Affairs and Citizens' Rights Committee, PE 229.986.fin, 20.4.99; Draft Convention on Mutual Assistance in Criminal Matters between Member States of the European Union - Interception of telecommunications, Presidency to COREPER/Council, ref: 11173/98, Limite, JUSTPEN 87, 15.9.98; Draft Convention on Mutual Assistance in Criminal Matters between Member States of the European Union - Interception of subjects on national territory using national service providers ("remote approach"), Presidency to Working Party on Mutual Assistance in Criminal Matters, ref: 7196/99, Limite, JUSTPEN 22, 7.4.99; Draft Convention on Mutual Assistance in Criminal Matters between Member States of the European Union - application of the remote approach regarding interception of satellite telecommunications, Italian delegation to Working Party on Mutual Assistance in Criminal Matters, ref: 6284/99, Limite, JUSTPEN 9, 25.2.99; Draft Convention on Mutual Assistance in Criminal Matters between Member States of the European Union - application of the remote approach regarding interception of satellite telecommunications, Working Party on Mutual Legal Assistance in Criminal Matters, ref: 6195/99, Limite, JUSTPEN 7, 19.2.99 and COREPER to Council, ref: 6195/1/99, Limite, JUSTPEN 7 REV 1, 9.3.99; Draft Convention on Mutual Assistance in Criminal Matters between Member States of the European Union, Working Party on Mutual Assistance in Criminal Matters to COREPER/COUNCIL, ref: 13144/98, Limite, JUSTPEN 108, 19.11.98; Interception of telecommunications - Draft Council Resolution on new technologies, Presidency to Police Cooperation Working Party, ref: 6715/99, Limite, ENFOPOL 19, 15.3.99; Interception of telecommunications - Council Draft Resolution in relation to new technologies, Presidency to Police Cooperation Working Party, ref: 10951/98, Limite, ENFOPOL 98, 3.9.98 and ref: 10951/1/98, Limite, ENFOPOL 98 REV 1, 10.11.98 and ref: 10951/2/98, Limite, ENFOPOL 98 REV 2, 3.12.98; PC Magazine, May 1999; Duncan Campbell, "Intercepting the Internet", Guardian Online and on the telepolis site: <http://www.heise.de/tp/english/special/enfo/6397/1.html>; Interception Capabilities 2000, report by Duncan Campbell for the Science and Technology Options Assessment Panel of the European Parliament, 6.5.99.

⁹⁹ ENFOPOL 112. 10037/95, 25.11.95.

¹⁰⁰ The first *Statewatch* report in February 1997 was followed up by coverage in bulletins, vol 7 no 1, vol 7 no 4 & 5, vol 8 nos 5 & 6, vol 9 no 2. Thomas Mathiesen, "Schengen: Police cooperation, surveillance and legal protection in Europe" (in Norwegian), Oslo, Spartacus Publishers, 1997.

¹⁰¹ At this time the first was by Nicky Hager in his book, "Secret Power", then ECHELON was covered by the STOA report, "An appraisal of technologies of political control", 1998, and more recently in Duncan Campbell's STOA report on Comint (1999).

also much confusion in civil society over the different terms and issues raised by "encryption", "ECHELON" and "EU-FBI plan".¹⁰²

In broad terms the ECHELON system was set up in the early 1980s under the 1948 UKUSA agreement between USA, UK, Canada, Australia and New Zealand. ECHELON conducts telecommunications surveillance for the "military-intelligence community".

The EU-FBI plan on the other hand is intended to serve the "law enforcement community" (police, immigration, customs and internal security agencies).

In the EU the *first* step was the adoption of "International Users Requirements" (IUR 95) in January 1995.

The *second* was the "Memorandum of Understanding", signed by the 15 EU member states on 23 November 1995, to extend the EU-FBI plan to other countries - Australia, Canada, Hong Kong and New Zealand indicated their willingness to sign-up and Norway was the first to do so. Officials from this group of 21 states (the EU, plus the US, plus the five above countries) worked through a number of informal "expert" non-EU working groups to take the plan forward - the IUR (International User Requirements), STC (Standards Technical Committee) and ILETS.

The EU-FBI plan is intended to serve as a global standard for the interception of telecommunications for the "law enforcement community" - for this reason Hong Kong's participation does not create a contradiction for the planners. The plan will also bring in its wake enormous profits for EU-US companies providing the hardware and software for the new systems.

The *third* step to introduce clauses on the interception of telecommunications into the draft Convention on Mutual Assistance in Criminal Matters in its version of 6 May 1997. Several revisions have been made to this text since then, including a major revision after the preparation on ENFOPOL 98. Over the spring, summer and autumn of 1999 one of sticking points was the refusal of the Italian government to agree to an open-ended authorisation for other EU states to intercept satellite telecommunications emanating to and from the Iridium "ground station".¹⁰³ The different versions reflect the different positions taken by EU governments and, of course, such debates should be in the public domain.

