The European Communities (Amendment) Bill: Implementing The Amsterdam Treaty

[Bill No 71]

Research Paper No 97/112

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The European Communities (Amendment) Bill is designed to pave the way in domestic law for ratification by the UK of the Amsterdam Treaty (Bill 71).The Treaty (Cm 3780), which represents the latest overhaul of the basic European Union treaties, was concluded at the European Council in meeting in Amsterdam on 16-17 June 1997 and signed there on 2 October 1997 after editing work on the text and translations. The history and background to the negotiations are summarised in Research Paper 97/54 *The IGC: The Story So Far* and a full bibliography of documents and commentaries may be found in Research Paper 97/55, *The IGC : A Bibliography.* This paper replaces 97/83 on *The Amsterdam Treaty.*

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I INTRODUCTION

A. Terms used in the paper

The new treaty is formally known as the:

> *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts*

In this paper it is referred to as the Amsterdam Treaty and quotations from it are printed in italics. The full text is contained in Cm 3780. Cm 3780 also contains consolidated versions of the Treaty on European Union and the Treaty establishing the European Community as they would appear if the Amsterdam Treaty were in force. The footnotes in this paper give the revised article numbers for the TEU and TEC, together with the page numbers in the Command Paper where the text of the amendment appears *and* where the amended article appears in context in the consolidated versions. The unamended texts of the two treaties as they stood after the Maastricht Treaty may be found in Cm 3151.

The Treaty on European Union (TEU) is also referred to as "The Maastricht Treaty". It was signed in 1992 and entered into force in June 1993. It created an overarching structure to be known as the European Union (EU) comprising three components or "pillars". The treaty articles creating this structure were lettered A-F and L-S. Article G consisted of numerous amendments and additions to the Treaty establishing the European Community (TEC) which became the first 'pillar' of the Union.

Articles beginning with 'J' in the TEU constituted Title V or the 'second pillar' of the Union and established the mechanisms for a Common Foreign and Security Policy (CFSP). Articles beginning with 'K' constituted Title VI or the 'third pillar', currently known as Justice and Home Affairs (JHA).

One of the effects of the Amsterdam Treaty is to consolidate and re-number all the articles of the TEU and TEC, including those in the TEU which currently bear letters rather than numbers.

The TEC is also known as the Treaty of Rome. It dates from 1957 but has been amended on several occasions. It is divided into 'Parts', 'Titles' and 'Chapters'. Phrases such as 'Community Institutions' and 'Community competence' refer to the TEC, whereas the CFSP and JHA have so far been mainly inter-governmental, i.e they have not involved the Commission, European Parliament (EP) or European Court of Justice (ECJ) to a large extent.

'Schengen' refers to a set of agreements between a sub-group of Member States on border controls and related matters which has hitherto been outside of the Community framework.

The French word '*acquis*' is sometimes used to indicate the body of agreements and decisions which have already been achieved under a particular treaty and which must be accepted by any new party. Hence 'the *Schengen acquis*' and 'the *acquis communitaire*'.

Like the earlier treaties, the Amsterdam Treaty is accompanied by numerous new protocols and declarations. The TEC already has many appended protocols and declarations, including 16 protocols and 33 declarations added by the TEU. The protocols are distinct legally binding agreements relating to the main treaties. The declarations are statements recording either the agreed intentions of the parties, or agreements which they intended should assist in the interpretation of the treaties. Some are in the name of all the Member States; others are unilateral statements, albeit made with the consent of all the parties. Declarations are attached to the Final Act of the IGC, but are not in themselves legally binding.

The Inter Governmental Conference (IGC) is the negotiating forum for amendments to the TEU and TEC. The 1996-97 IGC was begun in accordance with Article N.2 of the TEU. The Amsterdam Treaty makes provision for a further IGC to take place "*at least one year before the membership of the European Union exceeds twenty*".[1] The "Final Act" of the 1996-97 IGC may be found in Cm 3780.[2]

B. A brief chronology: Maastricht to Amsterdam and beyond

Chronology

9-10 December 1991	Maastricht European Council reaches conclusions on all the outstanding points in the two IGCs on Political Union and Economic and Monetary Union.
7 February 1992	Signature of Treaty on European Union in Maastricht.
1 November 1993	Treaty on European Union enters into force.
1 January 1994	European Monetary Institute (EMI) came into being, marking the start of Stage Two of Economic and Monetary Union (EMU).

[1] Protocol 11, Cm 3780, p.88
[2] pp 90-93.

24-25 June 1994	Corfu European Council creates the Reflection Group and requests the institutions to prepare a report on the Treaty on European Union.
28-29 June 1994	European Council in Cannes sets out priorities for the next IGC.
15-16 December 1995	Madrid European Council, presentation of the Reflection Group's report.
29 March 1996	Extraordinary European Council meeting, formal opening of the IGC to review the Treaty on European Union.
21-22 June 1996	Florence European Council, presentation of interim report on the IGC.
13-14 December 1996	Dublin European Council. Presentation of Dublin Draft Treaty.
16-17 June 1997	Amsterdam European Council, final agreement on Treaty of Amsterdam.
16 July 1997	Publication of Agenda 2000
2 October 1997	Signature of Amsterdam Treaty.
21-22 November 1997	Special summit on Employment in Luxembourg.
14-15 December 1997	Luxembourg European Council
1 January 1998	UK takes over the Presidency of the European Union.
February - March 1998	European Monetary Institute compiles data on convergence criteria, Commission to make recommendation to the European Council on which countries qualify to participate in a single currency.
February - March 1998	Conference in London to mark formal start of the EU enlargement process.
25 April 1998	Portuguese referendum. on the Amsterdam Treaty
May 1998	Council of Heads of State or Government to decide the participants in Stage III of Economic and Monetary Union.
28 May 1998	Danish referendum on ratification of the Amsterdam Treaty

15-16 June 1998	European Council in Cardiff.
1 January 1999	Third and final stage of Monetary Union commences (according to Maastricht Treaty). Responsibility for monetary policy passes to the ECB, start of currency changeover in the financial sector (only book money).
May 1999	Elections to the European Parliament.
1 January 2002	The euro becomes legal tender, exchange of notes and coins, conversion of all monetary values not yet denominated in euros.
1 July 2002	Changeover from national currencies to euros complete.

II WHAT THE TREATY DOES

A. An Area of Freedom, Security and Justice

1. The existing arrangements

The broad area of European cooperation now referred to as "freedom, security and justice" (approximately corresponding to areas which are the responsibility of the Home Office in the UK) has been in a state of flux in recent years. Since the coming into force of the Maastricht Treaty in 1993 this cooperation has been split between:

Title VI of the Treaty on European Union (also known as "the third pillar" or the "justice and home affairs pillar"), where all 15 member states of the EU cooperate on an intergovernmental basis; the EU institutions are much less involved and important agreements take the form of Conventions;

the Schengen Agreement, which is currently outside the EU structures, but under which 13 member states, along with non-member states Norway and Iceland, are committed to the gradual abolition of checks at common borders;

certain articles of the TEC which bear on freedom of movement, ie Article 7a ("The internal market shall comprise an area without internal frontiers in which the free movement of goods, *persons*, services and capital is ensured") and Article 100c (visa regime for nationals of third countries).

Since it was the ambition of some member states at the previous IGC in 1991 to incorporate all of these arrangements into the Community structures, a compromise was agreed whereby some of the matters covered by Title VI could be switched to the community pillar at a later date by unanimous agreement.[3]

This mixed arrangement has run into a number of institutional difficulties. Title VI has been slow to bear fruit in the form of fully ratified conventions and there have been disputes (involving the UK) about the optional jurisdiction of the European Court of Justice over them. The mechanisms have also been criticised for being unduly secretive and non-accountable, since neither national parliaments nor the European Parliament exercise much scrutiny over them. As more states have joined the Schengen group its separation from the EU has become a source of dissatisfaction. Finally, there is continuing disagreement about the meaning of Article 7a and the declaration which was adopted in parallel with it in 1986. While the Commission and other

[3] TEU, Article K.9 (Cm 3151, p21).

member states hold that it commits all of them to work towards the abolition of internal border checks for Community and Third Country nationals, the UK has consistently refused to accept this interpretation and has pointed to the wording of the declaration:

> Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.[4]

In the light of these circumstances, one of the aims of the majority of member states taking part in the IGC and of the Irish and Dutch presidencies has been to arrive at a new and more coherent settlement of all these arrangements.

2. The proposed changes

(1) a revised objective for the Union

The new treaty would indeed bring about some fundamental changes affecting the systems of decision-making to be applied and the extent to which the European Court of Justice would have jurisdiction in this area. The role of the European Parliament and the right of the Commission to take an active role alongside the member state governments would also be affected.

The proposed changes include a significant shift in the terminology used. This begins with Article B of the over-arching TEU where the objectives of the Union are set out. Whereas at present the whole of the "third pillar" area of co-operation is covered by the objective:

> - to develop close cooperation on justice and home affairs;

the new treaty offers a much fuller and more "citizen-friendly" definition:

> *- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders controls, immigration, asylum and the prevention and combating of crime;*[5]

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4 *Selected instruments taken from the Treaties*, 1993, Book 1, Volume 1, p764.

5 TEU New Article 2, pp 10, 113.

(2) a new title on free movement of persons, asylum and immigration

Under the Amsterdam Treaty, the existing "third pillar" would be divided into two parts, one of which would become a new title of the TEC as a sphere of fully-fledged community competence, while the other would remain predominantly inter-governmental. The impact of these measures on the UK is strictly limited by Protocols 3 and 4 (see page 21).

The new "title" (Title IV) of the TEC would be devoted to the free movement of persons, asylum and immigration. It would not immediately create "an area of freedom, security and justice", but rather establish mechanisms and in some cases a timetable for the "progressive" establishment of such an area. It would consist of nine articles, six protocols and ten declarations.

Article 61 would establish a general obligation on the Council to adopt the necessary measures, using new and existing powers under the treaties. Article 62 would establish an obligatory five-year time frame (starting at the entry into force of the new treaty) for the Council to adopt measures to abolish "*any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders*".[6] In other words the previous differences of interpretation over Article 7a would be settled in favour of the Commission's interpretation. However, Article 62 is to be read in conjunction with new Protocols 3 and 4 which govern the special position of the UK and Ireland and establish that the UK is entitled to exercise frontier controls *notwithstanding Article 7a.*[7]

Similarly, the Council would be given five years in which to agree measures to harmonise the control regime applying at the external borders of the Union, including visa rules for short-stay visitors from third countries. The corresponding TEC article agreed at Maastricht which did not establish a deadline for decisions would be repealed.[8]

Article 63 would establish a similar five-year timetable for new measures concerning immigration into the Union, including measures on refugees and displaced persons and the granting of asylum. The five-year timetable would not apply to new measures on sharing the burden of refugees and asylum seekers, nor to conditions of entry and residence of immigrants, nor to measures concerning the movement of legally resident aliens within the Union. The actual measures to be taken are not spelled out, but the main thrust in each case is to establish minimum standards for the treatment of third country nationals, whatever their reason for entering the Union and to promote "*a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons*".[9]

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6 TEC New Articles 61,62, pp.25-6 and 150-1.
7 See section B(5) below.
8 TEC Article 100c, Cm 3151, p.83.
9 TEC New article 63(2)(b), pp.26, 151.

Article 64 limits the scope of co-operation on freedom of movement issues in language similar to the 1986 declaration which was quoted earlier:

> *This title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*

The legal significance of this Article as a possible counterbalance to the preceding articles is not explicit, but it is clearly not intended to contradict the commitment to abolish internal border controls. Article 64 also provides a mechanism for the Council to adopt provisional measures for up to six months to deal with an emergency situation created by a sudden inflow of nationals from a third country. This would presumably be invoked in cases such as the influx of Albanians to Italy in early 1997. However, the initiative would have to come from the Commission and the decision would be taken by QMV, so there would be no automatic right for individual Member States to waive the normal rules for immigration etc, even in the event of an emergency.

Article 65 would provide for measures promoting greater co-operation in the cross-border workings of the civil law, e.g. in serving writs, enforcing decisions and taking evidence across borders and in promoting compatibility of rules on conflict of law and jurisdiction and civil procedure. There would be no fixed time-frame for this. However, it would imply a more proactive and Community wide approach than the existing Article 220 TEC. In the final draft of the treaty there was an indication that the fourth indent of this article, which calls on the Member States to negotiate with each other about reciprocal recognition and enforcement of judgements, would be repealed, but this has been dropped from the final version. A Declaration would make it clear that measures under this article could not be used to prevent constitutional safeguards of freedom of expression in the press and other media.

Article 66 would provide the Council with a treaty base for measures to ensure that relevant departments in each Member State cooperate both with each other and with the Commission to further the aims of the Title and a Declaration commits the Member States to consulting also with the UN High Commissioner for Refugees.

Article 67 lays down the voting rules for all of the above measures, apart from the short-term visa issues. The general rule would be that during the five year period after the entry into force, which also forms the intended time table for most of the measures, the decisions would be taken by unanimity on the initiative of either the Commission or a Member State and after consultation with the European Parliament. For any decisions which are outstanding after five years the Commission would then acquire sole right of initiative. Moreover, the Council will then make a decision, by unanimity, as to whether to adopt the Co-decision procedure, including its QMV stages for outstanding decisions. If it does not exercise this option then, by implication, unanimity will be retained as the voting rule for all outstanding decisions under the title. If the

Council does agree to apply Co-decision after five years, Article 67(2) also stipulates that it may adapt the provisions relating to the Court of Justice. This appears to refer to the powers set out in Article 68 (see below) and could be read as an intention to bring the European Parliament within the scope of Article 68(3) in recognition of its responsibilities as co-author of legislation under Co-decision. The article is unusual in two respects in that it appears to allow the Council to vary the jurisdiction of the Court as well as the voting procedure and does not allow for this decision to be confirmed by national ratification as has been the case with similar provisions in the past.[10]

Short-term visa issues form an exception to the general pattern of Article 67. The common list and uniform format decisions, the first of which is already identified as being subject to QMV after 1 January 1996[11] would both now be determined in that way; the issuing procedure and possible uniform visa would be decided by Co-decision after five years without any special decision being required from the Council.

Article 68 concerns the role of the ECJ. Being part of the TEC would normally mean that the title would fall under the jurisdiction of the ECJ. This article, however, modifies the way in which old Article 177 (references by national courts to the ECJ for preliminary rulings on Community law questions) applies to this Title. Only the highest national courts (and not, as under Article 177, the lowest courts) are to be entitled to make references and they must do so where they consider that an ECJ ruling is necessary to enable judgement to be given. [12]There will be no jurisdiction over internal border control measures "*relating to the maintenance of law and order and the safeguarding of internal security*". Under Article 68(3) the Commission and the Member States[13] could also seek rulings from the ECJ, "on questions of interpretation of this Title or provisions adopted under it" but could not use this power to re-open judgements already made by the courts of Member States. In other words neither the Commission nor the other Member States could use the ECJ to question the validity of judgements already made at the national level.

New Article 68 has already met some criticism from lawyers specialising in European law. For example, an analysis published by the UK-based Immigration Law Practitioners' Association concludes that the new treaty inhibits the jurisdiction of the Court of Justice in Community law for the first time and does so in a "bizarre" manner. In particular it finds that in the areas of law covered by the new title:

> …although national courts and tribunals will have to apply and interpret the Community measures adopted under it, they are not allowed to apply for help from the Luxembourg Court. The risk of divergence of interpretation among the courts and tribunals of the 15 Member States, all of which will be flailing about trying to figure out what the measures

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[10] For example Article K.9 of the TEU.

[11] Article 100c TEC,introduced at Maastricht

[12] TEC old article 177 becomes new article 234,p.207

[13] The European Parliament might also acquire this right should co-decision be adopted as the decision-making procedure after five years - see the earlier discussion of Article 67 (2)

> mean, is enormous. In view of the length of time which it takes for a case to makes its way to a court of final instance in any Member State, this means that we can expect at least five years of major legal uncertainty in this field.

With reference to new article 68(3) the analysis questions how any judgement of a national court can be regarded as closed (*res judicata*) if it is held to be wrong in law by a superior court.[14]

On the other hand, since the new title brings some matters into community competence for the first time and since the Court of Justice will also have a greater role under the revised third pillar (see next section) it can also be argued that the new treaty has the overall effect of increasing the influence of the Court of Justice vis-à-vis national courts.

Article 69 makes the whole of the new Title subject to the new Protocols 3,4 and 5 (see page 21 below).

The provisions on asylum in Article 63 which are referred to above apply explicitly to the citizens of non-Member States. It is generally assumed that the question of granting asylum to the citizens of other Member States should not arise. However, a separate protocol (6) has been agreed to deal with the exceptional circumstances in which this issue could arise. This text confirms that such applications would not be considered or declared admissible unless the Member State in which the applicant is a national has derogated from the European Convention on Human Rights, or is in the process of being suspended from the EU for serious and persistent breaches of fundamental rights, or has actually been suspended. Moreover part (d) of the sole Article would reserve the ultimate right of the Member State to decide individual cases, while preserving the presumption that applications are manifestly unfounded.[15] A separate declaration by Belgium records that country's intention to use this provision to examine any asylum request individually.[16] A further declaration by all the Member States reaffirms their right to safeguard their individual obligations under the Refugees Convention of 1951.[17] In his memorandum to the Foreign Affairs Committee on the Treaty Doug Henderson MP (Minister of State FCO) made clear that the British Government also interpreted the Convention as meaning that all asylum applications should be considered individually and that the British Government would therefore continue to give such consideration to applications by EU nationals.[18]

It should be noted that the first of the exceptions listed in the protocol could apply to the UK which has declared a derogation under Article 15 of the ECHR in view of the public emergency arising from the security situation in Northern Ireland.

