The IGC: the story so far

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The Intergovernmental Conference, which opened on 29 March 1996, is intended to conclude with a new Treaty at the Amsterdam summit of 16-17 June 1997. The outline draft treaty of the Irish Presidency, *The European Union Today and Tomorrow: Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future*, 5 December 1996, and the Dutch Presidency *Addendum to the Dublin II General Outline for a Draft Revision of the Treaties*, 20 March 1997, form the basis of the ongoing negotiations for the final treaty.

This paper summarises the progress of negotiations so far, and considers the latest proposals and draft texts, and their implications for Britain. A detailed bibliography of IGC documents and commentaries is also available as Research Paper 97/55, "The IGC: Bibliography".

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Introduction

IGC stands for Intergovernmental Conference, which is a special meeting of representatives of the governments of the Member States of the European Union, convened to consider amendments to the basic treaties on which the European Communities and European Union rest. There have been six Intergovernmental Conferences since 1957, the most recent of which resulted in the 1992 Treaty on European Union (Maastricht Treaty). Amendments to the Treaty only come into force after ratification by all member states "in accordance with their respective constitutional requirements". In the UK, this means that Parliament must pass legislation to amend the European Communities Act 1992 in order for the Treaty to be ratified. The ratification procedures in the member states may take several months and may involve a referendum in some cases. The last draft Treaty was agreed in Maastricht in December 1991 and signed on 7 February 1992, but was not ratified by all Member States until November 1993. The IGC which opened at Turin in March 1996 was provided for under the Maastricht Treaty, to consider "to what extent the policies and form of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community."[1]

The Conservative Government initially stated that the IGC would be "little more than a 3,000 mile service of the Maastricht Treaty"[2]. The Foreign Affairs Select Committee reports of 1996 and 1997 came to the conclusion that the IGC was a far more fundamental reexamination of "what kind of European Union we want to create".[3] One of the major motivations for the convening of this IGC is to reform the Union's institutions ready for enlargement. The Commission is currently examining applications from 12 countries, some of which could accede in 2002, if not earlier.

I The European Union

The three pillar structure of the Treaty on European Union (Maastricht Treaty) emerged from the last IGC as a means of distinguishing between methods of co-operation agreed to be appropriate to three major areas of EU activity. Since the Member States could not all agree to the use of the existing Community mechanisms (the first pillar) for the Common Foreign and Security Policy (CFSP) or for co-operation in Justice and Home Affairs (JHA), it was decided instead to create the second and third pillars respectively. While the detailed arrangements are specific to these pillars, the common element is that they both emphasize

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1 Article B. The date of the IGC is established by Article N(2) - see *European Union; The Treaty on European Union; The Treaty establishing the European Community*, Cm 3151, pp.10, 22.

2 Foreign Secretary, Official Report, 5 July 1995, Vol.263, Col.378.

3 Foreign Affairs Select Committee, "Developments at the Intergovernmental Conference", Session 1996-97, 19 March 1997, HC 148, p.xxxii.

intergovernmental co-operation based on consensus in the Council of Ministers[4], rather than majority voting, and they provide for little or no input from the Commission, the European Parliament (EP) or the European Court of Justice (ECJ).[5] The word "pillar" does not appear in the formal treaty language: the "third pillar" is formally known as Title VI of the Treaty on European Union.

The outcome at Maastricht was a compromise between the "more Europe" approach, which aimed at extending the areas of policy covered by the European Community and the powers of European Institutions relative to those of the Member States (for example, through increased use of Qualified Majority Voting (QMV) and increased powers of the EP), and the "intergovernmental" approach, which seeks to maintain the influence of national governments in decision-making. The final compromise leant towards the intergovernmental model. The "pillar" structure was the result of a compromise between the desire to include matters such as the CFSP and JHA with the pressure for cooperation in these areas to remain intergovernmental. One purpose of the 1996 IGC is to consider the working of this new three pillar structure.

There are no proposals to bring Second Pillar matters (the Common Foreign and Security Policy) under first pillar provisions, and the essence of the pillar structure remains in the new drafts. However, the location of the proposed new Title on the freedom of movement of persons, asylum and immigration (matters previously covered under the third pillar Justice and Home Affairs) is still a matter for negotiation, and it has been proposed by some delegations that this Title should come within first pillar arrangements, in other words under Community institutions and law. The Conservative Government has opposed both the idea of a separate Title for these matters, and the proposal to integrate it into the first pillar, stressing that it believes these are issues best dealt with at an intergovernmental level. Any change in the basic structure of the EU was opposed by the Conservative Government.