¹⁰² This confusion was compounded in the autumn of 1998 when some commentators referred to the EU-FBI plan as the "ENFOPOL" system - ENFOPOL simply being the acronym for reports emanating from the Police Cooperation Working Party covering many other subjects such as DNA, forensic science, public order etc.

¹⁰³ This was called a "convenient" option with the first operational satellite phone providers - Iridium, which subsequently filed for bankruptcy in the US.

The *fourth* step in the autumn of 1998 was to amend the IUR to also cover internet communications and satellite phones.

At the time of writing both the proposed change to the "requirements" (ENFOPOL 19) and the draft Convention still had not been agreed by the Council. There should be opportunities for the EP to intervene.

Faced by criticism of their plans EU member states tried at first to argue that there is no connection between the "Requirements" and the draft Convention. They then argued that the draft Convention proposals on interception did not give new powers of surveillance as they were "not binding" and depended on national laws - over the spring and summer of 1999 EU member state after member state announced plans to amend their laws on interception exactly along the lines of the draft Convention.

The offences for which interception is to be allowed are those covering all the new powers in the draft Convention and are simply based on the 1959 Council of Europe Convention which can apply to nearly all offences however minor.

Commission report

Two other reports are also of relevance to the proposals for the interception of telecommunications. First, a report from the Data Protection Working Party for the then Commission DG XV adopted on 3 May 1999 is critical of the privacy implications of the "Council Resolution of 17 January 1995 on the lawful interception of telecommunications" (The International User Requirements drawn up by the FBI and adopted by the EU, known as IUR 95).¹⁰⁴ The Working Party is comprised of data protection experts, its chair Peter Hustinx is one of the Dutch members of the Schengen Joint Supervisory Authority.

Their report says that the data to be collected would cover both the "target persons and any persons with whom they enter into communication". It expresses their concern at the "scope" of the measures envisaged and in particular with the "Memorandum of Understanding" to exchange data with non-EU states which "are not subject to the requirements of the European Convention on Human Rights and of Directives 95/46/EC and 97/66/EC."

¹⁰⁴ Their report is on:
<http://www.europa.eu.int/comm/dg15/en/media/dataprot/wpdocs/wp18en.htm>

The Working Party thus "wishes to draw attention to the risks of abuse with regard to the objective of the tapping, risks which would be increased by an extension to a growing number of countries - some of which are outside the European Union - of the techniques for intercepting and deciphering telecommunications.

Some of the provisions in IUR 95 would, they say, "conflict with more restrictive national regulations in certain countries in the European Union". They give examples of access to data concerning calls and "forbidding operators from disclosing interceptions after the fact". Moreover, when satellites or the Internet is used, it must not lead to "a lowering of the level of confidentiality and protection of the privacy of individuals."

The Working Party's recommendations call for "national law to strictly specify": 1. "the prohibition of all large-scale exploratory or general surveillance of telecommunications." 2. "compliance with the principle of specificity, which is a corollary of forbidding all exploratory or general surveillance. Specifically, as far as traffic data are concerned, it implies that the public authorities may only have access to these data on a case-by-case basis, and never proactively and as a general rule." 3. "that a person under surveillance be informed of this as soon as possible." 4. "the recourse available to a person under surveillance" 5. "the publication of the policies on the interception of telecommunications as they are actually practised, for example, in the form of regular statistical reports" 6. "the specific conditions under which the data may be transmitted to third parties under bilateral or multilateral agreements".

Also of direct relevance is another decision. At its meeting in May 1999 the Justice and Home Council adopted a "Common Position on negotiations relating to the Draft Convention on Cyber Crime in the Council of Europe". This is the first "Common Position" adopted under the new Amsterdam Treaty provision (Article 34.2.a). The Common Position covers the EU's negotiating position on both computer-related offences such as computer fraud and forgery and to content-related offences such as child pornography. However, the Common Position goes on to say:

"Furthermore Member States will advocate, where appropriate, the inclusion of rules which call for the application of content-related offences committed by means of a computer system."

Such a vague and unspecific provision while covering child pornography could also be used against protest movements who use the internet to publicise events such as the "leaderless" J18 demonstration "against Capitalism" in the City of London in June 1999.

The specific mention of "serious" criminal offences is only used when referring to the need for "mutual assistance" to "expedite search of data stored in their territory".¹⁰⁵

Other issues - EU databases and non-EU informal working groups

There are many other issues, which are properly the concern of the European Parliament, that can only be properly scrutinised in context. Here just two are referred to.

The EU has developed a number of databases - Europol, Custom Information System (CIS) and the Schengen Information System (SIS) - and is about to launch more - EURODAC, DNA and probably another one on fingerprints. The implications for data protection and civil liberties are wide-ranging and long-term.¹⁰⁶

Another area is the plethora of non-EU informal groups which fed directly into EU's policy-making and practices. These include: the "Budapest group" ("illegal" immigration); the "Vienna Club" which started to deal with terrorism and now extends to cover drugs; the "International Working Group on undercover policing"; ILETS, the "International Law Enforcement Seminar on Telecommunications"; and the "Hazeldonk-Group" dealing with customs cooperation.