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[14] ILP *European Update: July 1997 : the Draft Treaty of Amsterdam, 13-15*
[15] p.84.
[16] p.108
[17] p.107
[18] Dep 3/5428 of 13 October 1997, paragraph 19.

Other protocols and declarations would establish that both short-term visa and border security issues may be influenced by foreign policy considerations; and that the Member States will continue to have competence to negotiate border agreements with third countries, provided that these respect the Community and other international agreements.[19] One of the longest Community borders with a third country, that between Sweden and Norway, will in fact be covered by Norwegian participation in the Schengen arrangements.

(3) a revised Title VI: police and judicial cooperation

The creation of a new community title for free movement of persons, asylum and immigration, as described in the previous section, would necessitate a major overhaul of the JHA pillar established by the Maastricht Title VI because four of the areas dealt with under that title would be transferred to the new title and therefore to Community competence. The "justice and home affairs" label would disappear and the title would instead be known as *Provisions on police and judicial cooperation in criminal matters*.

Although this pillar would retain its inter-governmental character, it would move closer to community arrangements and the difference between the pillars hitherto would be significantly eroded.

The amended text would consist of 14 articles[20] with four associated declarations. There would be a completely new "scene-setting" article 29 which would list certain criminal phenomena to be addressed:

racism and xenophobia[21]
terrorism
organised and other crime
trafficking in persons
offences against children
illicit drug trafficking
illicit arms trafficking
corruption
fraud

[19] Protocol 8, p. 87, Declarations 16 and 19, p. 101.
[20] TEU: Title VI, new articles 29-42, pp. 16-21 and 122-6.
[21] In the final version of the treaty "racism and xenophobia" is to be prevented and combated, but is no longer categorised as a crime as are the other items in this list.

and three methods of co-operation:

between police forces, customs authorities and other competent authorities, directly and via Europol
between judicial authorities
by approximation (greater harmonisation) of rules on criminal matters

A new article 30 would enlarge on the meaning of police co-operation and set a series of targets to be achieved within five years to facilitate the work of Europol.

New article 31 would similarly define the scope for common action on judicial co-operation in criminal matters, including the enforcement of decisions, extradition, compatibility of rules, conflicts of jurisdiction and minimum rules covering penalties in the fields of organised crime, terrorism and drug trafficking. A declaration establishes that there would be no attempt under the last of these headings to oblige the Member States to introduce minimum sentences if their legal system does not provide for this.[22] New article 32 would give the Council responsibility for establishing the conditions under which police and judicial authorities may operate with consent on the territory of another Member State.

The provision in TEU old article K2.2 that nothing in the title should affect "*the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*" is retained as Article 33 in the new text. References to the European Convention on Human Rights would disappear from TEU Title VI because, in the new treaty, they are applied to the whole TEU by Article 6.

Article 34 would replace the old K.3 concerning the consultation and decision-making processes. As before, it would begin with a general obligation to inform, consult and co-ordinate action through the Council. In the new text "Joint Actions" would become "Common Positions". The treaty would also introduce a new category of "framework decisions" which would be similar to Directives under the TEC, i.e. they would not have direct effect but would oblige the Member States to achieve a certain result by national means. These would be "*for the purpose of approximation of the laws and regulations of the Member States*". It is anticipated that they may in due course replace the more cumbersome device of adopting conventions. There would also be a category of "other Decisions" covering any other purpose consistent with the objectives of the title. The voting rule would be unanimity, as at present, for all substantive decisions, including "framework decisions" under this title, but QMV would be available for the implementation of the "other decisions" category at the level of the Union. In as far as conventions are still used as an instrument of harmonisation, they would continue to be subject to the ratification of the individual Member States, in accordance with their own constitutional

[22] Declaration 8, p.100.

requirements, but would be capable of entering into force once ratified by half the Member States.

Article 35 would expand the role of the ECJ in relation to police and judicial co-operation. In the existing treaty this is limited to an optional jurisdiction (which the UK has hitherto rejected) over Conventions. Under the new arrangements the Court would automatically have jurisdiction to rule on disputes between the Member States over future conventions and would acquire a similar jurisdiction with respect to framework and other decisions if the dispute were not settled in the Council within six months.

The Court would also acquire the power to give preliminary rulings on questions referred by national courts and relating to this title, but only in respect of national courts in Member States which opt either at the time of signing the new treaty, or subsequently, to accept this form of jurisdiction. The declaration could apply either to highest national courts only or to all national courts. The jurisdiction would not extend to reviewing the validity or proportionality of police or other law enforcement operations, and the exercise of government responsibilities with regard to maintaining law and order and safeguarding internal security. A Declaration on Article 30 (which was Article K.2 before re-numbering) establishes that "*action in the field of police co-operation under Article K.2, including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State*".[23] Where the European Court of Justice did take up cases referred by national courts, other Member States which had not made the relevant declaration would still be entitled to offer statements and observations to the Court. The Commission and any Member State would also have the right to ask the Court to review the legality of decisions if they felt that there was no competence under the Treaty for a particular measure, or that essential procedural rules had been violated.

New Article 36 would replace the existing K.4 on the coordinating committee of officials with no substantive changes, except that the committee would in future deal only with the police and justice issues left in the title. The old Article K.5 on international cooperation would be unchanged as new Article 37. New Article 38 would allow the European Union to conclude international agreements on matters within the police and judicial co-operation title.[24]

New article 39 would strengthen the role of the European Parliament by giving it a specific right to be consulted about proposed decisions and conventions. However, the EP would continue to have no legislative role.

There would be a new article 40 devoted to closer cooperation by a sub-group of member states (see page 55 on **flexibility**).

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[23] The reference to Europol here appears to mean activities carried out by national authorities on behalf of Europol. It would be difficult, at least in the UK, for judicial review to touch directly upon the activities of Europol.

[24] See the section in part VII on the question of legal personality for the EU.

Article 41 would reverse the presumption in favour of financing by the individual member states to one of financing by the Community budget. Under the text preferred by the Netherlands presidency operational expenditure would fall to the Community budget unless the Council decided otherwise by unanimity.

Finally, and as before in the TEU third pillar, the new treaty provides in article 42 a *passerelle* (foot bridge) from the inter-governmental pillar to the Community pillar. In other words, any of the subjects covered in the pillar may be switched to community competence given unanimity in the Council and national ratification of the decision. In effect this would be a new amendment to the basic treaties and would be unlikely to be undertaken lightly by the Member States.

The Justice and Home Affairs pillar established by the Maastricht Treaty also has a provision relating to customs cooperation (existing Article K.1(8)). In the Amsterdam Treaty this is transferred to an expanded TEC Article 280 which would replace former Article 209a on combating fraud against the Community. The new provisions would give a specific treaty base for Council legislation on both fraud and customs cooperation, using the Co-decision procedure.

(4) Incorporating the Schengen Agreement

The Treaty of Amsterdam includes a Protocol (2) to incorporate the Schengen agreement of 1985 into the treaty system. The protocol refers to the Schengen *acquis*, i.e. the entire body of rules and agreements achieved so far under the Schengen arrangements. This is defined in an annex to the treaty text. All the member states, including the UK and Ireland, would be parties to the Protocol in as far as it authorises the 13 states which are committed to Schengen to make use of the Community institutions. The Schengen *acquis* would apply between the 13 in as far as the provisions are compatible with Union and community law. Once the Protocol enters into force the role of the Schengen Executive Committee will be taken over by the Council and the Schengen secretariat will be merged into the General Secretariat of the Council. A Declaration establishes that when Schengen rules on border controls are replaced by Community rules, the level of protection and security will not be diminished.[25] Article 2.1 (third para) establishes that the ECJ would have no jurisdiction over measures or decisions relating to the maintenance of public order or the safeguarding of internal security.

The fact that the UK and Ireland are *not* committed to Schengen themselves is acknowledged in the preamble to the proposed protocol and in subsequent articles which make it clear that both the *acquis* and future decisions based on them will apply only to the 13 member states.[26] Article 4 contains an option for the UK and Ireland to accept some or all of the Schengen acquis at a later date with the unanimous agreement of the other Member States and an associated

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[25] Declaration 15, p.101.

[26] Denmark, Greece, Italy, Austria, Finland and Sweden, which were not original signatories of the Schengen agreement and convention, are to apply the Schengen rules in full from dates to be set by the Council.

declaration looks forward to such acceptance.[27] Denmark's position is governed by Article 3 of the Protocol which states that Denmark's obligations under the Schengen agreement will remain static at the point at which they are translated into their new legal bases in the new freedom of movement title and the TEU Title VI. Further developments carrying forward the Schengen acquis will apply to Denmark only subject to the provisions in Protocol 5 (see page 23).

Under Article 6 a special agreement is to be concluded with Iceland and Norway to allow them to take part in the implementation of the Schengen Protocol. The same article recognises that a separate agreement would be needed to regulate the border regime between Iceland and Norway on one hand, and the UK and Ireland on the other. This would be subject to unanimity in the Council.

Article 8 would establish that the Schengen agreement is to form part of the body of EU achievements (the *acquis*) which have to be accepted in full by future new members of the EU.

(5) Special arrangements for the UK, Ireland and Denmark

While it was accepted by the Netherlands Presidency ahead of the Amsterdam Summit that the UK and Ireland would require special arrangements as regards the integration of the Schengen agreement into the TEU and the abolition of internal border controls, no text was inserted into the pre-Amsterdam drafts and the details of the proposed new arrangements became apparent only with the publication of Protocols 3 and 4 (originally X and Y) after the summit. Protocol 5 (Z) contains a special set of arrangements for Denmark.

The special position arrived at for the UK rests on provisions in the "Schengen" protocol coupled with Article 69 of the new title and protocols 3 and 4. As noted above, it is explicit in Article 2 of the Schengen protocol that the Schengen *acquis* applies only to the 13 states which have signed the Schengen agreements. Under Article 4 of this protocol the UK and Ireland "*may at any time request to take part in some or all of the provisions of this acquis*" and if they do so request the response will be determined by unanimous decision of the other 13. According to Declaration 45 the Member States will seek the opinion of the Commission on such a request, but this is not a legally binding requirement.[28]

Protocol 3 refers in its preamble to "*the existence for many years of special travel arrangements between the UK and Ireland*" and stipulates that the UK will be entitled to exercise controls at its frontiers with other Member States regardless of old Article 7a (in future TEC Article 14) and of any other provisions in the TEU and TEC and any other agreements reached under these treaties or by the EU with other states. Such controls may be for the purpose of (a) verifying the right to enter the UK of citizens of the European Economic Area (i.e. the EU 15 together with Norway,

[27] Declaration 45, p.106.
[28] Declaration 45, p.106.

Iceland and Liechtenstein) and of other states with which the UK has special arrangements and (b) determining whether other persons may enter. The article also applies to territories for whose external relations the UK is responsible, i.e. Gibraltar. Under Article 2 the UK and Ireland may continue to make their own arrangements for the Common Travel Area. Under Article 3 the other 13 states are entitled to exercise the same controls on persons entering their territory from the UK (including for this purpose Gibraltar) and Ireland. This again is to be regardless of Article 7a (14) which would otherwise require the elimination of these controls.

Protocol 4 governs the relationship of the UK and Ireland to the new title on free movement of persons, asylum and immigration. The basic provision in articles 1 and 2 is that the UK and Ireland will not take part in this title and that nothing agreed under it will apply to them. This exemption is explicitly made to encompass any relevant decisions of the Court of Justice. These will not apply to the UK or Ireland, nor will they enter into the *acquis communitaire* or the corpus of community law as far as the UK and Ireland are concerned. Thus the UK and Ireland are not only to remain outside the existing Schengen arrangements, but they will also be fenced off from the future development of these arrangements under the new Community title.

However, Article 3 of Protocol 4 allows the UK and Ireland to opt in to measures adopted under this title on a selective basis. This would mean, for example, that the UK and Ireland could choose to opt in to measures concerning the EU external frontier and asylum, while remaining outside any arrangements made in future for EU internal frontiers. Article 3 would allow both countries to take part in the negotiation of measures provided that they give notice of their intention to do so within 3 months of a proposal being presented to the Council. Since all measures under the new title (other than short term visa measures) are to be adopted by unanimity, at least for the first five years, the UK and Ireland would acquire a veto during the negotiation process, but only for "*a reasonable period of time*"[29] After this period, if agreement could not be reached with the UK and Ireland taking part, but could be reached with the unanimous agreement of the other 13, then it would be adopted for the 13 only and would not apply in any way to the UK and Ireland. The UK and Ireland would have a right to opt in at a later date should they wish. Whenever the UK and Ireland did choose to adopt a measure under the new title they would have to accept also the jurisdiction of the ECJ under Article 68 of the new title.

The arrangement outlined above was described by the prime minister, Tony Blair, in his statement to the House of Commons on 18 June in the following terms:

> We have obtained legal security for our frontier controls, through a legally binding protocol to the treaty. That is an achievement of lasting value, attained for the first time... (...) We have ensured that we, and only we, decide border policy, and that policies on immigration, asylum and visas are made in Britain, not in Brussels. Others may choose to have different arrangements, to suit their traditions and geographical position. I see no reason for

[29] Protocol 4, Article 3(2), p. 81.

> preventing them from doing so, although such arrangements will continue to be covered by unanimity. Under the treaty, the United Kingdom can also participate in areas of interest to us if we so choose, at our option. That is not an opt-out, but an opt-in, as we choose.[30]

In his response to the statement the Leader of the Opposition, John Major, said:

> On border controls, is the Prime Minister aware that he has our complete and unqualified support in maintaining the control of this House over this country's national borders? There can be no question about that. Is it not a fact, however, that the agreement on border control was effectively achieved by last March, when our partners accepted that Britain would never give up border control? [31]

While Ireland has the same rights and exemptions under the Amsterdam Treaty as the UK it has used a Declaration to make clear that it is to some extent a reluctant partner with the UK in Protocols 3 and 4. Had the protocols applied to the UK alone, then this would have destroyed the Common Travel Area and erected new barriers to travel between the UK and Ireland. The Declaration underlines that Ireland has agreed to Protocol 3 because it wishes to maximise freedom of movement into and out of Ireland and that it will exercise its right under Article 3 of Protocol 4 to the maximum extent compatible with the maintenance of the Common Travel Area. Protocol 4 also provides in Article 8 for a possible unilateral decision by Ireland in the future to opt out of the Protocol and into the new treaty title as a full partner. There is no equivalent provision for the UK.

Denmark has also secured a special arrangement at Amsterdam. The special provision for Denmark in the Protocol integrating the Schengen agreement with the EU has already been mentioned. Protocol 5 exempts Denmark from everything adopted under the new title on free movement of persons, immigration and asylum in terms similar to Protocol 4 concerning the UK and Ireland, but with a different version of the "opt-in". Denmark would not participate at all in the negotiation or adoption of measures to build upon the Schengen *acquis* under the new title, but would decide within six months of the decision on any such proposal whether or not to implement it in Danish national law. Such a decision would create an obligation between Denmark and the other Member States in international law, but without any jurisdiction of the European Court of Justice. Protocol 5 also reiterates the provision of the Edinburgh Agreement of December 1992 concerning the non-participation of Denmark in any decisions and actions of the EU which have defence implications. Finally Protocol 5 allows for the possibility that Denmark might in future dispense with all or part of the Protocol, but this would have to be in accordance with Danish constitutional requirements, which would almost certainly mean an additional referendum.

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[30] HC Debates, 18 June 1997, c313.
[31] ibid, c316. The leader of the Liberal Democrats did not specifically refer to this issue in his response to the statement.

The special arrangements for Denmark reflect public disquiet in Denmark about the Schengen agreement (which was approved for ratification in the Danish parliament on 30 May 1997) and the proposed "Euro-region" spanning southern Denmark and northern Germany. The Amsterdam Treaty will be submitted to the electorate in a referendum in May 1998, and it was widely held at the time of the Amsterdam summit that it stood little chance of being approved if Denmark agreed to "communitise" sensitive border and migration issues.[32]

B. Changes to the Common Foreign and Policy

1. Introduction

The Common Foreign and Security Policy (CFSP) was established as the second pillar of the European Union under the Treaty of Maastricht. Under that Treaty, the objective of the Union in external policy is to "assert its identity on the international scene, in particular, through the implementation of a common foreign and security policy, including the eventual framing of a common defence policy, which might in time lead to a common defence".[33] The CFSP contained two separate elements, a diplomatic side, developed from the earlier system of European Political Co-operation, and a new security and defence side which would in large part be implemented by the Western European Union.[34]

Reform of the second pillar has taken place against the background of a perceived EU failure in response to the disintegration of the Former Yugoslavia. Following this Balkan experience, the implementation of the CFSP has become less ambitious, but there is still a wide range of Joint Actions and Common Positions and a continuing plethora of declarations.[35] Many of the changes to the CFSP in the Amsterdam Treaty reflect this more pragmatic approach with fairly limited functional improvements to external policy mechanisms and a strengthening of the Presidency in its external role. There is also a certain amount of textual reorganization and codification. More controversially, changes have also been made to decision-making. Fundamentally, however, the intergovernmental structure of the CFSP could be said to have survived.

The Amsterdam Treaty also adjusts some existing provisions on defence and security. The Maastricht Treaty saw the Western European Union becoming both the defence arm of the EU and the newly reinforced European pillar of NATO. This was a compromise to reconcile Atlanticist Member States, led by the UK, which wished to preserve the pre-eminence of NATO in European security, and 'Continental' states, led by France, which supported the ideal of a

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[32] J Read, "Lone crusader Denmark battles on over border controls", *The European*, 5-11 June 1997.