A. IGC Timetable

The IGC opened in Turin in March 1996 under the Italian Presidency, continued under the Irish Presidency in the second half of 1996, and the Netherlands took over at the beginning of 1997. It is due to end at the Amsterdam summit on 16-17 June, but if it does not conclude then it will go on into the Luxembourg Presidency. The Netherlands Presidency is scheduled to produce a final draft of the revised Treaty by mid-May, which should then be discussed at an informal extra summit in Noordwijk on 23 May.

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4 The Council of Ministers, or Council, is the main legislative organ of the European Community, made up of representatives of the Member States (currently 15). Which ministers attend depends on the subject under discussion (e.g. Agriculture, Transport, etc.).

5 The European Court of Justice was established under the Treaty of Rome to carry out judicial supervision of the treaties and Community legislation.

Negotiations have proceeded mostly on the basis of monthly meetings at foreign minister level, with weekly meetings to discuss progress involving government representatives, who are a mixture of ministers and diplomats. Like most Council proceedings, IGC negotiations were in the past regarded as confidential transactions until an agreed text emerged. This convention came under severe strain during the 1991 IGC and it was agreed at the outset that the 1996-97 IGC would be more open. Documents formally submitted to the IGC have been made available to national parliaments and more than 300 of these have been placed in the House of Commons Library.[6]

There is some pressure on the Member State governments to conclude in June 1997 for a number of reasons. As already mentioned, a major motivation for the IGC Treaty revision was the prospect of enlargement, to possibly 20 or even 25 members within the next 10-15 years, and the desire not to delay enlargement points towards a June conclusion of the Conference. The EU is already committed to beginning negotiations with Malta and Cyprus within six months of the conclusion of the IGC, although Malta's government has since frozen its application, and there is a reluctance to admit Cyprus until its constitutional and territorial problems have been solved. Nine Central and Eastern European Countries (CEECs) have association agreements (so-called Europe Agreements) with the EU: Poland, Hungary, the Czech Republic, Slovakia (the 'Visegrad Four'), Bulgaria, Romania, and the three Baltic States, Latvia, Lithuania and Estonia. Slovenia has also concluded a Europe Agreement, although it has yet to enter into effect. Europe Agreements explicitly recognise that the ultimate objective of the associated countries is to become members of the European Union. The fear is that current institutional arrangements would be paralysed by such a substantial increase in EU membership to include countries with such divergent economies, histories, traditions and ambitions.

In addition to the question of enlargement, the German government must hold general elections in autumn 1998 and, perhaps anticipating a constitutional challenge on economic and monetary union, would not want a delay in the ratification of a new Treaty that might complicate matters still further. French National Assembly elections were due to be held in spring 1998, but the decision by President Chirac to hold snap elections on 25 May and 1 June 1997 could affect the timetable for completion of the IGC negotiations. The outcome is uncertain, but a victory for the Socialists, who have been resisting harsh austerity measures to meet the Maastricht criteria, could have an effect on the Conference. The outcome of the French elections are likely to have more implications for the EMU timetable than for the IGC negotiations, but either way France is likely to be preoccupied with preparation for elections and their aftermath, rather than focusing on completion of the negotiations. It also puts into doubt potential progress at the special summit scheduled for 23 May. All Member States, however, are anxious to avoid ratification of a new Treaty coinciding with the final stages of

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6 These include the "Dublin Draft" of 5 December 1996, CONF.2500/96, and the Netherlands Addendum of 20 March 1997, CONF.2500/96 ADD 1.

EMU, and this will be a major factor in pressing for the completion of the Treaty before the summer holidays.

B. Dublin and Dutch drafts

At the Irish Presidency summit in Dublin in December 1996, the Irish Presidency produced draft texts for discussion, which were designed to provide a general outline for a draft revision of the Treaties. The Presidency concentrated on those issues on which there was likely to be more consensus, leaving the more contentious issues for the following Netherlands Presidency. The Dublin draft was intended to provide a basis for further discussion, to be a springboard for further debate, and to this end offered not only proposed Treaty amendments but also an introduction to the issues and a commentary which includes references to minority or other views. The Irish Presidency emphasised that the draft was not binding in its detail on any delegation, and delegations remained free to advocate their own proposals etc. The Dublin II Outline was divided into three parts - Part A proposes texts in the areas of freedom, security and justice; the Union and the citizen; an effective and coherent foreign policy; the union's institutions and enhanced co-operation or flexibility. Part B concerns other issues and Part C deals with simplification of the Treaties.[7]

The major issues of disagreement were considered to be:

- Common Foreign and Security Policy;
- Employment chapter;
- Justice and Home Affairs;
- Institutional reform including the extension of Qualified Majority Voting;
- Flexibility;
- National Parliaments.