¹⁰⁵ Draft Joint Position on negotiations relating to the Draft Convention on Cyber Crime in the Council of Europe, K4 Committee to COREPER, 7352/2/99, Limite, 11.5.99.

¹⁰⁶ see Chart and *Globalisation of control: towards an integrated surveillance system in Europe* by Thomas Mathiesen, Professor of sociology of law at the University of Oslo. A Statewatch publication, November 1999.

Chapter 12

THE ROLE OF THE EUROPEAN PARLIAMENT IN MONITORING JUSTICE and HOME AFFAIRS MATTERS

General Suggestions

The following suggestions do not relate to the substance of the justice and home affairs (JHA) issues discussed by the European Union, but to general issues of procedure. How best can the EP monitor legislative developments as well as provide democratic supervision of EU-level operations and the implementation of Member States' JHA obligations? These suggested answers could (preferably) be incorporated into an Inter-Institutional Agreement between the EP, Commission and Council. Alternatively, they could take the form of ad hoc undertakings by the other institutions. Moreover, on some issues the EP can simply take the initiative by preparing its own reports and holding hearings.

1) Legislative Process

The process under Title IV (visas, asylum and immigration) of Part 3 of the EC Treaty will be governed by the regular rules of EC law, except for the limitations on the Court's jurisdiction and the shared right of initiative on most matters for five years. Therefore the EP must be consulted on every proposal, except for "emergency" legislation pursuant to Article 64 EC. In addition, it will have to be reconsulted before the Council adopts the final legislation, if there is an essential difference between the final legislation and the version upon which the EP was consulted.¹⁰⁷ However, there is a question over when the Council will consult the EP if a proposal is made by a Member State under the new Title. To give the EP a maximum opportunity to express a legislative view, the Council should agree to make all legislative proposals from a Member State available as soon as they are first made. This would bring practice as regards Member State's proposals into line with practice as regards Commission proposals. It is also arguable that there is a legal obligation to consult the EP as soon as a text is available, rather than at a time of the Council's choosing.

As for Title VI EU (police and judicial cooperation in criminal matters), again it is not clear when the Council will consult the EP. Despite Article K.6 in the Maastricht Treaty the pre-Amsterdam tradition only changed after the political agreement upon the Amsterdam Treaty in June 1997 after which the Council began to consult the EP regularly but there was no consistency concerning consultation. So the EP was sometimes consulted at an early stage (for example, the German Presidency's proposed Joint Actions on an early warning system, visa forgery detection, exchange of information, and

policing), but sometimes after political agreement had already been reached (for example, the Joint Action on child pornography). In fact, the delayed consultation of the EP on the latter measure made it impossible to agree the final text before the Amsterdam Treaty entered into force.¹⁰⁸ Some drafts were not sent to the EP until they had been discussed for several months (for example, the draft Joint Action on asset tracing). Again, to give the EP a maximum opportunity to express a legislative view, the Council should agree to make all legislative proposals from a Member State available when they are first made (and presumably the Commission will continue to follow the same approach, as it has done consistently pre-Amsterdam). It could again be argued that this is a legal obligation.

There might also be a problem with the time period for consultation on third pillar proposals. Article 39 EU says that Council may adopt a measure within three months if the EP does not deliver an opinion after it is consulted. This is a very limited period to expect the EP to examine detailed measures, especially considering that proposals from a Member State will often be "bunched" at the beginning of a Council Presidency, when that Member State assumes the Presidency. Adopting criminal and policing law is rarely subject to the level of urgency characteristic of economic sanctions, monetary stability or foreign policy measures. It is true that the goals of third pillar measures are important, but given that there will normally be a delay before the relevant measures are implemented at Union or national level after their final adoption, it is implausible to argue that the "fight against crime" will be damaged by a thorough examination of proposals by the EP. The EP should therefore press the Council to agree to waive the potential three-month time limit in practice, and only insist upon it sparingly when it can make out a detailed argument for imposing it because a particular proposal is genuinely urgent.

Title VI reconsultation is also an issue. The EP should press the Council to agree that the reconsultation principles of the EC Treaty apply to Title VI EU. In any event, it is arguable that the Council has a legal obligation to reconsult the EP in such cases.

Secret consultation must also be resisted unless a wholly exceptional case can be made out for it. While consultation of the EP (and the involvement of national parliaments) is an essential part of democratic supervision of the EU legislative process, parliaments ultimately exist to serve the public and so the process must also be made transparent for civil society. At national level it would be quite unacceptable for new measures to simply be given to "parliaments" and not made easily available to civil society so that it can make its view known. Moreover, if the EP only effectively conducts a dialogue with national interior ministries, it will not be doing its job properly, because it will not be hearing other views on the principles and merits of JHA proposals that are usually heard during

¹⁰⁷ For example, see Case C-392/95, *EP v. Council (visa list)* [1997] ECR I-3213.

¹⁰⁸ Austria has now proposed its adoption in the form of a third pillar "Decision".

discussions on proposals for national interior ministry legislation. Therefore, the EP's Committee on Citizens' Freedom and Rights, Justice and Home Affairs (LIBE) should for its own part make extended efforts to develop contacts with civil society.