[33] TEU, Article B

[34] A European collective security organization established under the Treaty of Brussels of 1948.

[35] For a series of studies on various aspects and actions of the CFSP see M. Holland (ed), *Common Foreign and Security Policy: The Record an*d Reforms (1997) and Regelsberger, de Schoutheete de Tervarent & Wessels (ed), *Foreign Policy of the European Union: From EPC to CFSP and Beyond*

European defence, which would be potentially capable of military actions independent of the USA.

In the past five years NATO has significantly remodelled itself. By changing from a largely military body into a politico-military-security organization, NATO has been revived as the central institution of European security. It has been acknowledged, even by France and Spain, which are now in the process of rejoining its military structures, as the predominant security organization. The key to this transformation was NATO's perceived success in facilitating a peace settlement in Bosnia in 1995 in comparison with the earlier failure of the EU and other international organizations.

While the more ambitious plans for a European Common Defence have again been postponed, a series of new military tasks in Europe under Chapters VII and VIII of the UN Charter, such as humanitarian intervention, crisis management and peacekeeping, have been identified as specifically European challenges. The EU has identified the need to pursue objectives in these spheres, known from a WEU declaration as "Petersberg tasks".[36] Without military means of its own, the Union will need the assistance of the WEU to fulfil these aims, but in order to improve effectiveness the relationship between the two bodies has been altered. This new direction of the putative European Common Defence Policy has taken place against the background of the decision by the USA to lend its military NATO-assigned assets to the WEU for limited military operations under the Combined Joint Task Forces (CJTF) concept and a corresponding 'Europeanization' of the Alliance, with a greater role for European military officers in the NATO command structure.[37]

2. Political Solidarity

There is a general belief that the CFSP has been weakened in the past by a lack of collective political will. The Amsterdam Treaty makes amendments to Title V which are aimed at instilling collective solidarity. These include simplifying but strengthening the existing Article J.1, which becomes TEU Article 11, relating to the EU's foreign policy objectives and mutual solidarity.[38] In the new Article 11(2), the Member States are additionally committed to "*work together to enhance and develop their mutual political solidarity*". There is also the inclusion of the word "*integrity*" of the Union as an additional objective of the CFSP in Article 11(1). The latter is in part a reference to the frustrated desire of some Member States, such as Finland (in relation to Russia) and Greece (in relation to Turkey), to include in the treaty an explicit reference to safeguarding the territorial integrity of the Union. On this point, the Treaty does not include a specific collective security guarantee but the addition of the wording "*in conformity with the principles of the United Nations Charter*" in the new Article 11(1) provides a reference

[36] Agreed at Petersberg, near Bonn, in June 1992.

[37] The CJTF concept was originally launched in 1994 but its development became bogged down in argument between France and the USA. The NATO Council held at Berlin in June 1996 broke this logjam. An agreement on CJTFs is to be ratified at the forthcoming NATO Summit in Madrid in July 1997.

[38] The CFSP articles may be found on pp 11-16, and, in their consolidated form, on pp.116-122 of Cm 3780.

to an implicit collective security understanding within the Union, as well as to the Petersberg tasks.

3. Direction and Tools of the CFSP

Like the existing TEU (Article J.8(1) and (2) first indent), the Amsterdam Treaty defines the European Council as the ultimate arbiter of the CFSP and it will continue to provide its principles and general guidelines (text moved to new article 13), although additionally guidelines will also be issued for "*matters with defence implications*". Out of a desire to promote greater effectiveness, some CFSP tools and decision-making mechanisms have been altered.

As part of the consolidation of the Second Pillar text, the Treaty moves the means by which the EU can pursue its foreign policy objectives from the old Article J.1(3) to a new Article 12. The means include: "*defining the principles of and general guidelines for the common foreign and security policy*"; *"strengthening existing systematic co-operation"*; and adopting the current tools of Joint Actions and Common Positions. To these is added a new tool, that of the '*Common Strategy*'.

A Common Strategy, to be decided on by the European Council under Article 13 when the Member States have important interests in common, could be an overall approach to a particular country or region or broad policy issue. Common Strategies will set out their objectives, means and duration. The Council of Ministers will define and implement the CFSP and may recommend Common Strategies to the European Council for decision. It will take CFSP decisions, (either Joint Actions, under Article 14, or Common Positions, under Article 15, or declarations) on the basis of general guidelines defined by and Common Strategies decided on by the European Council. The new Treaty seeks to define the boundary between 'Joint Actions' and 'Common Positions' in a clearer way. Under the new Article 14(1), a Joint Action will "*address specific situations where operational action is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation*". Under the new Article 15, a Common Position will define "*the approach of the Union to a particular matter of a geographical or thematic nature*". The place of the Commission in supporting Joint Actions is enhanced by Article 14(4) whereby the Council can ask the Commission to submit proposals which may ensure the implementation of a Joint Action. This might refer to the economic instruments exercisable by the Commission in the fields of trade sanctions and development assistance, for example. As in the Maastricht Article J.3(6), moved to the new Article 14(6), "In cases of imperative need and arising from changes in the situation and failing a Council decision, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of the joint action".

The obligation on Member States to inform and consult on foreign and security policy matters and to exert the Union's influence as effectively as possible by concerted and convergent action is unchanged but moved from the old Article J.2(1) to a new Article 16.

4. Decision-making and Flexibility

The Amsterdam Treaty contains significant changes to CFSP decision-making processes. The current position, under Article J.3 of the Maastricht Treaty, is that, on the advice of the European Council, the Foreign Affairs Council can decide that some matters should be subjects for Joint Action. The Foreign Affairs Council is empowered to agree by unanimity that certain decisions within a Joint Action can be decided by QMV. This implies that any single Member State can insist that there is no majority voting on a particular subject and that all decisions connected with a Joint Action are taken by consensus. However, once the Council has decided that a particular area should be subject to QMV, then all Member States are bound by the decision. This is subject to a number of provisos including a demonstrable change of circumstances which has an effect on the areas subject to Joint Action, major difficulties on behalf of a Member State in implementation and national action in an emergency. In its Article J.2, the Treaty of Maastricht defined a less intensive mode of co-operation, a Common Position, to be adopted by unanimity.

The Amsterdam Treaty moves the text on decision-making from old Article J.3 to a new TEU Article 23. The new Treaty seeks a revised balance between unanimity (possibility of national veto) and QMV, with the most important decisions of principle (Common Strategies or general guidelines) to be taken by unanimity in the European Council and most implementation to be decided in the Council of Ministers, where QMV will be available in certain circumstances.

Under Article 23(1) the basic voting rule for CFSP in the Council of Ministers is to be unanimity. It should be remembered that many decisions will be based on guidelines defined or Common Strategies adopted by the European Council by unanimity.

Where unanimity cannot be achieved, Article 23(1) would allow individual Member States or small groups of States the opportunity to register a constructive abstention in order to allow the majority to go ahead. However, although exempted from implementation, the abstaining State or States would have to accept that the decision commits the Union as a whole and could not undermine it subsequently. If the number of Members recording their abstention represented more than one third of the votes, weighted in accordance with TEC 205 (formerly Article 148), then the decision would not be adopted. National representatives to the Council would need to be present in the Council chamber in order to record their abstention.

Article 23(2) provides for a derogation from the general rule of unanimity in the case of the adoption of Joint Actions, Common Positions and other decisions based on Common Strategies and also the implementation of Joint Actions and Common Positions. In these cases decisions would be taken by QMV subject to TEC Article 205(2). Approval would require at least 62 votes in favour from at least 10 Member States. However, this paragraph also allows for a national veto, since a Member State can reject the adoption of any decision by QMV for "*important and stated reasons of national policy*". In other words, a vote would not be taken and the particular act in question would not be authorised. However, if a number of other Member States can achieve a qualified majority under this Article, the adoption of the decision would be regarded as merely postponed. The Council delegations could then appeal to the next, usually twice-yearly European Council, where decisions are taken by unanimity. Clearly, the use of a veto in the Council of Ministers would be seen as a serious step and is discouraged by the Treaty text here and elsewhere. The number of decisions taken by QMV in the Council of Ministers will ultimately be determined by the number of Common Strategies, decided on by consensus in the European Council, and the political will of a particular Presidency to try the QMV procedures on decisions of a secondary nature.

An important exception under Article 23(2) is that decisions having defence or military implications will never be taken by QMV. In these cases Article 23(1) will always apply. Thus, it could be said that the Amsterdam Treaty is unlikely to promote the greater use of QMV in the most sensitive and controversial circumstances. The most it may do is to force governments which wish to block EU action in a particular area to state their reasons more openly and to be prepared to argue their case at the Summit level.

Drafts of the Amsterdam Treaty have contained a specific clause on flexibility or enhanced co-operation with reference to the general clause on flexibility included in the Common Provisions. This would have allowed groups of Member States to pursue closer foreign policy and defence co-operation, using the EU institutions, mechanisms and procedures. However, on the insistence of Austria, Britain, Greece and Ireland a specific flexibility clause in the CFSP was dropped from the final Treaty. Despite this, an element of flexibility is introduced into the CFSP by Article 23(1), which allows constructive abstention, and could be said to have already existed under the Maastricht Article J.4(5) which is carried over into the Amsterdam Treaty by Article 17(4).

5. Leadership, Institutions and Cooperation

A weakness of the CFSP has been its dependence on the diplomatic resources of the country holding the Presidency at any given time. The Presidency represents the Union in international organizations, conferences and bilateral relationships. When small states, such as Luxembourg, have been incumbents, they have often been greatly stretched. The Troika (last, present and next holders of the Presidency working together) was created to help remedy this deficiency but lacks coherence.

Under the new Article 18 (TEU), the Presidency will still represent the Union but will be assisted by the Secretary-General of the Council Secretariat in a new capacity as "High Representative".[39] The Secretary-General will effectively replace the past holder of the Presidency in the Troika, since in future only the next presidency can be called upon to assist the current one. The role of the High Representative in formulating, preparing and implementing policy decisions, including a role in political dialogue with third parties, is defined in a new Article 26. This reform is fairly modest since the Secretary General already has a role, albeit a largely non-public one, within CFSP policy-making.[40] Much of the administrative burden of running the Council Secretariat will pass to a new Deputy Secretary-General, who like the Secretary-General, will be appointed by the Council by unanimity.[41] The Amsterdam Treaty has, however, added to the Council's powers by allowing it to appoint "*a special representative with a mandate in relation to particular policy issues*".[42] This is no more than a codification of existing practice. The EU has already appointed a special representatives in relation to the Middle East peace process, for example.

Article 19 is a consolidation of two separate sub-Articles from the Maastricht Treaty. It includes, firstly, the text of the previous Article J.2(2) on the obligation of Member States to co-ordinate their actions and uphold Common Positions in international organizations. Secondly, it adds the wording of the old Article J.5(4) which obliges Member States in international organizations or conferences to keep Members, who are not involved, informed of any developments of common interest. This provision also covers Member States who are permanent or elected members of the UN Security Council, who must uphold the interests of the Union, "without prejudice to their responsibilities under the provisions of the United Nations Charter".

TEU Article 20 in the new treaty is the old Article J.6 unchanged. This underwrites practical co-operation in support of the CFSP by Member State diplomatic missions and consular missions and Commission offices in third countries.[43]

The purely consultative role of the European Parliament in the Common Foreign and Security Policy is set out in the new Article 21. This is merely a repetition of the wording of the Maastricht Article J.7. The Article gives the Presidency of the Council and the Commission the

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[39] P. 119.

[40] More radical proposals in the IGC had included the appointment of a personality outside the existing structures who would act as a CFSP representative, the so-called "Mr or Ms CFSP". He or she would have been a prominent political personality from a Member State. However, some States were concerned that such a person might adopt his or her own agenda, potentially in conflict with the European Council. The Secretary-General of the Council is a public official. A second proposal was for the appointment of a person of Secretary-General rank within the Secretariat, who would work alongside the current Secretary-General, to assume the CFSP representative/advisory role. The final compromise tends towards the former proposal.

[41] TEC new Article 207 (2)

[42] TEU new Article 18(5), p. 119.

[43] There is a good deal of practical diplomatic co-operation between the Fifteen. Weekly meetings of EU ambassadors are held at the UN and regular ambassadorial meetings occur in third countries. There is also much consular liaison; under Article 8c EU citizens may approach any EU consulate for assistance in third countries. A growing practice is for British diplomats to share premises with other EU countries. For example, the British and Italian embassies in Belarus share offices. (Foreign Affairs Committee Second Report, *Public Expenditure: Spending Plans of the Foreign and Commonwealth Office and the Overseas Development Administration 1996-97 to 1998-99*, HC 370-II, p. 35)

task of keeping the EP informed about the CFSP and requires the Presidency both to consult the Parliament and to ensure that its views are taken into consideration. In fulfilment of these requirements, the Commissioners for external relations make statements to and can be questioned by the Parliament in plenary session. The latter also applies to Ministerial representatives of the Presidency-in-office. Representatives of the Presidency and Commission can appear before the EP Committee on Foreign Affairs, Security and Defence and its sub-committees.[44]

Article 22, a consolidation of the Maastricht Articles J.8(3) and (4), concerns the right of initiative. As at present, the new Treaty proposes that the Member States and the Commission may refer to the Council any question relevant to the CFSP and submit proposals. The Presidency, of its own will or at the request of a Member State or the Commission, can call a Council meeting within 48 hours or, in an emergency, sooner. Under new Article 27, which is the existing and unamended Article J.9, the Commission is fully associated with work of the CFSP but is located outside the leadership triumvirate of the High Representative and current and future holders of the Presidency.

Article 24 allows the Presidency to open negotiations on international agreements on behalf of the European Union, subject to the unanimous consent of the Council. In this task it will be assisted by the Commission. For the legal implications of this see page 57.

Article 25 repeats the text of the current Article J.8(5) concerning the Political Committee (POCOM). POCOM is the Committee of Political Directors in the foreign ministries of each Member State which convenes before each Foreign Affairs Council and also co-ordinates much of the CFSP work between ministerials. Under a Declaration appended to the Final Act, POCOM would meet whenever required, even at very short notice. To facilitate this, the Amsterdam Treaty allows deputies of Political Directors to be able to represent their national governments at POCOM meetings.

6. The Planning and Early Warning Cell

The CFSP has often been criticized for being too reactive. This may be partly one of the consequences of intergovernmentalism. Currently, in ministerial meetings, each national representative arrives in Brussels with his or her national assessment of, and perspective on, a given situation or crisis. Much time may then be expended in formulating a common approach to the issue at hand before addressing any possible solutions. There is a general feeling that Foreign Affairs Councils are under-supported. The CFSP unit established under the TEU, which

[44] The EP has two important powers outwith the Second Pillar but which relate to external policy and are not part of the Second Pillar. Firstly, under TEC Articles 300 and 310 (formerly 228 and 238), it must approve all EC Association and Co-operation agreements with third states or groups of states. Secondly, under TEC Article O, the EP must approve, by absolute majority, treaties of accession of new Member States. The EP's influence could further expand with it new budgetary powers (see below).

contains a Director and one diplomat from each Member State, is regarded as little more than a centre for shuffling papers between the Council, Commission and European Parliament. A Declaration in the Treaty establishes a new policy planning and early warning unit, placed within the Council Secretariat under the responsibility of the High Representative.[45] As its name implies, this would *inter alia* prepare policy options for Council meetings. The unit would include personnel drawn from the Member States, the WEU, the Commission and the Council Secretariat. In addition, the Cell would be able to draw on the information resources of the Member States and the Commission. The Member States and the Commission would also have the right to suggest particular research or planning projects.

7. Security and Defence: the WEU

At Maastricht it was decided to give the EU a defence identity, albeit tentatively, and that EU decisions with defence implications would be expressed through a revitalized Western European Union (WEU). The key Article in this respect was Article J.4. Article J.4.(1) stated that the CFSP includes all questions relating to the security of the Union, "including the eventual framing of a common defence policy, which might in time lead to a Common Defence".[46] In Article J.4(2) the "Union requests the Western European Union, which is an integral part of the development of the Union, to elaborate and implement decisions and actions of the Union which have defence implications". Both sub-articles contained important points. Firstly, in Article J.4(1), direct EU involvement in defence tasks was "eventual" i.e. it was placed in the future and the formation of a collective security organization within the Union was even more distant and might not happen at all. Secondly, in Article J.4(2) the relationship between the EU and WEU was an informal one and the two remained distinct. Partly for this reason, the EU's request in Article J.4 was answered by the WEU in a declaration appended to the Maastricht Treaty. This in essence repeated much of the Article J.4 language but also underscored the WEU's role as the "means to strengthen the European pillar of the Atlantic Alliance".[47]

During the IGC, the Member States were in accord that the WEU should provide the vehicle for the Union's new quasi-military Petersberg objectives, but there was disagreement as to exactly how the two bodies should be related. The UK, under both governments, Denmark and the three EU neutrals, Austria, Ireland and Sweden, favoured the strengthening of co-operation between the EU and WEU but without any legally binding link between them. The remaining ten Members supported moves, at varying speeds, to integrate the WEU into the EU. The new Treaty mainly reflects the policy of the former group whilst not ruling out the integrationist position for the future.

The compromise is contained in a substantially revised version of the old Article J.4, now to be Article 17 in the TEU. In Article 17(1), the framing of a common defence policy is no longer "eventual" but "*progressive*", subject to further qualifications in the second paragraph of the

[45] Declaration 6, p.99.
[46] Cm 3151, p.16.
[47] Declaration No.30 on Western European Union, Para 4 (Cm 3151, p.34)

Article. The wording "might in time lead to a common defence" is retained but this will only occur if the European Council so decides.

The role of the WEU, as set out in the second sub-paragraph of Article 17(1), is to support the Union "*in the framing of the defence aspects of the common foreign and security policy*" and to provide the EU with access to the "*operational capability*" to enable it to undertake the Petersberg tasks described in Article 17(2). These are "*humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacekeeping*".[48] The closer relationship between EU and WEU is further supported in Article 17(3). Instead of the Union requesting that the WEU undertake actions on its behalf, the Union will now "*avail itself of the WEU t*o elaborate and implement decisions and actions which have defence implications". With regard to Article 13, the European Council will also be able to establish guidelines for the WEU when it uses the latter's services. The five Members States which are WEU Observers (Austria, Denmark, Finland, Ireland and Sweden), will be able to be involved in the planning, decision-making, elaboration and implementation of WEU operations initiated by the EU, if they so choose.[49] The position of Denmark is, however, ambiguous since Article 6 of Protocol 5(Z) on the Position of Denmark states that the Danish government will "*not participate in the elaboration or implementation of decisions and actions of the Union which have defence implications*".[50]

The above arrangements bring the EU closer to a definition of a Common Defence Policy but do not provide for an EU Common Defence, which would only be fully realised if the WEU were to be merged into the EU. The key wording with respect to the relationship between these two bodies is contained in the second paragraph of Article 17(1). This states that "*The Union shall foster closer institutional arrangements with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements*". It could be argued that the idea of integrating the WEU into the EU has now been given some recognition in the Treaty but actual integration is only a "possibility" i.e. it may occur or it may not. In addition, approval of integration would be subject to the agreement of the European Council where all Member States have vetoes. Finally, if an EU/WEU merger were to happen this decision would have to be ratified by all the Member States and some would need to make constitutional amendments because of existing commitments to neutrality.

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[48] The Treaty uses the maximalist interpretation of Petersberg missions. Paragraph II.4 of the Petersberg Declaration defines the tasks as "humanitarian and rescue, peacekeeping and combat forces in crisis management, including peacekeeping". Para I.2 refers to lesser "effective implementation of conflict prevention and crisis management measures, including peacekeeping activities of the CSCE [now OSCE] or United Nations Security Council" (WEU Petersberg Declaration June 1992). A broad definition of "combat forces in crisis management" could, for example, be conceived to include military operations such as European involvement in a Gulf War scenario.

[49] Article 17(3), Third Paragraph, pp. 118-9.

[50] This Article recalls a similar statement in the *Decision of the Heads of Government, meeting within the European Union, concerning certain problems raised by Denmark on the Treaty on European Union*, agreed at Edinburgh in December 1992. Given that some EU decisions with defence or military implications may be implemented by Combined Joint Task Forces within the NATO rubric, Article 6 may not necessarily prevent Danish participation in originally EU sponsored military missions.

Prospects for an EU Common Defence, realised through the WEU, must also be weighed against new Treaty language concerning NATO. As well as being the defence component of the EU, the WEU is also the European pillar of the Atlantic Alliance. As in Article J.4(4) of the Maastricht Treaty, the third sub-paragraph of new TEU Article 17(1) respects the "specific character of the security and defence policy of certain Member States". This caters for the defence positions of the EU neutrals and Member States with NATO commitments. However, the recognition of the latter has been strengthened. Whereas Article J.4(4) stated that "The policy of the Union in this Article ... shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within this framework", the new Article 17 inserts the wording "*which see their common defence realized in NATO*"[51]

The modalities of the relationship between the EU and WEU are provided for in a Protocol to Article 17 (J.7).[52] This calls for arrangements for "*enhanced cooperation*" between the two bodies to be drawn up within a year of the Protocol coming into force. Under successive WEU Presidencies since Maastricht working links between the WEU and both the EU and NATO have been created, and the WEU has been prepared to lead limited military operations. The WEU thus stands ready to respond to the EU's new directions in defence and security and a WEU Declaration to this end has been attached to the revised Treaty on European Union.[53] However, it is significant that under the new Treaty arrangements both organizations will remain legally distinct even if more closely linked. The latter point is underlined by a repetition of the language in Article 17 concerning national defence characteristics and NATO obligations. There is also a Declaration on the adoption by the Council of appropriate security clearance arrangements for Council Secretariat staff so that they can handle confidential WEU information.[54]

Article 17 also includes a commitment, "*as Member States consider appropriate*", to co-operation in the armaments field as part of the "*progressive framing of a common defence policy*".[55] A commitment to examine "enhanced cooperation in the field of armaments with the aim of creating a European armaments agency" was included in the WEU Maastricht Declaration. Article 17(1) merely marks a recognition within the Treaty of existing practice.[56]

Again, as in the Maastricht Treaty, Member States can pursue their own bilateral or multilateral defence co-operation as long as it is consistent with the Atlantic Alliance, WEU and the new

[51] Article 17(1) third sub-paragraph, p.118.

[52] Protocol 1, p.76.

[53] WEU Paris Declaration, Para 6 and Cm 3780, pp.94-9.

[54] Declaration 2, p.94. The WEU Members concluded a Security Agreement amongst themselves in 1995 (see Cm 2971). There is also an agreement between NATO and the WEU on the transfer of classified information.

[55] Article J.7(1)

[56] Since 1991, the structures for European armaments co-operation have advanced considerably. A Western European Armaments Group was established in 1993 and has been assisted since April 1997 by a Western European Armaments Organization as an agent for its research projects. Separately, the four leading European defence manufacturing states, Britain, France, Germany and Italy have established the Quadrilateral Armaments Agency or OCCAR (Organisme Conjoint de Cooperation en matiere d'Armement). Work continues in the WEU on the prospects for a European Armaments Agency which could be based on an amalgamation of WEAO and OCCAR. See Research Paper 97/15, *European Defence and Armaments Co-operation*, February 1997 for further details.

Treaty. To this end the language of the old Article J.4(5) is reproduced in Article 17(6). The provisions of Article 17.as a whole, including the prospects for a merger between EU and WEU, will be reviewed at a future IGC in accordance with TEU Article 48 (formerly N), but no date has been set for this.[57]

8. Finance of the CFSP

The Amsterdam Treaty also addresses the question of financing of the CFSP. There has been some dispute on this issue due to the contradictory nature of Article J.11 of the Treaty of Maastricht. This stated that the EC budget would pay for the (small) administrative costs of the CFSP but that operational costs would either, by unanimous consent of the Council, be charged to the EC budget, in which case the EP would be involved, or be charged to the Member States themselves on a scale to be determined.[58] This procedure has created some tension with the EP which has demanded budgetary control over all areas of CFSP expenditure.

The new Article 28 seeks to remedy this problem by stating that, as well as administrative spending, operational expenditure for the implementation of CFSP decisions, other than those having military or defence implications, will be charged to the budget, unless the Council decides by unanimity otherwise. In short, this is the reverse of the current position. This will be expenditure subject to normal EC budgetary procedures, including EP scrutiny. If expenditure is not charged to the budget of the European Communities it will be charged to the Member States on the basis of national shares of EU GNP, unless the Council decides unanimously otherwise. Members who have constructively abstained from the application of a decision with military or defence implications under Article 23(1) will not be obliged to contribute to its financing. The modalities of CFSP funding are set out in an annexed Inter-Institutional Agreement between the EP, the Council and the European Commission.[59] The CFSP budget will contain provision for urgent actions. Moreover, the Commission, on the basis of a Council decision, will be able to move monies between budget lines within the overall CFSP budget. Together, these provisions should offer some financial security to Second Pillar actions. EP authorization of the CFSP budget could, however, lead to the Parliament seeking to expand its influence over individual CFSP decisions and the development of the Policy as a whole.

C. Changes to the Institutions and Procedures

A major goal of this IGC was to reform the EU's institutions in order that they should continue to be effective after further enlargement. These matters proved controversial, and many of the more detailed proposals in earlier drafts of the Treaty have been dropped from the final version.

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[57] This is a concession to Member States who had desired a prescriptive timetable for merger between the EU and WEU.
[58] Old Article J.11(2)
[59] The text may be found in CONF/4001/97, EN 109-10.

Instead, a new Protocol on the institutions postpones changes to the size and composition of the Commission, and to the voting weights in Council, to a later date.[60]

This Protocol provides that when further enlargement takes place, the Commission shall comprise one national of each of the Member States, provided that, by that date, the votes in the Council have been reweighted in a manner acceptable to all Member States. Those countries which will lose their second Commissioner (Britain, France, Germany, Italy, Spain) have pushed for compensation by means of a reweighting of votes in their favour. This is particularly relevant as enlargement will result in there being considerably more smaller states in the EU. A new Declaration recognises the need to find a solution for *"the special case of Spain"*.[61] This refers to the compromise, confirmed by the European Council at Ioannina in 1994, by which Spain has been compensated for accepting fewer votes in Council than Britain, France, Germany and Italy, by being guaranteed two Commissioners. However, under the new Protocol, Spain could lose a Commissioner, without seeing a redistribution of votes in its favour.

The Protocol also provides that, at least one year before the membership of the Union exceeds twenty, an intergovernmental conference must be convened to carry out a comprehensive review of the composition and funding of the institutions.

1. Legislative procedures

The number of legislative procedures involving the European Parliament has been reduced to three: assent, co-decision and consultation. The "cooperation procedure" has been abolished, apart from in relation to EMU provisions. The co-decision procedure has been introduced in a number of existing Treaty provisions currently subject to either the assent, cooperation or consultation procedure, as well as for a number of new Treaty provisions. Co-decision was extended to all those provisions currently subject to cooperation (except EMU provisions). The only exception to this is Article 161 (formerly Art.130d), Structural and Cohesion Funds, remaining subject to the assent procedure. In addition, Article 42 (ex-Art.51), on rules on social security for Community immigrant workers, will be subject to co-decision as suggested, but remain subject to unanimity.

Co-decision was introduced by the TEU to enhance the powers of the European Parliament in the EC legislative process, and is set out in Article 189b of the Treaty (now Article 251).[62] The procedure is designed to give the EP a stronger role than it enjoyed under the "cooperation procedure" which is described in Article 189c (now Article 252), in particular by giving it opportunities to reject the texts proposed by the Council. It is extremely complex, and was restricted to certain areas of Community competence. As well as being applied to new areas, the co-decision procedure is simplified by the new Treaty.

[60] Protocol on the institutions with the prospect of enlargement of the European Union, p.88.
[61] Declaration to the Final Act no.50, p.107.
[62] TEC p.39 & p.212.

The co-decision procedure will now be Article 251 of the TEC as amended at Amsterdam. The amended article simplifies the earlier stages of the co-decision procedure, and removes the last stage whereby the Council can (subject to the Parliament's veto) adopt its original common position if there is no agreement in the Conciliation Committee.

The Council will act by qualified majority in all cases, except that were it to approve EP amendments where the Commission had delivered a negative opinion, it must act by unanimity. The EP will be required to act by an absolute majority of its Members at all stages of the procedure. A provision is included to allow the extension of the time limits of three months and six weeks by a further one month and two weeks respectively. However, a Declaration emphasises that such extensions should be considered *"only when strictly necessary"*, and that at no time should the period between the second reading by the European Parliament and the outcome of the Conciliation Committee exceed nine months.[63]

The new procedure gives the European Parliament more power to reject a common position outright without having to refer it to a Conciliation Committee, as well as maintaining the existing power to prevent the adoption of an act by rejecting by an absolute majority a joint text approved by the Conciliation Committee. Rejection by the EP is absolute and cannot be overridden, and the removal of the additional complication of the requirement to first announce intention to reject may make it easier for the EP to extract concessions. However, the simplification procedure may also place more pressure on the EP to come to some agreement through amendments, rather than allow a measure to fail entirely. In short, it will be difficult to assess whether the changes significantly alter the balance of power between the institutions until the new procedures are tested on controversial legislation.

Those areas which will now be subject to the co-decision procedure under the new Treaty are listed below:

New Treaty provisions:

Article 129	Employment - Incentive measures.
Article 137(2) 3rd subpara.	Social exclusion.
Article 141	Social policy - Equal opportunities and treatment.
Article 152	Public health (former basis Article 43 - consultation) - minimum requirements regarding quality and safety of organs. - veterinary and phytosanitary measures with the direct objective of the protection of public health.
Article 255	General principles for transparency.
Article 280	Countering fraud affecting the financial interests of the Community.

[63] Declaration to the Final Act no.34, on respect for time limits under the co-decision procedure, p.104.

Article 135	Customs cooperation.
Article 285	Statistics.
Article 286	Establishment of independent advisory authority on data protection.

Existing Treaty provisions:[64]

Article 12	Rules to prohibit discrimination on grounds of nationality (cooperation).
Article 18(2) [65]	Provisions for facilitating the exercise of citizens' right to move and reside freely within the territory of the Member States. (assent).
Article 42[66]	Internal market (consultation) - rules on social security for Community migrant workers unanimity).
Article 46(2)	Coordination of provisions laid down by law, regulation or administrative action for special treatment for foreign nationals (right of establishment). (consultation).
Article 47[67]	Coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons (consultation). Amendment of existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons (consultation).
Article 71(1)	Transport policy (cooperation) - Common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; - the conditions under which non-resident carriers may operate transport services within a Member State; - measures to improve transport safety.
Article 80	Transport policy (cooperation) - sea and air transport.
Social policy	Articles resulting from the transposition into the Treaty of the agreement on social policy (Article 137(2)), except for aspects of that Agreement which are currently subject to unanimity (Article 137(3)) (cooperation).
Article 148	Implementing decisions relating to the European Social Fund (cooperation).
Article 150(4)	Vocational training (cooperation) - measures to contribute to the achievement of the objectives of Article 150.
Article 156 3rd subpara.	Other measures.
Article 162	ERDF implementing decisions.

[64] Current procedure given in brackets.
[65] The Council shall act unanimously, p.139.
[66] The Council shall act unanimously
[67] The Council shall act unanimously, p.147.

Article 172 2nd subpara.	Adoption of measures referred in Articles 168 and 169 - research (cooperation).
Article 175(1)	Environment (cooperation) - Action by the Community in order to achieve the objectives of Article 174.
Article 179	Development cooperation (cooperation).

This represents a considerable extension of the co-decision procedure, and clearly increases the ability of the EP to influence legislation. This means that in the UK it will be necessary that the implementing legislation approves the Amsterdam Treaty explicitly for the purposes of the *European Parliament Elections Act 1978* (see page 71).

2. Size of the European Parliament

The Treaty provides for changes to the organisation and composition of the European Parliament. Article 189 of the TEC is amended to limit the size of the European Parliament to a maximum of 700 members.[68] There are currently 626 members, and the implication is that enlargement will eventually require a reduction in the allocation of seats to current members. Article 190(3) is also amended to allow the EP to draw up a proposal for elections to the EP *"in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States"* - this is a dilution of the previous article which required uniform electoral procedures.[69] The Parliament is also empowered to set new regulations and general conditions, with the approval of the Council, concerning the performance by MEPs of their duties.

3. Qualified Majority Voting

The Amsterdam Treaty extends qualified majority voting (QMV) to a number of areas which are currently decided by unanimity. These are:

Article 46(2)	Coordination of provisions laid down by law, regulation or administrative action for special treatment for foreign nationals (right of establishment).
Article 166(1)	Adoption of the research framework programme.
Article 166(2)	Adapting or supplementing the research framework programme.
Article 172	Setting up of joint undertakings in R&T development.

[68] TEC, p.37 & p.196.
[69] TEC, p.37 & p.197.

It was also proposed to move a number of other articles to QMV, but in the final negotiations these were dropped from the list. These include:

Article 18[70]	Right of movement and residence.
Article 42[71]	Measures in the field of social security necessary to provide freedom of movement.
Article 47(2)[72]	Amendment of principles laid down by law governing the professions in a Member State.
Article 151	Culture.
Article 157	Industry.
Article 175(2)	Environment.

The extension of the scope of Article 133 of the TEC (common commercial policy)[73] also involves an extension of the scope of QMV, as do the new provisions proposed in CFSP for the decision making process. Doug Henderson, in a written reply to a Parliament Question, stated that "a Member State may prevent a vote from being taken for important and stated reasons of national interest, whereupon the decision may be referred to the European Council for decision by unanimity".[74] The flexibility provisions in Article 11 of the TEC and Article 40 of the TEU are also subject to QMV, but with a "similar national veto mechanism". Britain is not obliged to participate in the cooperation under the new chapter on free movement of persons, asylum and immigration, where there are some QMV provisions on Articles 62(2)(b) (i) and (iii).[75]

A number of new Treaty provisions would also be subject to QMV. These are:

Article 128	Employment guidelines.
Article 129	Incentive measure.
Article 137(2)	Social exclusion.
Article 141(3)	Equality of opportunity and treatment of men and women.
Article 152(4)	Public Health.
Article 255	Transparency.
Article 280	Countering fraud.
Article 285	Statistics.
Article 286	Protection of individuals with regard to the processing and free movement of personal data.
Article 299(2)	Outermost regions.
Article 135	Customs cooperation.

[70] These articles have changed to Co-decision, but with unanimity retained in the Council of Ministers.
[71] These articles have changed to Co-decision, but with unanimity retained in the Council of Ministers
[72] These articles have changed to Co-decision, but with unanimity retained in the Council of Ministers
[73] TEC p.31 & p.178.
[74] HC Deb, 23 June 1997, c 346w.
[75] TEC, p.26 & p.153.

4. Council

The Amsterdam Treaty replaces existing Article 151 of the TEC which deals with the Council with an entirely new Article.[76] Under new Article 207, there will be a new Deputy Secretary-General of the Council to assist the Secretary-General. This is a result of the decision to allow the Secretary-General of the Council to act as the High Representative of the EU in CFSP matters, as well as maintaining overall responsibility for Council business.[77] Both the Secretary-General and the Deputy Secretary-General are to be appointed by the Council acting unanimously.