2) Legislative implementation by Council or Commission

Title IV EC measures (including all measures within Title IV building upon the Schengen acquis) will be subject to the usual rules of EC Treaty comitology (in particular, the new, more open, rules on comitology which were agreed at the end of June 1999).¹⁰⁹ However, implementation of Title VI EU measures needs to be subjected to rules also. Article 39 EU states that the Council must consult the EP on all measures mentioned in Article 34 EU except Common Positions. Applying the ordinary meaning of this wording means that the Council must consult the EP not just on all Decisions, Framework Decisions and Conventions, but on all measures implementing Conventions and Decisions, since implementing measures are also among the acts mentioned in Article 34. This will include all measures within Title VI building upon the Schengen acquis. If there is a failure to consult the EP on any of these measures, their adoption will be invalid. The Council should be invited to confirm that this is the correct interpretation.

3) Future legislative/policy initiatives

It is firmly established in EC law that potential future legislation is preceded by Green Papers, White Papers, or Communications from the Commission. This gives the EP, national parliaments, and civil society a chance to discuss the desirability and scope of future legislation, followed by a later chance to influence any specific legislative proposals. Indeed, the principle of advance consultation is now entrenched in a Protocol to the EC Treaty on subsidiarity and proportionality.

However, the tendency in JHA matters has often been to deprive the EP, and often national parliaments, of any comparable early chance to comment on the future direction of legislation and policy. The most obvious examples are the draft Europol Convention and the Action Plan on Organized Crime of 1997, but see also the 1991 Ministers' Action Plan on immigration and asylum and the 1995 anti-drug action plan. There have been some exceptions recently. For example, the EP was consulted on the Immigration/asylum strategy paper, the resolution on JHA priorities 1997-99 and on post-1999 drugs strategy; and the Commission has consistently consulted the EP (where it has drafted a JHA discussion paper), but there are still examples of ignoring the EP. For example, the Council and Commission Action Plan on development of the area of freedom, security and justice was agreed

¹⁰⁹ OJ 1999, L 184.

before any EP vote.¹¹⁰ Moreover, the Council prepared for the special Tampere European Council without consulting the EP, and without any formal contribution from the Commission or any submissions of the consultation with national governments.

The recent exceptions should become the rule; it is unacceptable for the EU to agree a future programme of legislation and policy without wide discussion in EP and national parliaments and the opportunity for civil society to discuss and then to comment. In addition, the development of criminal law in Member States is often preceded by a discussion period before drafting detailed legislation. It is not sufficient to say that such policy papers do not matter, on the grounds that they are not actual legislative proposals, because the policy discussion will have a huge impact on the existence and scope of future legislation. Therefore the EP should press the Council and Commission to agree that no "Action Plans" or similar measures on any aspect of JHA development should be agreed in future without the opportunity for wide discussion on a public communication, issued in advance, discussing the relevant policy options.

In addition, proposals by Member States in JHA areas are very rarely accompanied by explanatory memoranda and never accompanied by impact assessments. It is obviously more difficult for legislators and civil society to assess the value of a proposal and consider possible amendments to it without such material. Of course, such memoranda and impact assessments are the norm for Commission proposals. Member States' officials should be required to consider carefully and justify in detail their views on whether new JHA proposals are really necessary and would be cost-effective, just as they must do nationally and the Commission must do for all its proposals.

4) Annual report on Immigration/Asylum policy

The EP should pressure the Commission to draw up an annual report on development of such policies, because they are as important as the application of EC law and the EC's policies on equal opportunities and the fight against fraud, which are also subject to debates after annual reports. The reports should include:

- details of legislative developments at EC level, including implementation of EC measures under comitology procedures and administration of EC funding programmes;
- details of Member State implementation of pre- and post-Amsterdam EC/EU measures, including legislative, administrative and judicial developments;

¹¹⁰ OJ C19, 1999.

- details of other Member State developments in this field;
- an explanation of the Commission's use (or non-use) of the powers to sue MS for infringement of EC rules or to request the ECJ for an interpretation of the relevant rules (Article 68(3) EC);
- details of operation of Eurodac, Cirea, Cirefi and any other relevant EC/EU bodies during that year;
- details of all relevant contacts with third countries or coordinated EC/EU approaches within international organizations or at international conferences;
- details of the implementation of all relevant formal treaties or informal arrangements between the EC and third states;
- and a detailed assessment of whether EC and Member State action during that year upheld human rights principles relevant to immigrants and asylum-seekers.

5) Commission's use of judicial powers

The EP should pressure the Commission to:

- publish a memorandum on policy regarding use of the "request for interpretation" power (Article 68(3) EC), in particular indicating when it will use that power and when it will resort to infringement proceedings;
- publish an official communication setting out in detail the rights that it grants to complainants during the Article 226 EC infringement procedure generally (as recently agreed after complaints to the ombudsman);
- publish an official communication setting out formal policy on use of the infringement procedure generally, ie, how quickly it aims to respond to a complaint, when it will move to later stages, etc. The Commission should then detail in its annual report on the application of EC law whether it has observed these guidelines and if not, why not.