This Article also includes the rules under which Council documents and legislative decisions are made public, according to new Article 255 of the TEC on transparency.[78]

5. Commission

The European Parliament is given the right to approve the nomination for President of the Commission in an amendment to Article 214(2) of the TEC.[79] Previously, the EP was consulted about the Presidency of the Commission but had to approve (or reject) the Commission as a whole. However, there is no right of nomination for the EP, either originally or in place of a rejected candidate. The nomination of the President of the Commission is still the preserve of the Member States. A second amendment requires that the Member States nominate the other Members of the Commission *"by common accord"* with the nominee for President. This strengthens the position of the President of the Commission regarding the composition of the Commission, and within the Commission itself, since the President, once approved by the EP, will now be able to veto other nominations for the Commission. A new insertion into Article 219 of the TEC provides that the Commission should work under the political guidance of the President. Again, this will strengthen the role of the President within the Commission.

Although reform of the composition and organisation of the Commission was one of the goals of this IGC, actual changes have been postponed until enlargement begins to take place. The Protocol on the institutions does indicate broad agreement on a move towards one Commissioner from each Member State to a maximum of twenty, although the linkage of this issue to reweighting ensures that this will again be a sensitive subject in future negotiations.

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[76] TEC, p.38 & p.201.
[77] See section on CFSP.
[78] See section on Transparency.
[79] TEC, p.38 & p.203.

A Declaration to the Final Act indicates that the Commission will prepare a *"reorganisation of tasks within the college... in order to ensure an optimum division between conventional portfolios and specific tasks"*.[80] This refers to the suggestions that there may be different types of Commissioners, some taking on specific responsibilities (for example, the Declaration suggests a Vice-President with responsibility for external affairs), and some taking on more traditional portfolios. The Declaration also envisages a stronger role for the President of the Commission in the allocation and reshuffling of tasks within the Commission.

6. Court of Justice

The Article governing the remit of the Court of Justice in the TEU is amended to extend the competence of the ECJ in certain areas.[81] Part b of this article extends Court competence to provisions of Title VI (Justice and Home Affairs) under the conditions of Articles 35 of the TEU.[82] The changes to these Articles may represent an extension of ECJ jurisdiction, depending on the extent to which Conventions rather than framework decisions are used, and the extent to which Member States are willing to "opt-in" to ECJ competence in framework decisions.[83]

Part c gives the Court some competence in the area of closer cooperation (Title VII of the TEU) under the conditions laid out in Art. 11 of the TEC and Art. 40 of the TEU.[84] Part d of this Article gives the Court jurisdiction with respect to the institutions over Article 6(2) of the TEU on respect for *"fundamental rights... as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms"*.[85] According to legal specialists the ECJ has already derived such jurisdiction from previous texts in the treaty relating to the European Convention on Human Rights and from case law - the new text is therefore mainly declaratory in nature.

7. Economic and Social Committee

The Treaty extends the range of areas on which the Economic and Social Committee is consulted, to include guidelines and incentives in employment, legislation on social matters and application of the principle of equal opportunities and equal treatment, and public health.

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[80] Declaration to the Final Act no.32, p.103.
[81] TEU, Art.46, p.22 & p.128.
[82] TEU, pp.18-19 & pp.124-125.
[83] See page 18 of this paper.
[84] See the section on closer cooperation.
[85] Article 6 TEU, p.10 & pp.114-5. For further information on the implications of this, see Library Paper 97/68, The European Convention on Human Rights.

An amendment to Article 262 of the TEC also allows the Economic and Social Committee to be consulted by the European Parliament.[86]

8. Committee of the Regions

A number of provisions are included to give greater autonomy to the Committee of the Regions(COR).[87] Protocol number 16, which currently provides that the Economic and Social Committee and the Committee of the Regions should have a common organisational structure, will now be repealed. It adds to Article 263 by specifying that no member of the Committee shall also be a Member of the European Parliament. The Committee may be consulted by the Parliament, and the Treaty widens the scope of areas in which the COR will be consulted, to include guidelines and incentive measures in employment, legislation on social matters, public health, environment, implementing decisions in the social fund, measures relating to vocational training, and transport.

9. Seats

There is a new Protocol on the location of the seats of the institutions and of certain bodies and departments of the European Community.[88] This specifies the locations of the various institutions. The institutions will continue to be distributed between Brussels and Luxembourg, and in the case of the European Parliament, Strasbourg. The European Monetary Institute and the European Central Bank will be in Frankfurt, and the European Police Office (EUROPOL) will be based in The Hague. Until now decisions about the seat of each institution have been made by the Council or European Council. For example, the current pattern of sittings of the European Parliament as between Strasbourg and Brussels was determined by the European Council in Edinburgh in December 1992. The new protocol will enshrine such decisions in the treaty for the first time.

D. Role of National Parliaments[89]

The Protocol on National Parliaments[90] is in two parts: the first seeks to provide national Parliaments with timely information so that they may carry out their role of European scrutiny more effectively; the second gives a Treaty status to the Conference of European Affairs Committees (usually known by the French acronym COSAC).

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[86] TEC p.41 & p.216.
[87] TEC, Arts.263-265, pp.217-218.
[88] Protocol no.12, pp.88-9.
[89] Section contributed by Robert Rogers, Clerk to the European Legislation Select Committee.
[90] Protocol 13, p.89

Difficulties in obtaining documents - attributable to translation, transmission and organisational delays - havlong been a problem for national Parliaments, and particularly so for those, like the Westminster Parliament, with a demanding and extensive European scrutiny system. Other difficulties arise from unpredictable Council agendas, late Commission proposals, and the "bunching" of business towards the end of a Presidency.

In 1994 the Select Committee on European Legislation described European legislation as appearing "to be made in a private club" and recommended a four-week period of notice to protect the interests of national Parliaments and the citizens they represented.

The Committee pursued this recommendation, which was accepted by the Government, and at the meeting of COSAC in Dublin in October 1996 it was unanimously endorsed by all the European Affairs Committee of Parliaments of the Member States. A Treaty amendment was thereupon tabled by the British Government, and formed the basis for the draft Protocol which appeared in the Treaty text presented to the Dublin European Council.

The final text of the Protocol provides that

- Commission Green and White Papers, and Communications (the last is an addition to the Dublin text) shall be "promptly" forwarded to national Parliaments;

- Commission proposals for legislation shall be "made available in good time" so that Member Governments may transmit them to their Parliaments;[91]

- a six week period (lengthened from four weeks in the Dublin text) shall elapse between a legislative proposal, or a proposal under TEU Title VI (police and judicial cooperation in criminal matters), being made available by the Commission in all languages to the European Parliament and the Council, and a decision being taken by the Council to adopt an act or a common position, subject to exceptions on the grounds of urgency.

On the role of COSAC, the present text of the Protocol gives COSAC the role of commenting to EU Institutions on legislative texts - especially as regards subsidiarity - or on proposals related to the area of freedom, security and justice which might bear on the rights and freedoms of individuals. This part of the Protocol is a redraft of the Dublin text, but without substantial change. The final Amsterdam text introduced an additional sentence underlining that contributions made by COSAC to the discussion of particular proposals do not bind national parliaments.

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[91] The definition of legislation in this section of the draft Protocol is based on a addition to Article 151(3) which was also agreed at Amsterdam This concerns openness and requires the Council to define the cases in which it is to be regarded as acting in its legislative capacity.

The Select Committee on European Legislation reported on the Dublin text in February 1997.[92] Its main comments on the period of notice were:

- enshrining the period of notice in the Protocol will make it legally enforceable, a great improvement over Declaration No 13 in the Maastricht Treaty;

- pre-legislative documents should be subject to a formal period of notice rather than being covered by a statement of good practice;

- the starting point for the period of notice should be the transmission of documents to national governments, over whom national Parliaments have control, rather than to the European Parliament and the Council as a whole, over whom they do not [the extension of the notice period from four weeks to six will absorb some of the possibility for delay in transmission that concerned the Committee];

- exceptions for urgency should be tightly defined to avoid the exception becoming the norm. The Council should be required to state formally the grounds for urgency.

On the COSAC provisions, the Committee noted that the Protocol provisions reflected a compromise between those who wanted to see a formalised COSAC taking on some of the functions of a Second Chamber, and those (such as the Westminster Committees) who saw its strength in its informality, especially when concentrating on the technical issues of scrutiny and the relationship between national Parliaments and the EU Institutions.

The Committee saw the provisions as "entirely permissive" and said that "the differences between the draft Protocol and what COSAC could do anyway, if it wished, are marginal". However, if COSAC took on the task of formally examining texts, it would have to be supported by a modest secretariat.[93]

E. Employment and the Social Chapter

1. Employment

A new Title on Employment is inserted after Title VI (Economic and Monetary Policy) of the TEC.[94] This means that this Title forms part of the first pillar of the EU, where Community institutions and procedures will apply.

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[92] Thirteenth Report, HC 36-xiii of 1996-1997

[93] Luxembourg has subsequently volunteered to provide such a secretariat.

[94] TEC, pp.29-31 & pp.176-7.

The Title generally adds the goal of a high level of employment to the common objectives and makes this a proper area for Community action. Article 125 commits the Member States and the Community to work towards the development of a coordinated strategy for employment, and particularly for promoting a skilled and adaptable workforce and labour markets responsive to economic change. Article 127 of the Title establishes the objective of a high level of employment as a consideration in formulating and implementing Community policies. It is possible that this may have future implications for the single currency, as the Maastricht criteria have been criticised for not taking account of unemployment figures. A commitment to high employment has been seen as important for securing continued popular support for the EU and for the single currency in particular.

The provisions provide for the drawing up of joint annual reports by the Council and the Commission, and the drawing up of guidelines for Member States to take into account in employment policies. Member States will also be required to provide annual reports. The Community can already issue non-binding guidelines in the area of economic policy. There is also recognition of *"the national practices related to the responsibilities of management and labour"* in promoting employment as a matter for common concern.[95]

Article 129 of the new Title allows the adoption of *"incentive measures in relation to employment"* on the basis of Article 251, the co-decision procedure (involving the European Parliament and qualified majority voting).[96] It is not clear what these "incentive measures" would be, although it probably means financial incentives of some kind, possibly training schemes for the unemployed. This would be funded from the Community budget. The Community is already able to provide financial assistance for training and other schemes, through the European Social Fund, but these provisions now make it possible for the Community to adopt specific policies. However, it is explicitly stated that *"These measures shall not include any harmonisation of the laws and regulations of the Member States".*[97]

A Declaration to the Final Act on Article 129 adds that any expenditure under this Article will fall within Heading 3 of the financial perspectives.[98] This is the area of the budget which provides funding for research and development programmes, rather than the considerably larger section of the budget (Heading 2) which deals with most existing employment projects through the structural and cohesion funds. This indicates that large scale expenditure on employment projects is not envisaged under this Article.

New Article 130 provides for the establishment of an Employment Committee, to monitor the employment situation and policies in Member States and to provide opinions. This Committee is to *"consult social partners"*, meaning the organisations representing the national employers

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[95] TEC, p.176.
[96] For details on the co-decision procedure, see the section on institutional issues.
[97] Article 129 TEC, p.177.
[98] Declaration to the Final Act no. 24, p.102.

organisations and trades unions, UNICE and ETUC. Its main significance is that it will provide an institutionalised voice to ensure that employment matters are taken into consideration.

2. Social Policy

The TEC is amended so that the current Social Provisions Chapter (Chapter 1 of Title VIII of the TEC), is replaced with the agreement annexed to the existing Protocol 14 of the Maastricht Treaty, known as the Social Chapter or Social Agreement.[99] Thus the terms of this agreement will now in future be applied to the UK which "opted out" at Maastricht. The Social Chapter remains essentially the same as annexed to Protocol 14, the main difference being that those areas currently subject to Article 189c, the cooperation procedure, will now become subject to Article 251(ex-189b), the co-decision procedure. This is in line with the proposals to streamline the legislative process by reducing the number of procedures to three, phasing out the cooperation procedure.[100]

A new paragraph is inserted into Article 137(2), (formerly Article 2 of the Social Chapter), which allows the Council, acting again according to Article 251, to adopt measures designed to *"encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion."*[101] The inclusion of elderly and disabled persons in this clause in previous drafts has been dropped from the final version.[102] This paragraph does not indicate any new legislative powers for the Community, but concentrates on cooperation between Member States. A Declaration makes it clear that expenditure under this Article is to fall within Heading 3 of the financial perspectives, a relatively small area of the Community budget.[103]

Article 141 (Article 6 of Protocol 14) adds to existing provisions on equality between men and women. The Council, again acting according to Article 251 (co-decision), shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. The previous article had made the Member States responsible for ensuring this, whereas the new Article provides for Community legislation on the basis of co-decision.

The Treaty retains a clause allowing for positive discrimination, but replaces *"women"* with *"the underrepresented sex"*.[104] This is intended to reflect the fact that it is not always women who

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[99] TEC, pp.31-24 & pp.179-182.
[100] See the section on legislative procedures.
[101] TEC,p.180.
[102] CONF/4000/97 EN 63.
[103] Declaration to the Final Act no.25, p.102.
[104] TEC, p.182.

are the underrepresented sex. A new Declaration makes it clear that the primary objective of this clause is to improve the situation of women in working life.[105]

F. Human Rights

1. Fundamental Rights

The Treaty strengthens the European Union's commitment to what it calls "fundamental rights", and amends Article 6 (ex-Art. F) of the Common Provisions of the TEU, to add that,

> *"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."*[106]

The existing commitment to respect the European Convention on Human Rights remains and the new treaty confirms that, as far as the EU institutions are concerned, this paragraph falls under the jurisdiction of the ECJ.[107]

In addition, the preamble contains a new paragraph, which adds:

> *"Confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers."*[108]

This commitment was previously included in the preamble to Protocol 14, the Social Chapter, which will now be integrated into the Treaty.

The Treaty includes a new Article 7 in the Common Provisions, which introduces a procedure for determining instances of a serious and persistent breach of the fundamental principles referred to in Article 6, and allows for a partial suspension of the rights of a Member State found to be in breach of these principles.[109]

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[105] Declaration to the Final Act no.28, p.103.
[106] TEU, p.10 & p.114.
[107] On the possible implications of this, see Library Research Paper 97/68, *The European Convention on Human Rights.*
[108] TEU, preamble, p.9 & p.111.
[109] TEU, pp.10-11 & p.115.

Such a breach would be determined by the Council, meeting in the composition of the Heads of State or Government, and acting by unanimity, after obtaining the assent of the European Parliament and after inviting the Member State concerned to submit its observations. Where such a determination has been made, the Council, acting by qualified majority voting, may decide to suspend *"certain of the rights deriving from the application of this Treaty to the State in question, including the voting rights"*. The Article also specifies that the obligations under the Treaty continue to be binding upon the Member State concerned. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the Member State concerned. Abstentions of Members present or represented shall not prevent the adoption of decisions on determining a Member State to be in serious and persistent breach of its obligations under Article 6(1).[110]

This provides a safeguard against the possibility of any Member State reneging on its commitments to uphold the principles of fundamental rights as included in Article 6. This has

been of particular concern with regard to enlargement to Central and Eastern European countries, where human rights, the rule of law and democracy are relatively new. The Council of Europe already has ad hoc monitoring arrangements with respect to its newer CEEC members, to ensure that commitments regarding human and minority rights are respected.

There is also a corresponding Article in the TEC, which provides for the suspension of voting and other, unspecified, *"certain of the rights deriving from the application of the this Treaty to the State in question"*.[111]

Amendments to Article 49 of the TEU introduce specific conditions for membership of the EU.[112] These are the principles specified in new Article 6, giving a Treaty basis to the existing situation. Article 49 as amended seems to allow an application to be rejected or shelved on the grounds of insufficient adherence to these principles. The European Parliament has taken a very strong interest in human rights matters, and threatened to veto the Customs Agreement between the EU and Turkey on this basis.

There is a new Declaration to the Final Act on the status of churches and non-confessional organisations. This states that the Union will respect the status under national law of churches, religious communities or associations, or philosophical and non-confessional organisations.[113]

A new Declaration to the Final Act on the abolition of the death penalty is included. This notes that the death penalty is no longer applied in any EU Member States, and refers positively to

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[110] TEU, p.10 & pp.114-115.
[111] TEC Article 309, p.43 & p.230.
[112] TEU, p.22 & pp.128-9.
[113] Declaration to the Final Act no.11, p.100.

Protocol No.6 to the European Convention on Human Rights which provides for the abolition of the death penalty. Britain has not signed this Protocol. The Declaration imposes no binding restrictions on the Member States in respect of the death penalty.[114]

2. Non-discrimination

New Article 13 in the TEC on non-discrimination would give the EC new powers to act in specified areas.[115] Article 12 (ex-Art.6) of the TEC already allows the EU to act against discrimination on the grounds of nationality. There has already been a provision to prevent discrimination on the grounds of sex, but this is made more explicit in this article, and other areas are newly introduced. The new Article 13 provides a legal base for Community measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This article entitles the Council, after consulting the European Parliament, to take *"appropriate action"* against discrimination based on sex, racial or ethnic origin, religion and belief, disability, age or sexual orientation. The article will be subject to unanimity. Although the article fails to make clear what it means by "appropriate action", it does open up new areas in which the Community can act.

A Memorandum on the Amsterdam Treaty from the Minister of State for the Foreign Office said,

> *The clause is couched as a legal basis for future action, rather than as a free standing and unrestricted principle which might allow direct interference in the UK laws in the realm of anti-discrimination.*[116]

UK law already provides against discrimination on the grounds of sex, race and ethnic origin, and disability. Discrimination in employment on the grounds of religion is not allowed in Northern Ireland.

The British Government supported the new Article at Amsterdam. In addition, it also tabled a Declaration attached to Article 95, calling on the Community institutions to take the needs of the disabled into account when framing internal market legislation. This was adopted.[117]

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[114] Declaration to the Final Act no.1, p.94.
[115] TEC, p.24 & p.138.
[116] Memorandum on Amsterdam Treaty from Doug Henderson, 13 October 1997.
[117] HC Deb, 23 June 1997, c345w. Declaration to the Final Act no.22, p.102.

3. Data Protection

A new Article 286 is introduced to the TEC on the protection of individuals with regard to the processing and free movement of personal data.[118] The Data Protection Directive[119] requires all Member States to introduce harmonised data protection procedures by 24 October 1998. These include rules for the transfer of personal data between Member States and to countries outside the EU, and a right of access for individuals to their own personal data. Some changes to UK domestic law will be necessary to comply with the directive (for example, the directive applies to manual records as well as electronic data) and a commitment to introduce primary legislation for this purpose was included in the Queen's Speech.

The new Treaty Article would apply the Data Protection Directive to the institutions of the EU, for example the European Commission and the ECJ.

G. Other Changes

1. Animal Welfare[120]

A new protocol to the TEC agreed at Amsterdam would require that the Community and Member States "*shall pay full regard to the welfare requirements of animals as sentient beings*" while respecting national provisions relating to "*religious rites and cultural traditions and regional heritage*".[121]

For many people in the UK, the Treaty of Rome seemed to be at fault when it was argued that a Member State could not ban the export of live animals on animal welfare grounds, because of general provisions (TEC Article 36, new Article 30) strictly limiting the circumstances in which freedom of trade within the Union can be curtailed. A Declaration calling on the Member States to pay full regard to the welfare requirements of animals was adopted at Maastricht, but had no legal force. UK campaigners wanted the undertaking to be made binding and to be strengthened by a reference to animals as "sentient beings". British ministers in the Conservative Government objected to this phrase on the grounds that the meaning was obscure even in one language, let alone a dozen, and limited their initiative at the IGC in July 1996 to the proposal that the previous declaration should be converted into a binding protocol.[122]

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[118] TEC, p.42 & p.224.
[119] 95/46/EC
[120] Note provided by Christopher Barclay, Science and Environment Section.
[121] Protocol 10, p.87
[122] IGC.CONF.3887/96.

In the event the phrase "*as sentient beings*" has been included in the protocol, but it remains to be seen whether this may in future sway the European Court of Justice in its consideration of whether the Member States are allowed to restrict exports of live animals.

The passage on religious rites would mean that the proposed protocol would not affect religious slaughter for kosher or halal meat. The cultural traditions is no doubt intended to mean that bullfighting and the treatment of animals in Spanish festivals would not be affected and the reference to "regional heritage" added to the previous draft at Amsterdam is probably intended to have the same effect.

2. Citizenship

An amendment to previous Article 8 of the TEC states that citizenship of the EU shall complement and not replace national citizenship. A new addition to Article 8d enables any citizen to write to any of the institutions or bodies of the Union in one of the twelve languages of the Treaties and have an answer in the same language.[123]

3. Consumer Protection

A brief title consisting of a single article (129a) on consumer protection was added to the TEC at Maastricht. The Amsterdam Treaty would revise and somewhat expand this article, which becomes Article 153, without making any major changes. Alongside the existing aims of protecting the health, safety and economic interests of consumers and providing "adequate information", the draft would add the promotion of education for consumers and of their right "*to organise themselves in order to safeguard their interests*".

In addition to taking specific measures to promote these goals, the Community would accept the following commitment: "*Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities*".

4. Countering Fraud

In response to widespread concern about fraud within the European Union, the Treaty contains an amendment to Article 209a which offers provisions on combating fraud affecting the financial interests of the Community. Member States are required to take the same measures to combat fraud affecting the financial interests of the Community as they take regarding similar fraud affecting their own interests. The new Article 280, provides for action to be coordinated,

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[123] TEC new articles 17 and 21, pp. 25 and 139-40.

and for the organisation by the Member States and the Commission of close and regular cooperation between the competent authorities.

Perhaps the most significant aspect of this Article is the fourth paragraph, which provides for the Council to act according to Article 189b, co-decision, to adopt *"necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community"*.[124] The co-decision procedure operates on the basis of qualified majority voting. The Prime Minister argued in his statement to the House of 18 June 1997 that, "It is important for this country that we have QMV in certain areas. Fraud is one such area."[125]

The Commission is to submit a report to the Council and EP each year on the measures taken for the implementation of this Article.

5. Culture

There is an amendment to Article 128(4) of the TEC which states that the Community shall *"take cultural aspects into account in its actions under other provisions of this Treaty"*.[126] There is a particular emphasis on respecting and promoting the diversity of cultures. The Article is very general and there are no specific measures included.

6. Environmental Issues[127]

Amendments to preambular language and objectives

The Amsterdam Treaty would introduce a number of textual changes to the existing treaties to take account of environmental objectives: a reference to sustainable development would be added to the TEU preamble; "balanced and sustainable development" would become an end in itself among the objectives set out in TEU Article B which becomes Article 2; a "high level of protection and improvement of the quality of the environment" would become a task of the Community in TEC Article 2; new TEC Article 6 would require that environmental protection be integrated into the main objectives and policies for the Community, with a view to promoting sustainable development.

In a memorandum addressed to the Luxembourg Presidency of the European Union, the European Environmental Bureau (EEB) calls for the inclusion of the principle of sustainable development in the Treaty of Amsterdam to be translated into tangible action. "In the short

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[124] TEC New Article 280, pp. 41, 223.
[125] Prime Minister, Statement to the House on the Amsterdam European Council, 18 June 1997.
[126] This becomes TEC Article 151, pp. 35 and 184.
[127] Includes notes provided by Christopher Barclay and Emma Downing, Science and Environment Section

term steps can be taken, including improvements in the enforcement of environmental legislation and strict environmental requirements for the use of EU funds".[128]

Declaration to the Final Act

There is already a Directive on Environmental Impact Assessment (85/337/EEC) which requires Member States to ensure that projects likely to have a significant effect on the environment by virtue of their nature, size or location are subject to environmental impact assessment. A new Declaration[129] extends this principle in very general terms to the Commission noting that the Commission "undertakes to prepare environmental impact assessment studies when making proposals which may have significant environmental implications."

Amendments to TEC Article 100(a)

The section of existing TEC Article 100(a) (future Article 95) which is devoted to the circumstances in which the Member States may maintain national provisions on health, safety, environmental protection and consumer protection would be amended and expanded by the Amsterdam Treaty. The Article is designed to ensure that the levels of protection agreed by the Community are sufficiently high to avoid justifiable national provisions becoming a restraint on the freedom of the internal market. It was originally introduced by the Single European Act along with the decision to use QMV as the voting rule for measures to complete the internal market and the mechanism was amended at Maastricht to Co-decision involving QMV and the European Parliament.

The Amsterdam Treaty would add new refinements to the balance between the responsibility of the Commission to make proposals for adoption by all the Member States and the right of the Member States to maintain national measures, provided that these "are not a means of arbitrary discrimination or a disguised restriction on trade between Member States".[130] In particular it would require the Commission to take account "*of any new development based on new scientific facts*" and allow the Member States to devise national provisions "*based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to the Member State arising after the adoption of the harmonisation measure*". As before, the Commission would have the power to confirm or reject such national measures, but it would now have to decide within six months; otherwise its approval would be assumed. The Commission would have the right to extend this period for a further six months, provided that the matter was complex and there was no danger to human health. Further new paragraphs would prompt the Commission to make new proposals for all the Member States whenever one of them has been authorised to take stricter national measures or when one of them raises a specific public health problem.

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[128] *EEB Calls for Applcation of the "Green" Amsterdam Treaty*. European Report Predicasts Newsletters. 13.9.97. The EEB represents some 130 environmental-defence organisations.

[129] Declaration 12, p.100.

[130] This language is currently in TEC 100a (4) and would become new Article 95(6).

The Amsterdam amendments reflect concern, particularly in Scandinavian countries with high traditional standards of protection in these areas, that harmonisation might be achieved by reducing them to the lower standards of other countries and they particularly welcome the new emphasis on scientific evidence.[131] The Danish prime minister, Poul Nyrup Rasmussen, has commented that the new treaty "is greener, more human, and more democratic" than its predecessor."[132]

The CBI reacted with a briefing note to its members in July 1997, making the following points:

- Business is generally cautious that the amendments could lead to new barriers to trade but welcomes the fact that the text of the Treaty states that stricter environmental rules must not constitute a disguised restriction of trade in the EU.

- Regarding the requirement for the Commission to take into account any new development based on new scientific fact:

    * As new scientific developments can be causes or solutions for challenges in these areas it is difficult to anticipate the effect for business (CBI informal quote).

    * Business recognises that it will now be marginally more difficult for Member States to deviate from measures aimed at harmonisation where the environment is at risk. Nevertheless the CBI feels that this is an area to watch carefully and one which may add a "complex dimension to negotiations"[133].

More far-reaching proposals to extend QMV to all the remaining environmental issues covered by TEC Articles 130r and 130s (due to become Articles 174-5) were dropped in the final negotiations at the Amsterdam Summit. Provisions of a primarily fiscal nature, measures concerning planning and land use (apart from waste and water management) and measures affecting a Member State's balance of energy sources will therefore remain reserved for voting by unanimity, unless the Council should unanimously decide otherwise in the future.

7. EU negotiations with other states and international organisations

Elaborate proposals to amend Community procedures for the negotiation of trade agreements with other states and international organisations were included in the presidency draft of 30 May 1997, but dropped almost entirely at Amsterdam.

In the final treaty text there is just one addition to existing Article 113 TEC (future Article 133) on external trade negotiations. This would enable the Council, acting by unanimity after

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[131] Concern that free trade might damage the environment or consumer protection by preventing countries from banning imports of lower standards (or occasionally from banning exports) extends far beyond the European Union. Environmentalists in the USA were critical of the Uruguay Round of the GATT for failing to include provisions of this type.

[132] *Berlingske Tidende*, 19 June 1997.

[133] *The Amsterdam Treaty - Implications for Business*, CBI Europe Brief , July 1997

consultation with the European Parliament, to extend the existing arrangements to cover GATT/WTO negotiations on services and intellectual property.

Modest amendments are also made to existing TEC Article 228, which covers the negotiation of EU agreements with third countries and international organisations in general. These would: (1) give an explicit treaty base for the provisional application of agreements pending their entry into force[134]; and (2) provide that the European Parliament is informed, but not consulted about decisions to apply agreements provisionally, decisions to suspend agreements or about decisions on taking a common EC position in an international body. An exception to the last of these would be in the case of decisions changing the institutional structure, in which case the assent of the EP would be required under existing TEC 228.3.[135]

8. Flexibility ("closer cooperation")

Flexibility was one of the buzzwords of the 1996-97 IGC, just as subsidiarity was for the 1991 IGC. Known more formally as "closer cooperation"[136] it refers to a range of mechanisms which might allow a sub-group of EU Member States to integrate or cooperate more closely than is provided for by the rules which apply to all Member States. In the past there have been some sub-group arrangements specifically sanctioned by the treaties, such as the Benelux agreement, the Social Protocol and the EMU provision and others, such as the Schengen agreements, completely outside the treaties.[137] Arrangements of this kind raise a number of questions and concerns: do they effectively pre-empt the future even for the Member States which have not participated? should they be allowed to make use of the common institutions? how can these institutions be adapted to deal with sub-groups? how far can the process be allowed to go without threatening the integrity of the whole structure?

Provisions in the new treaty

The Amsterdam Treaty would insert a new title in the TEU establishing general principles for "closer cooperation" projects and would also add specific new articles about it to the TEC and TEU Title VI (police and judicial cooperation in criminal matters). There would also be a reaffirmed reference to the possibility of closer cooperation on a bilateral level, or in the framework of WEU or NATO in the Common Foreign and Security Policy title (TEU new article 17) and a new option for "constructive abstention" under the same title (new article 23.1).[138]

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[134] The current practice is to cite the treaty base which will govern formal conclusion for provisional application as well - see I Macleod, ID Hendry & S Hyett, *The External Relations of the European Communities*, 1996, p91.

[135] This becomes TEC new article 300, pp.42-3 and 227-9.

[136] "Enhanced cooperation" in earlier drafts.

[137] The Maastricht treaty introduced article K.7 which refers to the possibility of closer cooperation in justice and home affairs between two or more Member States, thus giving a shadowy treaty base for the Schengen arrangements.

[138] See section II D of this paper.

The general principles are designed to ensure that any such projects in the future are fully consistent with the objectives of the EU and its achievements up to now. They should arise only as a last resort, if the objectives could not be attained otherwise under the treaties and if a majority of Member States wish to participate. They must not fragment the EU institutions or affect the rights and interests of non-participating Member States, nor must they exclude any Member State which decides to join in later. The non-participants should not impede such cooperation in any way. All Member States will have the right to take part in deliberations about enhanced cooperation, but only those which have decided to participate in the implementation would have voting rights. Any administrative costs would be carried by the institutions in the normal way, but other expenditure would be borne only by the participating states unless the Council decided otherwise by unanimity.

The treaty also contains a new article (11) specific to the TEC which would create even tighter conditions for any "closer cooperation" projects falling within the Community sphere. Such cooperation would be possible only in areas not subject to exclusive Community competence (eg external trade). It cannot concern citizenship or discriminate between nationals of different Member States and must not distort competition in the internal market.

Proposals meeting these conditions would be screened by the Commission which would have the power to veto them. If passed by the Commission the proposal to proceed in principle with a project would be decided by the whole Council. It would act by QMV, but if any Member State cites important reasons of national policy why this should not proceed, then either no vote will be taken and the matter will rest unresolved, or the Council will decide by QMV to refer the issue to the European Council, where decision will be taken by unanimity.

In this manner an ultimate national veto will be retained, provided that there is a willingness to state reasons and take the matter to the summit. This new arrangement will inevitably be compared to the so-called "Luxembourg Compromise" of 1966 whereby the original six members of the European Community agreed that in matters where QMV applied under the treaty, but "very important interests of one or more partners" were at stake, they would try to reach unanimous solutions and France insisted that discussion would have to continue indefinitely until unanimity could be achieved. However, there are two crucial differences: unlike the "Luxembourg Compromise", the new closer cooperation system is to be enshrined in the treaty; and the European Council (i.e. the summit meeting of EU heads of government), which works by unanimity, will be available as a final arbiter.

A new TEU Article 40 would apply the "closer cooperation" idea to the third pillar, which will in future deal only with police and judicial cooperation in criminal matters, the other Justice and Home Affairs issues having been switched to the TEC. Here the proposal would be permissable only if it furthered the aim of "*enabling the Union to develop more rapidly into an area of freedom, security and justice*". In this case, reflecting the continuing intergovernmental nature of the third pillar, the Commission would have a right to comment on, but not veto a suggestion.

Authorisation would be by the Council using the same formula as for the TEC, with the European Council as the ultimate arbiter.

The whole subject of "closer cooperation" with the exception of cooperation facilitated by "constructive abstention" under the CFSP, would be subject to the jurisdiction of the Court of Justice.

It is not clear how much use would actually be made in future of the closer cooperation procedures set out in the draft treaty. The one obvious area where the idea might have been applied, the Schengen agreement, is to be integrated into the EU by means of a special protocol to which the new flexibility criteria will explicitly not apply. In effect, the decisions on this have already been pre-empted in the Amsterdam Treaty. The closer cooperation criteria appear to be drawn in such a way as to make frequent recourse to the new mechanisms unlikely. The whole idea had its genesis in Franco-German discussions when the French and German governments were significantly more enthusiastic about rapid integration than the British and some other governments and felt that the only way forward lay through agreements which could bypass national vetoes or blocking minorities.

9. International Legal Personality

The proposal to confer explicit international legal personality on the EU, which had significant symbolic overtones, was dropped at the Amsterdam Summit and does not appear in the final version of the treaty. The British government had made clear its opposition to the presidency proposals before the summit. Lord Whitty, as a government spokesman in the House of Lords, had said on 4 June 1997:

> ... it is not the Government's view that we should extend legal personality to areas that are essentially intergovernmental. They must remain under the sovereignty of national member states. We therefore oppose what is currently proposed in that area.[139]

At present the three separate communities which constitute the EC (first pillar) and which have largely common institutions (the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community) have three distinct legal personalities, but there is no explicit legal personality for the European Union as a whole, and this will now continue to be the case.

Instead, specific powers to conclude agreements on behalf of the EU are created by TEU new article 24 in the CFSP pillar and new article 38 in the Police and Judicial pillar. These articles do appear to confer legal personality on the EU, but only for a limited purpose, i.e. "*when it is necessary to conclude an agreement with one or more States or international organisations in*

[139] HL Debates, 4 June 1997, c647.

implementation of this Title". Much of the law concerning the legal personality of international organisations derives from a 1949 Advisory Opinion of the International Court of Justice which found that the United Nations possessed legal personality, despite the lack of any explicit provision in its Charter. *Oppenheim's International Law* concludes:

> It is legitimate to deduce from the unanimous finding of the Court in the *Reparations for Injuries* case that international personality is a necessary attribute of any public international organisation which possesses a personality independent of its members and whose rights and duties, in the light of its constitution and practice, are such that they cannot be effective without the attribution of international personality to the organisation in question.[140]

It is clear from TEU new article 24 that the Member States intend that the EU should have the power to enter into binding agreements, and, to that extent, they also intend that it should be attributed with a sufficient degree of international personality.