Admittedly, the second and third points are more relevant to the Legal Affairs and Internal Market Committee, since they concern the application of EC law generally; but the Committee on Citizens'

Freedom and Rights, Justice and Home Affairs may want to consider bringing them to the attention of that committee at an appropriate time.

The EP should urge the Commission to add a "third pillar" section in its annual report on the application of EC law, detailing disputes that the Commission had with Member States concerning third pillar Conventions (Article 35(7) EU and pre-Amsterdam Conventions).

6) Public oversight of dispute settlement

The EP should encourage the Council to publish any agreements by Member States to settle disputes concerning the interpretation or application of third pillar measures or pre-Amsterdam Conventions (Article 35(7) EU).

7) Annual report on data protection

There needs to be an annual public report on the application of Article 286 EC and measures adopted pursuant to it,¹¹¹ integrating annual reports for joint supervisory organs of SIS, Eurodac, CIS, Europol and any other future such bodies. These reports should incorporate regular reports on the application of the EC data protection directives as well as data protection under third pillar measures which have limited rules (Naples II Convention and the forthcoming mutual assistance Convention) or lack formal rules (eg, resolutions on telecommunications surveillance and DNA analysis, Joint Action on public order). This will allow an integrated discussion of the issue.

The EP should also establish arrangements for regular links with the various joint supervisory bodies, allowing for their testimony during the annual debates and other exchanges of information.

8) System for remedying breaches of right to privacy

Various EU measures have different systems for individuals to bring complaints regarding breaches of data protection rules. The EP should press supervisory bodies or the Commission to draw up and publish an understandable guide in all EC languages covering all breaches of various first and third pillar rules

9) Third pillar treaties

¹¹¹ For example, the proposal for a Regulation of July 1999.

If the Council approves third pillar treaties with third states pursuant to Article 38 EU by a "Decision", then it is obvious that the EP must be consulted pursuant to Article 39 EU. The Council should be invited to confirm this interpretation.

In addition, there is no reason why the EP's role in the negotiation and future implementation of such treaties should be subject to different arrangements than apply to negotiations with third states under the EC Treaty. Therefore the EC Treaty arrangements for advance information to the EP before and during negotiations, fresh consultation of EP if there is a major change to the treaty, and the supply of information to the EP on implementation of the treaty should also be transposed to the third pillar. Like first pillar treaties, the text of a treaty should be published once signed and drafts concerning the EU position in bodies set up by such agreements (as well as the final decisions of such bodies) should also be published. There should also be public discussion papers before the decision to negotiate major treaties with third states, as in the first pillar.

The same should apply *mutatis mutandis* to any agreements concerning Europol, the CIS, SIS, etc. and third states or bodies. In particular, there should be public discussion of the data protection and civil liberties standards upheld by such third states or bodies before the conclusion of any such agreement (see below).

10) Reports on third pillar implementation (including Schengen acquis)

There is no justification for the secrecy established by the 1997 Joint Action on implementation of Member States' third pillar obligations, except to the extent that the evaluation under that Joint Action relates to ongoing operations or to undisclosed investigative techniques. Therefore this measure should be amended to require public disclosure of such reports except for such operational information.

Other third pillar acts have separate requirements concerning reporting on implementation. It would be useful to consolidate these provisions and allow for regular reports on Member State implementation of all criminal, customs and policing measures, perhaps every two years. This could also include information on the development of the particular types of crime mentioned in the third pillar, to link in with the requirement for impact assessment prior to third pillar proposals.

11) Supervision of third pillar and non-EU bodies

Europol

The Europol work programme for every six months should be discussed by EP, as well as the annual report. The EP should be able to submit detailed questions to Europol and get detailed answers. The EP rules of procedure should be amended to call the Europol Director, and the Chair of the Management Board, at least twice a year to testify regarding the work programme and annual report.

EU bodies and databases

All other EU bodies (CIS, SIS, etc.) should make an annual public report and arrangements for testimony by a relevant official should be agreed.

Non-EU working groups and bodies

The EP should call for a report from the Council and the Commission and conduct its own survey of participation by EU agencies, bodies and database centres in non-EU working groups, bodies and agencies and by member states when acting under a decision taken by the Council or Commission. This should therefore cover third pillar issues as well, for example, ILETs - the International Law Enforcement Telecommunications Seminar - in which member states' representatives participate and which inform, influences or determines EU policy development.

Following the initial review an annual report should be submitted to the EP and it should have the powers to put questions to the responsible bodies or officials.

12) Access to documents

It is essential if the EP is to carry out its functions properly for it to receive from the Council and the Commission not just the measure or report on which its view is being sought but also *all* documents related to that measure/report. This might be termed the "horizontal approach" whereby a file of all the documents/notes contributing to the proposed measure are forwarded to the EP (including SN, DS and other preparatory material).