One of the concerns about this has been that, if the new power is used extensively, the EU may gradually exclude the Member States from making bilateral treaties in the fields covered by the intergovernmental pillars, just as they are already excluded from making bilateral trade agreements. In practice most European agreements with neighbouring states in Eastern Europe and around the Mediterranean are currently mixed competence treaties to which both the EC and the individual member states are parties, but many matters are still governed by bilateral agreements, for example between the UK and Russia. In order to avoid new articles 24 and 38 (J.14 and K.10 in the negotiating documents) impinging on national competence, they are accompanied in the Amsterdam Treaty by a declaration which states: "*The provisions of Articles J.14 and K.10 and any agreements resulting from them shall not imply any transfer of competence from the Member States to the Union.*"[141]

Another concern in this area is that under the new arrangements EU agreements with other states or international organisations on matters covered by the intergovernmental pillars would not automatically be subject to national ratification, as mixed competence agreements are. This objection is met by the following wording in new Article 24:

> *No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them.*[142]

The debate about legal personality for the EU has been largely technical, but there is a symbolic importance in as far as the Maastricht TEU left the overarching European Union structures relatively weak compared to other international organisations, such as NATO or the UN. It was intended that the Union structures should be minimal and that the principal function of the Union was to supply a common framework for the three pillars, one of which already had a

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[140] Ninth edition, 19, footnote 20.
[141] Declaration 4, p.99.
[142] p.121.

strong and established legal identity as an international organisation in its own right. The fundamental changes originally proposed by the Presidency would have gone a step further in shifting the emphasis of European co-operation from the primarily economic functions of the EC to the multi-faceted economic and political functions of the EU, but the European Council at Amsterdam found itself unable to agree to this further step.

10. Island Regions and Outermost regions

The Treaty amends Article 299(2), which provided for the phasing in of the application of the provisions of the TEC in French overseas departments.[143] The new Article recognises the particular social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, and provides for specific conditions in applying provisions of the Treaty. The Article provides for the Council to,

> *"take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aid and conditions of access to structural funds and to horizontal Community projects".*[144]

There is also an Article amendment (Article 158) on island regions, which provides for the Community to

> *"aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas."*[145]

A Declaration acknowledges that Community legislation should take account of the specific *"structural handicaps"* faced by island regions, and that specific measures may be taken in favour of these regions.[146]

11. Overseas Countries and Territories

A Declaration on overseas countries and territories (OCTs) recognises the need for special arrangements for OCTs, but notes that the number of OCTs have declined significantly since the existing arrangements were established in 1957. The Declaration states that the purpose of association is to promote the economic and social development of the countries and territories, and to establish closer economic relations between them and the Community as a whole, and

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[143] TEC, p.42 & p.227.
[144] TEC, p.227.
[145] TEC, p.36 & pp.187-8.
[146] Declaration to the Final Act no. 30 on island regions, p.103.

invites the Council to review the association agreements between the Community and the OCTs before February 2000.[147]

12. Public health[148]

The Amsterdam treaty includes proposed amendments to existing TEC Article 129 on Public Health which will become TEC Article 152. The aim of these amendments is to ensure a high level of human health protection. Public health is already subject to the co-decision procedure under existing Article 189b. Changes here involve the setting of minimum requirements in respect of the quality and safety of transport organs and substances of human origin, blood and blood derivatives. It will still be possible for member states to maintain or introduce more stringent protective measures and it has been explicitly provided that the measures will not affect national provisions on the donation or medical use of organs and blood.

In the areas of veterinary and plant health, where measures are proposed that will have as their main objective the protection of public health, these, under Article 43 (agriculture) at present, will be included under new article 152.

13. Sport

A Declaration to the Final Act on Sport emphasizes the *"social significance of sport"*, and calls on the EU to *"listen to sports associations when important questions affecting sport are at issue"*.[149]

14. Subsidiarity

Subsidiarity, introduced in the TEU, was a subject of much debate.[150] It was included in the Maastricht Treaty in Article 3b, but this Article was criticised for being vague, and for not laying down clear guidelines for when and how it was to apply.[151] The Amsterdam Treaty includes a new, legally binding protocol to the TEC laying out the principles of subsidiarity and proportionality.[152]

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[147] Declaration to the Final Act no.36, p.104.
[148] Note by Alex Sleator, Science and Environment Section.
[149] Declaration to the Final Act no. 29 on sport, p.103.
[150] See various other Research Papers.
[151] Now TEC Art.5, p.136.
[152] Protocol 7 (on the application of the principles of subsidiarity and proportionality), pp.84-86.

This Protocol obliges the Commission to *"consult widely before proposing legislation and, wherever appropriate, publish consultation documents"*, and to justify the relevance of its proposals with regard to the principle of subsidiarity. Separate justification is required for the financing of Community action in whole or in part from the Community budget. The Commission will also be required to submit annual reports to the European Council, the Council and the European Parliament on the application of Article 5. The Commission has in fact published an annual report on the principle of subsidiarity since 1993, on the basis of an agreement at the Edinburgh European Council of December 1992. The new protocol requires the reasons for concluding that a Community objective can be better achieved by the Community to be substantiated by qualitative or, wherever possible, quantitative indicators.

The Protocol specifies that the subsidiarity principle does not affect the primacy of Community law nor call into question the powers conferred on the EC by the Treaty, as interpreted by the ECJ, and that it shall relate to areas where the Community does not have exclusive competence.

A potential problem with this Protocol is that the checking and justifying process might lengthen the legislative process.

15. Simplification and codification

Early in the IGC it was decided that there should be a parallel but separate exercise to simplify and re-codify the whole TEC/TEU treaty structure, including any changes to be adopted at Amsterdam. Such changes are not to change the legal effects of the treaties, but rather to make their arrangement more logical, less repetitive and easier to follow.

Measures for simplification of the whole treaty structure form the second part of the Amsterdam Treaty (Articles 6-11). A Declaration attached to the Final Act of the IGC expresses the intention of the Member States to complete the technical codification process as soon as possible following signature and records their intention that the codification should not have any legal effect. Much of the detailed change consists of deletions of outdated terminology. For example, the powers of the Coal and Steel Authority "High Authority" have long been exercised by the Commission, but only now are the treaty references to the former deleted and replaced. The treaties creating the Coal and Steel Community and the European Atomic Energy Committee will, however, remain as distinct entities. It will therefore still be correct to refer in some contexts to the European Communities in the plural.

There is also a wholesale renumbering of the TEU and TEC contained in an annex to Article 12 of the Amsterdam Treaty. As a result of this, the TEU and the TEC become more clearly distinct entities, but the lettered articles of the TEU are given numbers (1-53). The current 248 articles of the TEC become 314 articles in the new TEC. As a result some familiar and much-quoted treaty articles change numbers: Article 100a (use of QMV for single market measures)

becomes Article 95; Article 177 (preliminary rulings by the Court of Justice) becomes Article 234; Article 189b (co-decision procedure) becomes Article 251; Article 235 (action in areas where the treaties do not provide specific powers) becomes Article 308.

16. State aids ("services of general interest")

The Treaty contains a new Article 16 concerning *"the place occupied by services of general economic interest in the shared values of the Union".* The drafting or translation into English is somewhat obscure, but the text has its origin in a French proposal to remove some of the restrictions on state aids to publicly owned service industries. This was resisted by other Member States and the new article is now explicitly *"without prejudice"* to other treaty articles on state aids. However, it gives the Community and national governments a general shared responsibility for ensuring that such services remain viable and are able *"to fulfil their missions".*[153]

A separate new protocol affirms the competence of the Member States to fund public service broadcasting.[154]

17. Transparency

The EU has been the subject of much criticism for the lack of transparency in its legislation and operation. The Amsterdam Treaty amends Article A of TEU, Common Provisions, to state that *"...decisions are taken as openly as possible and as closely as possible to the citizen".*[155]

This section in the Treaty is in part an attempt to answer criticism of opaque decision-making practices. A new Article in the TEC provides for a right of access for citizens of the Union, and natural or legal persons residing or being registered in a Member State, to documents originating from the Community institutions.[156] Each institution is to lay down the rules of procedure regarding access to its documents.

New Article 207 specifies procedure for the Council.[157] The Council is to specify when it is acting in its legislative capacity, with a view to providing greater access to documents in those cases. When it acts in its legislative capacity, the results of votes, explanations of votes, and statements in the minutes, shall be made public. This alters the present situation. Voting in

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[153] P. 138
[154] Protocol 9, p.87.
[155] Now TEU Art.1, p.9 & p.113.
[156] TEC, Art.255, p.40 & p.214.
[157] TEC p.38 & p.201.

Council was secret until October 1993, when a change in the rules of procedure allowed details of voting to be published. In December 1993 the rules were changed again to allow votes to be published more frequently. However, details of votes on legislative decisions were still not to be published where a simple majority of the Council decided otherwise.

The new article provides for the publication of votes when the Council makes legislative decisions in all cases, and gives this a Treaty basis (rather than the current basis in the rules of procedure). It also provides for the publication of explanations of votes and of statements in the minutes. Some discretion remains regarding freedom of access to full documentation, but there is a presumption in favour of greater access, particularly in legislative matters.

A Declaration on the quality of the drafting of Community legislation is included to ensure proper implementation by the competent national authorities and improve understanding by the public and in business circles. This provides for guidelines to be laid down by the Community institutions responsible for legislation, that is the Commission, the Council, and the European Parliament. It declares that Community legislation should be made more accessible, and declares its support for the codification of legislative texts.

III THE RATIFICATION PROCESS

A. Ratification By The UK

1. The background

Treaties are ratified on behalf of the UK by the Foreign Secretary or his representative, acting on the residual authority of the Crown (the so-called Royal Prerogative). However, this statement must be qualified in three ways to be applied to the Amsterdam Treaty:

i Starting in the 1920s, and continuously since the 1930s, there has been a constitutional practice (not a law) known as the Ponsonby Rule which requires that all treaties subject to ratification should be laid before parliament for information and to give parliament an opportunity (not always taken) to debate them. The formal submission of the treaty text to Parliament as a "Command Paper", together with the debates on the European Communities (Amendment) Bill will cover this requirement.

ii When the UK joined the Community in 1973, accession was preceded by the passing of an Act of Parliament which made the treaty and the law deriving from it applicable within the UK. This was the *European Communities Act 1972*. On all subsequent occasions when new treaties have been agreed, including treaties of accession, there has been new legislation in the UK to amend the European Communities Act so that those parts of the new treaties which are intended to have domestic legal effect are also made applicable within the UK. Consequently similar legislation is required to cover all parts of the Amsterdam Treaty which are intended to have direct legal effect within the Member States. These parts are also sometimes described as forming part of the "Community legal order". Under British constitutional practice the passage of the implementing legislation is not formally part of ratification, but it will have to precede ratification.

iii Under the *European Parliamentary Elections Act 1978* the British Parliament introduced a specific limitation to the freedom of the government to ratify treaties on the basis of the prerogative power. Under this Act, Parliament has to give its explicit approval (by Act of Parliament) to any future treaty or other international agreement which increases the powers of the European Parliament. The extension of co-decision in the Amsterdam Treaty makes it such a treaty and therefore it will have to be approved by the British Parliament for this purpose.

2. Could there be a referendum?

There is no constitutional requirement to hold a referendum for any purpose in the UK, but Parliament is free to legislate for a referendum on any question at any time. Parliament cannot be formally bound by the outcome of a referendum, but a referendum could be made

to have other legal effects. For example, referendum legislation might stipulate that, depending on the outcome, a minister will lay before parliament an order in council which would either bring into force or repeal an Act of Parliament. Such a provision could, if Parliament so decided, be added to a European Communities (Amendment) Bill relating to the Amsterdam Treaty.

The Leader of the Opposition, William Hague, made a call for a referendum on the Amsterdam Treaty at the Scottish Conservative Party conference on 27 June 1997, saying that the treaty had removed the UK veto in 16 areas and extended the powers of the European Parliament in 23.[158] The demand for a referendum was repeated by the shadow Foreign Secretary, Michael Howard MP, at the Conservative Party Conference on 8 October.

The prime minister, Tony Blair, rejected such calls in parliamentary answers of July 1997:

> Apparently, the reason why some people say that there should be a referendum is the extension of qualified majority voting. I have looked carefully at both the Single European Act and the Maastricht Treaty, and there are vastly greater extensions of qualified majority voting in both. Not a word about a referendum did we ever hear from Conservative Members - but then they are consistent at least in their inconsistency. (…)
>
> The idea that this country should have a referendum on the Amsterdam Treaty is one of the most absurd propositions that has been advanced in recent times. What happens in Denmark is a matter for Denmark and does not affect us.[159]

B. Ratification by the other Member States[160]

The Amsterdam Treaty now stands to be ratified in each EU Member State according to its own constitutional procedures before it can come into effect. Referendums will be held in Denmark, Ireland and Portugal. A rejection of the Treaty in any of these referendums could cause the Treaty to fail, since it will only enter into effect once ratified by all. In June 1992 the Danish electorate rejected the Maastricht Treaty in a referendum. However, a package of special arrangements which did not directly contradict the treaty was agreed at Edinburgh in December 1992 and approved in a second referendum.

Austria

There is likely to be a vote on the Amsterdam Treaty in the National Council, for which a two-thirds majority will be required. A referendum would be necessary if the Treaty could be

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[158] *The Times*, 28 June 1997.
[159] HC Debates, 2 July 1997, c289 and 9 July 1997, 933.
[160] This section draws on *Die Ratifikationsbedingunden fur den Vertrag von Amsterdam*, European Parliament research directorate, 18 July 1997.

termed an amendment to the Constitution as a whole – but it is not expected that this will be considered necessary on this occasion.

It is unlikely that ratification will encounter significant difficulties given the large parliamentary majority commanded by the governing coalition. Ratification is expected by early 1998

Germany

The Bundestag and the Bundesrat will need to approve the Amsterdam Treaty by a two-thirds majority vote. The law is then signed by the President. However, the German Constitutional Court (Article 93(1) may have to take a decision on the constitutional implications of the Treaty, a process that could take around six months. Referendums are ruled out in principle by the German Constitution (Basic Law), unless the matter at issue relates to re-organization of the federal Länder. The whole ratification process could take around one year.

The ratification of the Amsterdam Treaty is not expected to face significant difficulties in Germany. The main political parties have given a positive assessment of the Amsterdam Treaty. However, there have been sharp differences of view between the federal government and the Länder over some of the third pillar and freedom of movement issues and the fact that the Länder point of view was sometimes ignored by the government in the IGC negotiations could lead to difficulties in Bundesrat.

Denmark

There are two possible routes for ratification according to the Danish Constitution. In order to ratify a treaty which involves the transfer of powers to a supranational organization like the EC, there must be either a five-sixths majority in the Folketing (the Danish Parliament), or, if there is a smaller majority in the Folketing, ratification can take place if the Bill is confirmed in a referendum. In the case of the Treaty of Amsterdam, a referendum is certain. Should the Treaty be deemed to require a constitutional amendment, the procedure would be even more demanding. This would have to be passed by two successive Parliaments with intervening elections and then confirmed by at least 40% of the electorate. Some of the special provisions in the treaty governing the position of Denmark were specifically designed to avoid this eventuality.

The Danish Foreign Minister has announced that a referendum will take place on 28 May 1998, partly as it is certain that by this stage the constitutional ruling on the validity of the Maastricht Treaty (a case is currently being brought against the Danish Government by some opponents of that treaty) will have been made by the Supreme Court.

On the whole the Amsterdam Treaty with its special Danish protocol appears to have been received relatively well by the Danish press and political parties, with the exception of those on the extremes of the political spectrum. The government is expected to emphasise preparations

for eastern enlargement of the EU in order to "sell" the treaty to the electorate.[161] The opposition Socialist People's Party decided at its annual conference to recommend a No at the referendum on Amsterdam. This immediately led to the resignation of the leading pro-European Mr Steen Gade, as chairman of the parliamentary group. He is now expected to lead a pro-Europe campaign aimed at Socialist voters. The emergence of this Yes element will give added support to those left-of-centre Social Democrats currently in government, as they will not have to fight a pro-treaty campaign alone on the left.

Spain

The ratification of the Amsterdam Treaty will take place according to the special procedure laid down in Article 93 of the Spanish Constitution, which requires an absolute majority in the Congress of Deputies.

A referendum is theoretically possible but there is no intention to hold one. It is not expected that there will be real difficulty in ratifying the Amsterdam Treaty, as most of the major political actors in Spanish politics are favourable to the European integration process. Ratification should take place by the end of spring 1998.

Finland

Treaties which enter into the domain of the legislative power of Parliament require approval by Parliament. Parliamentary approval is by a simple majority of the votes cast in the final, third reading of the Bill concerning the Treaty. However, if the provisions of the Treaty are at variance with the Constitution, the Bill has to be approved by a majority of two thirds of the votes cast in the third reading. The final decision on which procedure to apply will be made by the Constitutional Law Committee of Parliament. However, it appears likely that certain provisions of the Treaty of Amsterdam are at variance with the Constitution, and that the Bill for ratification of the Treaty will require a two thirds majority to be passed.

Obligatory referendums do not exist under the Finnish Constitution. An optional referendum may be held for consultative purposes, but one is not expected in this case. Ratification is expected to be completed without difficulties during 1998.

France

It is the President of the Republic who ratifies treaties, but parliamentary authorisation is necessary for treaties which relate to international organisations. There is no obligation to hold a referendum, although a referendum was held on the Maastricht Treaty.

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[161] Ole Tonsgaard in *Berlingske Tidende*, 19 June 1997.

It is expected that the Treaty of Amsterdam will be ratified by normal legislative procedures. The French government has announced that a referendum will not be held. The ratification procedure should be complete by mid-1998.

Greece

According to the Greek Constitution, the Treaty requires parliamentary ratification (simple majority). Article 44 of the Constitution allows the possibility, in the case of vital national interests, for the President of the Republic to call a referendum after a resolution supported by a majority in Parliament on a proposition from the Council of Ministers. At the time of the ratification of the Treaty of Maastricht, some deputies (communists and ecologists) attempted unsuccessfully to have a referendum called.

Ratification of the Amsterdam Treaty is supported by the majority of Greek political parties, and it is therefore unlikely that any referendum will be organised. The ratification procedure should be completed by the middle of 1998.

Ireland

A referendum is certain, as ratification will require changes to the Irish Constitution, but a date has yet to be set.

Italy

According to the Italian Constitution, both the Senate and the Chamber of Deputies must authorise the ratification of the Treaty, on a vote by simple majority. This procedure could take an estimated six to twelve months. The Italian Government has stated its intention to wait for the resolution of the EP, before its national Parliament ratifies the Treaty. The EP resolution will be debated and voted in plenary in Strasbourg on 17-21 November 1997.

The Constitution does not provide a basis for a direct obligation to hold a referendum on ratification of the Amsterdam Treaty. It is not expected that there will be substantial political opposition to the Treaty, and it could be ratified in the spring of 1998, but the Italian government is potentially very weak, as its recent political difficulties over the budget have demonstrated. This could result in a delay in ratification.

Luxembourg

According to the terms of Article 37 of the Luxembourg Constitution, the Grand Duke concludes treaties, but they are not effective until they have been approved by the Chamber of Deputies.

The Luxembourg Constitution does not make provision for referendums as an instrument of ratification of international treaties. The Treaty is likely to be ratified by the beginning of 1998.

The Netherlands

The ratification of the Treaty of Amsterdam requires the vote of the national parliament, by a simple majority of votes.

This procedure of voting was contested, without success, at the time of the ratification of the Treaty of Maastricht. A simple majority will be sufficient for the Amsterdam Treaty, and the parliamentary ratification procedure should be very rapid. It is anticipated by late 1997 or early 1998.

Portugal

Ratification is completed by means of a decree adopted by the Assembly of the Republic, following a report by the competent Standing Committees.

A referendum is expected. A new Constitution came into force in October 1997, and establishes that a referendum can be held on questions of relevant national interest that concern international conventions. The result of the referendum is legally binding when the number of votes is superior to half the number of electors. The law on the referendum process will be finalised by the end of the year.

The referendum will not be a "yes or no" to the new Treaty, but on the process of Portuguese integration in the EU and will take place on 25 April 1998. Ratification by the Portuguese Parliament will follow, having taken account of the result of the referendum. Ratification is supported by all the main political parties.

Sweden

The approval of the Riksdag (the Swedish Parliament) is required if a treaty relates to a subject over which the Parliament has competence.

The Government has indicated that it does not view the Amsterdam Treaty as a fundamental change of the constitution. It is anticipated that the Government will ask for the Riksdag's approval by means of a Government Bill before the end of the year. The decision of the Riksdag can be expected in spring 1998, and is currently expected to be favourable.

The main opposition Conservative Party has not called for a referendum on the issue. However there has been some public pressure for a referendum and this is supported by the Greens and the far left.

IV THE BILL

The purpose of the Bill, as stated in its long title, is to "make provision consequential on the Treaty", but there is no reference in the Bill to ratification. This is because the ratification of treaties by the UK is a matter for the Crown. In effect, the Bill is designed to make all the legislative provision necessary for the implementation of the Amsterdam Treaty, clearing the way for the government to deposit an instrument of ratification after the Bill has received the Royal Assent and become an Act of Parliament.

The Bill, if passed, will amend the *European Communities Act 1972*, i.e. the statute governing the fundamental relationship between the UK and the European Communities. There has been no move to alter the name of the 1972 Act to reflect the creation in 1993 of the European Union because the British government continues to regard the Union as an essentially inter-governmental matter. Assuming that the Amsterdam Treaty is eventually ratified by all Member States and enters into force, there will in future be a clearer distinction between the Treaty on European Union and the Treaty Establishing the European Community. The *European Communities Act 1972* (henceforth ECA) gives legal effect in the UK only to the latter, along with the treaties on the Iron and Steel Community and the Atomic Energy Community; the former will be like other international treaties which are binding externally on the UK, but not enforced internally by British courts.

Clause 1

Clause 1 adds certain specified parts of the Amsterdam Treaty to the list of texts which are defined in Section 1 (2) of the ECA as “treaties” for the purpose of that Act, i.e. for the purpose of their enforcement in the UK by Section 2 of the Act.

As on two previous occasions (following the adoption of the Single European Act and the Maastricht Treaty) the new treaty is added to the list in parts rather than as a whole. To add it as a whole would, in some respects, be tidier, but this would breach the principle so far upheld by British governments, that it is important to maintain the distinction between the “inter-governmental” and “community” aspects of any European treaty.

For this reason, Clause 1 specifies that only Articles 2-9, Article 12, “other provisions of the treaty so far as they relate to those articles” and all the protocols except for the one addressed to Article J.7 are to be included in the list covered by the ECA.

Why the omissions?

Article 1 of the new treaty is exclusively concerned with amendments to the TEU.

Article 10 is concerned with the effects of the treaty simplification process and its sole purpose is to guarantee that nothing in the simplification process should unintentionally change the legal effects of the treaties. Since this is so, there is by definition no need to change UK law to reflect

the article. Should any dispute about this arise then the Court of Justice would be obliged to rule in favour of the original legal effect.

Article 11 confirms the power of the Court of Justice to interpret the simplification exercise in the light of Article 10. Again, there is no need for this to be enshrined in UK law. Article 11 also establishes Court of Justice jurisdiction over the privileges and immunities arrangements for the new European Central Bank and European Monetary Institute. However, since these are contained in Article 9, they will fall within the "other provisions" clause of the Bill.

Article 13 establishes that the Amsterdam Treaty is to apply for an unlimited period; Article 14 establishes the ratification procedure and entry into force; Article 15 establishes that the versions of the treaty in 12 different languages are equally authentic and that a single text, from which all other copies will be certified, will be deposited with the Italian government.[i] All of these final articles are matters of international treaty law which do not require domestic enforcement.

The Protocol on Article J.7 appears on p.76 of Cm 3780. It is concerned with the relationship between the Common Foreign and Security Policy under the TEU and the Western European Union (WEU), making reference also to NATO, and is therefore exclusively inter-governmental in nature.

Clause 2

Clause 2 approves the Amsterdam Treaty for the purposes of section 6 of the *European Parliamentary Elections Act 1978.* This Act was originally passed as the *European Assembly Elections Act*, but its title was amended by the *European Communities (Amendment) Act 1986.* Section 6 states:

> No treaty which provides for any increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament.

This wording was added to the original Bill during its passage in 1977-8 as a government-backed New Clause intended to meet anxiety that the European Assembly (as it was then) would encroach on the powers of the British Parliament without the consent of the latter. The Foreign Secretary of the day (Dr David, now Lord, Owen) recognised in moving the new clause that it represented a major constitutional innovation because it created "a statutory fetter on the Royal Prerogative to negotiate and ratify treaties".[162]

During the passage of the European Communities (Amendment) Bill of 1992-3 a dispute arose as to whether or not it was sufficient to refer in the equivalent clause relating to the European Parliamentary Elections Act only to the Treaty, since this might not be taken to include the Social Protocol attached to the Treaty which also had the effect of increasing the powers of the European Parliament. On that occasion the House of Commons accepted the Attorney General's advice that the Protocol should be read as being an integral part of the Treaty.[163] None of the

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[162] See HC Debates, 1 December 1977, Vol 940, c820 and 2 February 1978, Vol 943, c802.

[163] For details see *The Maastricht Debate: Further Developments in the Argument over Ratification*, House of Commons Library Research Paper 93/24, Part 2.

protocols attached to the Amsterdam Treaty appears to have any similar effect on the European Parliament, so the problem does not arise.

Is the Bill amendable?

The Amsterdam Treaty cannot be amended by the action of any Member State or its national parliament during the ratification process. If any Member State were to find itself unable to ratify because of an adverse parliamentary decision or referendum result, then the whole Treaty would fail to come into effect and the situation would have to be remedied by further negotiation. Any amendment to the Treaty which resulted from such negotiation, whether it took the form of a change of text or an amending protocol, would have to be regarded as a new treaty subject to ratification by all of the Member States.

The European Communities (Amendment) Bill is not, of course, identical with the Treaty. Rather it consists of provisions "consequential" on the Treaty. The Bill can therefore be amended like any other Bill, with the only proviso that were it to be amended in such a way that it no longer made provision in UK law for those parts of the Treaty which are intended to form part of the Community legal order, then the Government would be prevented from ratifying.

The previous European Communities (Amendment) Bill of 1992-3, which made provisions consequential on the Maastricht Treaty, was in fact amended quite significantly during its somewhat stormy passage through Parliament, but not, in the end, in any way which prevented UK ratification of that Treaty. The most controversial amendment varied the scope of the Bill to exclude the Protocol on Social Policy, by which the UK acquiesced in the decision of the other Member States to proceed with an agreement on Social Policy. Since the substantive agreement did not in itself apply to the UK, the then Attorney General was eventually able to assure the House, contrary to the original advice of the Foreign and Commonwealth Office, that the amendment did not prevent ratification.[164]

Other successful amendments required the Government and the Bank of England to make annual reports to Parliament on a range of matters relating to Economic and Monetary Union; provided that only elected members of local authorities could be nominated to represent the UK on the Committee of the Regions; and provided that the Act would come into force only when both Houses of Parliament had come to a further resolution on the question of adopting the Protocol on Social Policy.

[164] For details see *The Maastricht Debate: Further Developments in the Argument over Ratification*, House of Commons Library Research Paper 93/24, Part 1.

V CONCLUSION

The IGC which began at Turin in March 1996 reached its culmination at Amsterdam in June 1997 when the leaders of the 15 EU Member States concluded a treaty which, if ratified later by all of their parliaments, will mark another significant overhaul of the basic structures of Western and Central European cooperation, the third such treaty in the space of 11 years (the Single European Act 1986, the Maastricht Treaty on European Union 1992, the Amsterdam Treaty 1997). In some respects Amsterdam has completed business left unfinished at Maastricht in December 1991, when the then leaders of the "twelve" found themselves in fundamental disagreement about the future direction of Europe and had to cut a compromise deal which left almost everyone dissatisfied and which eventually passed the hurdle of national ratification only with the greatest of difficulty. And yet Amsterdam has also left some unfinished business: in particular it failed to settle a range of institutional issues which must be resolved as the EU takes in new members early in the next century.

The Maastricht Treaty was described by Helen Wallace as "a document negotiated in a room without windows".[165] The Amsterdam Treaty has been arrived at by a much more open process of negotiation since the various national submissions, presidency suggestions and draft texts have been made available to national parliaments and other interested parties. The negotiators have also been keenly aware of the need to make the new document more coherent and, as far as is possible with such a legally complex structure, more appealing to the electorate. In some ways they have succeeded: there is to be greater transparency and a simplification of the legislative procedures. However, the need to achieve subtle compromises between the Member States in the final stage of the negotiation has left the final text littered with complex protocols and declarations.[166] Even with the work of consolidation and codification finished, the amended treaty will hardly become easy or popular reading.

These are some of the key features of the treaty:

- the structure will become somewhat simpler and more logical as a result of the simplification of the legislative processes involving the European Parliament and the separate re-codification exercise.

- the distinction between "community" and "intergovernmental" pillars will remain, but some matters will transfer to community competence and the difference will be eroded to an extent. The "community" element will be increased in the intergovernmental Police and Judicial Cooperation pillar and the EU will also be empowered to enter into legally binding agreements with other states and international organisations in respect of both intergovernmental pillars.

- there will be some strengthening of all the major community institutions: the European Parliament will gain influence because more use will be made of the Co-decision

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[165] H Wallace, "European Governance in Turbulent Times", *Journal of Common Market Studies*, vol 31, no 3, p296.
[166] The final text includes 13 protocols, 51 conference (i.e. unanimous) declarations and 8 unilateral declarations.

procedure; the Commission presidency will be strengthened with respect to the other members of the Commission; the European Court of Justice will have expanded jurisdiction over free movement issues (potentially including asylum and immigration), and over police and judicial cooperation matters.

- one UK "opt-out", from the Social Agreement, will end; another, from the Schengen agreement on border controls, which is now to be incorporated into the treaties, is to begin. On other freedom of movement issues the UK, Ireland and Denmark will "opt-in" on a case-by-case basis. The general principle that some states may proceed faster than others with integration ("closer cooperation") will be written into the treaty.

- some preparations will be made for future enlargement: in particular a cap will be placed on the future size of the European Parliament; a suspension procedure will be put in place if Member States do not respect fundamental human rights; the very modest extension of qualified majority voting will make it more difficult for any single state to exercise a veto. Other essential reforms, for example to the size of the Commission and the weighted voting system, have been left to a future occasion.

- the arrangements for a coordinated approach to foreign affairs and defence issues will be strengthened, in particular by the device of "common strategies" to be agreed by the European Council and by the appointment of the Secretary-General of the Council to be the EU "High Representative" for foreign affairs; however, there will still be a national veto on these matters and no guarantee of greater policy coherence in the future in the face of conflicts around the borders of the Union; WEU will continue to serve as a bridge between the EU and NATO and there will be no timetable for WEU to merge with the EU.

- there will be greater transparency in the affairs of the Union, a clarified approach to subsidiarity (the definition of matters which should be left to the Member States), a new commitment to inform and involve national parliaments and a greater emphasis on the rights and interests of the citizen, including the need to tackle unemployment.

Most of the heads of government returned home from Amsterdam declaring the new treaty a success. Chancellor Kohl described it as "altogether a great success" and "a solid foundation for the continuation of European integration".[167] The prime minister of Denmark said that it was "greener, more human and more democratic" than the Maastricht Treaty.[168] Prime Minister Aznar of Spain declared the treaty "reasonably positive, constructive, optimistic and satisfactory".[169] Tony Blair asserted: "we said that we would start to make Europe more relevant to the concerns of the peoples of Europe - and we did".[170]

The Amsterdam Summit was followed by a lull, as far as the new treaty was concerned, while the diplomats, lawyers and translators worked on a clean text in all the relevant languages. There was no lull, however, in the affairs of the EU because in July 1997 the Commission published

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[167] *Frankfurter Allgemeine Zeitung*, 19 June 1997.
[168] *Berlingske Tidende*, 19 June 1997.
[169] *El Pais*, 19 June 1997, p4.
[170] HC Deb 18 June 1997, c316.

the package of documents known as *Agenda 2000* along with its Opinions on the applicant countries.[171]

The first volume - *For a stronger and wider Union* - reviews the progress of the EU and touches on many issues. It argues that not only must the Euro be in place by 1 January 1999, but the extensions of QMV and other new measures in the Amsterdam Treaty should be utilised to their fullest extent. The likely challenges to the EU in the next century are sketched and reforms to employment systems, the CAP, structural funding and the Cohesion Fund proposed. The Commission goes on to examine the challenges of enlargement and the implications for financing of the EU in the period 2000-2006. A second volume examines the enlargement issues more closely, summarising the ten individual opinions. The conclusion is that the Commission recommends the early opening of accession negotiations with 5 states in Central and Eastern Europe (Hungary, Poland, Estonia, the Czech Republic and Slovenia), in addition to Cyprus, which has already been promised that accession negotiations can begin 6 months after the conclusion of the IGC. The Commission recommends a "reinforced pre-accession strategy" for the other applicants (Romania, Bulgaria, Latvia, Lithuania and Slovakia).

By the time the new treaty had been prepared for signature on 2 October 1997, the mild euphoria of June had worn off for some of the participants. The President of the European Commission, Jacques Santer and the Dutch prime minister Wim Kok were among those who launched the treaty with faint praise.[172]

The treaty will be presented to the parliaments, and in some cases the electorates, of the Member States for their approval over the next year and can only enter into force when all 15 are in a position to ratify it. They will therefore make their decisions at a time when the preparations for the single currency are reaching their climax. While the question of monetary union is of fundamental importance and lends itself more readily to wide debate, the question of institutional reform is likely to appear more specialised and obscure. However, it too is of fundamental importance for the applicant states from Eastern and Central Europe, because if the Amsterdam Treaty were to be held up for a significant period, it is unlikely that their accession negotiations could proceed according to schedule. It is also important for all those, businesses and citizens, who have to live with the rules and regulations which emerge from the EU.

The need for yet another IGC and another radical overhaul has already been raised by those disappointed with the outcome of Amsterdam and by the Commission.[173] Adjustments to the weighting of votes for QMV could probably be made as part of the next accession process, i.e. without convening an IGC, but the treaty text does also envisage another general review when the membership of the Union is about to exceed 20, a point which may or may not be reached at the next enlargement. It could be, however, that the pressures from monetary union, from the ambitious workload of Agenda 2000, from the enlargement process and from the issues left unresolved at Amsterdam will be such as to persuade the EU governments quite early in the next

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[171] Commission documents 9984-9994/97

[172] reports in *The Times* and *The Guardian*, 3 October 1997.

[173] "The Commission therefore suggests that a new Intergovernmental Conference be convened as soon as possible after 2000 to produce a thorough reform of the provisions of the Treaty concerning the composition and functioning of the institutions. This would, in any event, have to involve the introduction of qualified majority voting across the board" - *Agenda 2000*, Vol 1, p6.

century that their cooperative machinery still does not correspond to the demands which the next century will place on it and that further engineering is required.