13) Research and evaluation capability

The above proposals for scrutiny and monitoring have major implications for the EP's servicing arrangements. This is both to gather, evaluate and analyse the relevant official data but also to

encourage civil society input - which on the ground is often better informed on the implementation and effect of measures than "official" summary reports.

Chapter 13

OPENNESS AND JUSTICE AND HOME AFFAIRS

Nowhere is openness - access to documents - more important than in the field of justice and home affairs in the EU. The policies and practices agreed and undertaken effect the rights of citizens, refugees, asylum-seekers and other non-EU nationals.

The civil liberties of everyone within, or attempting to enter, the EU defines the quality of democratic standards. These standards are not static but ever changing - like democracy itself they need to be defended and extended continually.

Openness thus places obligations on parliaments.

First, to ensure that in carrying out its scrutiny role it obtains and takes into accounts all relevant documents and views.

Second, to ensure that documents are made available to civil society - not after the event when measures are adopted but when they are lodged with the parliament so that civil society can play its proper role in the decision-making process.

Third, the EU parliament has a special responsibility to represent the interests of the people by ensuring that the new Regulation to be adopted on access to documents is truly "enshrined" as a right.

The argument that the European Parliament should have special, privileged, access to documents during the decision-making process is indefensible in a democratic society.

The argument that there may be occasions when the Council or Commission seeks to communicate documents on a privileged basis as "confidential" because of their security classification has to be viewed with a critical eye. In our view less than 1% of documents could fall into this category.

There are two categories of documents to which this argument might apply. First, documents containing the names, addresses and contact details of officers and officials. In most cases these documents can be provided with these details noted and removed. Second, there are documents containing actual operational details - it is unlikely these would ever be communicated to parliament and if they were they would properly remain protected. Third, there are documents which mention

member state positions. These documents should be in the public domain, if necessary, with the names of the member states deleted.

Finally, there are documents which primarily involve new policy developments and reports on implementation. Taking account of the above exception there will rarely be good reasons for these to be classified as "confidential" for the parliament and they would be in the public domain. For example, it is suggested that changes to the SIRENE manual should fall under the heading of "confidential" transmission to the parliament.¹¹²

The European Parliament may wish to consider exercising **scrutiny** over the receipt of "confidential" documents from the Council or Commission. The parliament could, where in its view a document properly belongs in the public domain, refuse to accept such a document under this procedure. For example, where a proposed measure presents a significant threat to civil liberties.

Present practices and the new Regulation

Prior to the Maastricht Treaty there was no right of access to Council documents.¹¹³ On 20 December 1993 the Council Decision on public access to Council documents was adopted.¹¹⁴ It is this Decision (known as Decision 93/731) which had governed access to documents from 1993 right up to the present, and it will continue in operation until the adoption of a new Regulation. Under the Amsterdam Treaty the Council, Commission and European Parliament have to adopted a Regulation governing public access to documents (under Article 255, TEC). This new Regulation has to be adopted within two years, that is, by May 2001.¹¹⁵ The new Regulation will be followed by each of the three institutions adopted relevant rules of procedure.

Decision 93/731 did not establish a "right" of access, rather it established a set of guidelines under which the Council would release documents to applicants. Between 1994 and 1999 a number of successful challenges to the Council's refusal to release documents were taken to the Court of Justice and to the European Ombudsman.¹¹⁶

¹¹² Doc no 9078/99, CATS 3 ASIM 26, dated 9.6.99: "Consultation of the European Parliament on confidential and secret information".

¹¹³ Indeed even now the Council usually refuses to give access to pre-Maastricht documents, under the second and third pillar, on the grounds that they are the "property" of the then 12 participating member states.

¹¹⁴ This was preceded by the adoption, on 6 December 1993, of the "Code of conduct concerning public access to Council and Commission documents".

¹¹⁵ The Council Presidencies during this period are: Finland, Portugal, France and Sweden

¹¹⁶ For an analysis of the issues involved and the major challenges to secrecy see, *Secrecy and openness in the European Union*, by Tony Bunyan, Kogan Page, 1999.

These challenges together with the backing of a number of EU member states - notably Denmark, Finland and Sweden and most of the time the UK - has lead to a *modus vivendi* through which many more documents are released. The Council now has a "public register of documents" on the internet - although many documents are still not listed.

Under the Amsterdam Treaty the job of drawing up the new Regulation falls to the Commission - which is unfortunate because the Commission is arguably the least open of the three institutions. The original intention of the Commission was to publish a consultation paper and then the draft Regulation. A drafts of the consultation paper were put in the public domain at a conference on openness held in the European Parliament in April 1999.¹¹⁷ The drafts were roundly attacked at the conference and afterwards as seeking to turn the clock back to the pre-Maastricht situation. This was largely due to the Commission seeking to base the new initiative on its own practice to the exclusion of that of the Council and the European Parliament. As a result of criticism the draft paper was withdrawn and is now unlikely to re-appear. Instead it seems that the Commission will simply proceed by publishing a draft Regulation early in 2000.

The real danger is that the draft Regulation will seek to undermine the present practices based on the 1993 Decision. The Commission's draft Regulation may seek to limit access to so-called "preparatory" documents - which could exclude everything but the penultimate and final drafts of measures. Moreover, the Commission, which has conducted a survey of national government practices, may seek to "harmonise" down to the lowest common denominator.

Already on the table is an excellent draft Regulation and explanatory note from the Standing Committee of experts in international immigration, refugee and criminal law (the "Meijers Committee" based in Utrecht).¹¹⁸ This has been widely circulated and is gathering extensive support from NGOs, voluntary groups and MEPs. This proposal would indeed "enshrine" the right of access to documents and put into effect the spirit of the Amsterdam Treaty.

Recommendation

¹¹⁷ See Statewatch website: <http://www.statewatch.org> for the text.

¹¹⁸ *Proposal for a European Parliament and Council Regulation laying down the general principles and limits governing citizens' right of access to documents of the European Parliament, Council and Commission and the explanatory memorandum*, Standing Committee of Experts on international immigration, refugee and criminal law, July 1999. Copies are available from the Committee at: Postbus 201, 3500 AE Utrecht, Netherlands. tel: 00 31 30 297 4328 fax: 00 31 30 296 0050 e-mail: cie.meijers@forum.imo.nl

Openness (and transparency), access to documents on policymaking and implementation (practice), is one of the benchmarks of a healthy democracy and a vibrant civil society.

There is no more important area for openness than that covered by justice and home affairs. The civil liberties of citizens, refugees and asylum-seekers is another fundamental benchmark for democratic societies. It must therefore be recommended that:

The European Parliament adopt the proposal from the Meijers Committee as its position on the new Regulation.

Chapter 14

The COUNCIL's JUSTICE & HOME AFFAIRS DECISION-MAKING STRUCTURE

The present structure of justice and home affairs decision-making emerged after the entry into force of the Maastricht Treaty on 1 November 1993. Minor changes were made between 1993 and 1999 but the Amsterdam Treaty required a more radical overhaul, partly due to the incorporation of the Schengen acquis.

Pre-Maastricht decision-making

Between 1976-1993 cooperation on justice and home affairs between the EU member states was run on an *ad hoc* basis. The Trevi group, started in 1976, covered terrorism and police cooperation and from 1985 international organised crime. In 1986 the Ad Hoc Group on Immigration was created and in 1988 the "Coordinators of Free Movement" (senior interior ministry officials; this became the K4 Committee under the Maastricht Treaty). From 1987 twice yearly meetings were held of Immigration Ministers and Trevi Ministers.¹¹⁹

Decision-making under the Maastricht Treaty

When the Maastricht Treaty came into effect on 1 November 1993 the K4 Committee together with three Steering Groups (immigration and asylum, policing and customs, and legal cooperation - civil and criminal) plus a number of Working Groups.

Internal criticism of this three-tier structure led to the abolition of the three Steering Groups in 1997. In 1996 the first the High Level Group was set up on organised crime

The Amsterdam structure

The final working structure was agreed by COREPER at its meeting on 10 March 1999 and is set out in the chart.¹²⁰ The structure allows for Working Parties which "always deal with questions relating to the development of the Schengen acquis", those which "sometimes" deal with the Schengen acquis and those which are not affected by this acquis. The new structure is both more flexible and more complex.

¹¹⁹ See, "Trevi, Europol and the new European state", Tony Bunyan in *Statewatching the new Europe*, Statewatch, 1993.

¹²⁰ "Responsibilities of Council bodies in the field of justice and home affairs following entry into force of the Treaty of Amsterdam", 16.3.99, 6166/2/99, CK4 12.

The Justice and Home Affairs Council (JHA Council) usually meets twice under each Presidency.¹²¹ It has two agendas. The "A Point" agenda is nodded through at the beginning of the meeting while the "B Point" agenda covers issues of substance which need to be resolved. However, it should be observed that reports on the "A Point" agendas often cover issues which while agreed by member states without discussion are of great interest to civil society and may present a potential threat to civil liberties.¹²²

All reports for the JHA Council first pass through COREPER either as uncontentious "I Points" which are nodded through or as "II Points" which are discussed - although some "I Points" may become "II Points" if one or more member state delegations raises a substantive issue.

Major differences which cannot be ironed out in the Working Parties will be discussed either at the Article 36 Committee (the renamed K4 Committee) or the Strategic Committee on Immigration, Frontiers and Asylum, or on substantial issues go to COREPER.¹²³

The current decision-making structure is thus quite complicated. The Article 36 Committee deals with issues coming under Title VI of the TEU and the Strategic Committee on Immigration, Frontiers and Asylum (known as SCIFA) deals with Title IV of the TEC. Under each of these Committees are a number of Working Groups.

There are now a number of "High Level Groups" and other groups dealing with "Horizontal matters". But even this distinction can be confusing, for example, the High Level Group on Immigration and Asylum is also a "cross-pillar" horizontal group.

¹²¹ Under the Finnish Presidency there are three JHA Council meetings - two to deal with ongoing business and one theoretically to preparing reports for the Tampere Council meeting in October.

¹²² For example at the JHA Council on 26-27 May 1997 reports on voluntary repatriation, a Joint Action on public order, the implementation of the Dublin Convention and the controversial "analysis files" of Europol went through as "A Points". See *Statewatch* bulletin, vol 7 no 3.

¹²³ Since 1998 the then K4 Committee adopted the practice of COREPER for the first time and divided its agenda between "I Points" (nodded through) and "II Points" this practice has continued in the Article 36 Committee.

Name of the data system	Responsible/ Executing Authority	Head Office	Stage of planning, running of the system	Connections	Legal or contractual basis	Aim and content of the system
Criminal Information System (CIS)	Interpol General Secretariat	Lyon	running since 1989	only Interpol-General Secretariat, data only provided by means of conventional request	Guidelines on international police co-operation and on internal control of data from Interpol, in force since 1984	Data pool of the General Secretariat, 1994 - around 350.000 data inputs, around 40.000 new entries and around 150.000 updates every year
Automatic Search Facility (ASF)	Interpol General Secretariat	Lyon	running since 1989	all Interpol national central bureau's (NZB) with more than x.400-technology at their disposal	Rules relating to data bank with selected data and direct access by the NZB's through the Interpol General Secretariat, in force since 1992	Sets of data which the NZB's have released for direct access, should in large part be search alerts for wanted persons
Strategic Intelligence System	Sub-division Drugs of the Interpol General Secretariat	Lyon	internal, running since the 1980's	access only through Drugs sub-division	Regulations.....	especially for the production of strategic intelligence, first and foremost relating to confiscated drugs methods of smuggling, etc.
Schengen Information System (SIS)	Schengen member states	C.SIS, Strasbourg, as technical support unit	running since April 1995	since 1998, 10 states: DE, F, NL, B, Lux, Sp., Port., I, Aust., GB.	Schengen Implementation Agreement from 1990, since the Schengen Protocol of the Amsterdam treaty extension to all EU countries possible	Wanted object and person search system, in Dec. 1996 around 500.000 Persons had been entered - of which over 80% relate to expulsion or 're-admission' (unwanted "third country nationals"), around 1% for arrest/ extradition, around 2% for police surveillance
Eurodac	European Union	---	in planning	asylum and immigration authorities of the European Union	1990 Dublin Convention, after the entry into force of the Amsterdam Treaty, specific EC- regulation for Eurodac	automatic comparison and identification of fingerprints of asylum seekers and 'illegal immigrants'

Europol Information System	European Union, Europol	The Hague	being set up at the moment with view to install in 2001	all EU police headquarters	1995 Europol Convention	Europol Data bank - Data on persons with criminal records, suspects and 'other persons',
Europol Analysis System	European Union, Europol	The Hague	starts running beginning of 1999 as interim system	Europol analysts and liaison officers of the EU police headquarters which take part in the respective analyses	1995 Europol Convention	each project of analysis has a n analysis file; operative and strategic analyses; (potential) suspects, witnesses, victims, contact persons, also highly personal data; 5.000 analysis files can be worked on parallel to each other
Mar-Info	formerly MAG, now: EU Council Customs Working Party	northern part: Customs Office for Criminal matters Cologne. southern part: head office of the French customs in Paris	at first only regular meetings since 1986, probably in force as a computer system since the beginning of the 1990's	North: Belgium, Netherlands, GFR, UK, Sweden, DK, Poland, Russia, Baltic States; South: European Mediterranean countries and Portugal	bi- and multilateral Customs assistance agreements, Naples Agreement, EC-customs assistance regulation, no specific agreement in its own right	combat drugs trade, support of control and surveillance of cargo ships, creation of harmonised format for the transfer of data on persons
Yacht-Info	formerly MAG, now: EU Council Customs Working Party	Customs Office for Criminal Matters in Cologne	as above	probably the same membership as that of Mar-Info	as above	surveillance of yachts and private ships (as above)
Cargo-Info	World Customs Organisation	Customs Office for Criminal Matters in Cologne	as above	similar membership circle, but including Switzerland and Luxembourg amongst others	as above	support the control of air cargo traffic , as above
Balkan-Info	World Customs Organisation	Customs Office for Criminal Matters in Cologne	as above	Turkey, south east European states, Austria, Switzerland, Italy, GFR, Benelux countries	as above	control of the lorry traffic on the so-called Balkan route, as above
System Customs Enforcement Network (SCENT)	EU Commission	Brussels	running since the beginning of the 1990's	EU Customs Authorities, connection of other states via telex	Naples agreement, EC-regulation for mutual customs assistance	mailbox-system, harmonised format of data was worked out by the EU Commission

Customs Information System(CIS)	EU Commission	Brussels	being set up	EU customs authorities as well as the EU Commission	1995 Agreement on the use of Information Technology in the Customs Area - not ratified yet, renewed EC-regulation for mutual customs assistance	violation of national laws (e.g. drugs law) and EC customs regulations, enables customs control (comparable to discrete surveillance)
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