The Netherlands Presidency has concentrated on those areas which appeared to require the most work: Justice and Home Affairs, enhanced cooperation and the Union's institutions, and issued an Addendum to the Dublin Draft in March 1997.[8] The Addendum offers revised texts in the following areas:

- the "Progressive establishment of an area of freedom, security and justice";
- fundamental rights and non-discrimination;
- Justice and Home Affairs;

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7 Library Research Paper 96/114, "IGC Issues: Progress and the Dublin Draft", "Dublin Draft", CONF 2500/96.
8 Addendum to the Dublin Draft, CONF 2500/96 ADD 1.

- enhanced cooperation/ flexibility;
- equality between men and women;
- data protection;
- the CFSP;
- legal personality for the Union.

Issues which are not covered by the Addendum include:

- employment;
- social provisions;
- environment;
- consumer policy;
- transparency;
- subsidiarity;
- external economic relations;
- other institutional issues.

Issues tabled under Part B of the Dublin Draft (entitled "Other issues"), as well as further proposals made by delegations since December, will also be taken up by the Presidency in the next phase of work. These issues are still the subject of negotiation, with more work to be done before draft texts can be offered. New Presidency texts are continually coming out as negotiations proceed in those areas not covered or not covered fully in earlier drafts.[9]

C. British Government's Approach

The British Government's initial approach to the IGC negotiations was set out in March 1996 in the White Paper, "A Partnership of Nations".[10] The Select Committee on Foreign Affairs produced a report in July 1996 on the progress of the IGC[11], and rushed out a new report on 19 March 1997 designed to inform the new Parliament and its successor Committee of developments at the IGC so far.[12] These reports have identified the key elements of the Conservative Government's approach to the negotiations so far. These include:

- no change in the pillar structure of the EU;
- no new Community competences; no extension of the scope of majority voting;

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9 A full list of texts may be found in Library Research Paper 97/55, "The IGC: Bibliography".

10 White Paper, "A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996", March 1996, Cm 3181.

11 Third Report from the Foreign Affairs Committee, Session 1995-96, HC 306 (the "July 1996 Report).

12 Foreign Affairs Committee, Fourth Report, "Developments at the Intergovernmental Conference", Session 1996-7, HM 148.

- no new powers for the European Parliament;
- improvements in the functioning of the CFSP, the JHA pillar, and the ECJ;
- weighting qualified majority votes more closely to population;
- a greater role for national parliaments;
- further entrenchment of subsidiarity; greater use of flexibility.

Other major issues for the Conservative government included the question of "quota-hopping" in the fisheries sector, and the lifting of the BSE ban, although neither issue is currently on the Amsterdam agenda.[13]

The 1997 Foreign Affairs Committee report gives an outline of proposals submitted by the British Government and an overall assessment of progress to date. It also points out that it is clear that there are significant areas where the Government's position appears to be substantially at variance with that of the majority of its EU partners.[14] The position of the new British Government has yet to be made clear on a number of those areas which are still matters for negotiation. The Labour Party made commitments in its manifesto to retain the national veto over "key matters of national interest, such as taxation, defence and security, immigration, decisions over the budget and treaty change", and to consider the extension of "Qualified Majority Voting in limited areas where that is in Britain's interests."[15] This implies that the new Government would be opposed to majority voting in the proposed new title on asylum, immigration and free movement, as it insists on retaining a national veto over these areas. The Labour Party has also made clear its intention to sign the Social Chapter, from which the Conservative Government secured an opt-out in 1992. This is not formally part of the IGC negotiations, but the necessary changes to the existing Treaty could be incorporated in the new Treaty.

The new Government outlined its approach to the IGC negotiations in May 1997 in a speech by Doug Henderson, Minister for Europe.[16] It indicated the main areas where its position differed from that of the previous Conservative Government. This included a willingness to accept the extension of QMV in some First Pillar Matters, increased co-decision with the European Parliament, an Employment Chapter in the Treaty and the removal of the Social Chapter opt-out.

D. Major areas of agreement and disagreement

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13 The quota-hopping issue was labelled as a "show-stopper" for the British Government, and the Minister for Europe, David Davis, said that the Government "will not allow conclusion of the IGC without a satisfactory solution to quota-hopping issue." Ibid., p.22.

14 Foreign Affairs Select Committee, Fourth Report, "Developments at the Intergovernmental Conference", Session 1996-7, 19 March 1997, HC 148, p.x.

15 "New Labour: because Britain deserves better", Labour Party Manifesto 1997, p.37.

16 Opening Statement, by Mr Doug Henderson, Minister for Europe, at the EU Intergovernmental Conference Working Group of Personal Representatives, Brussels, 5 May 1997 "Britain and the EU - A Fresh Start", FCO Press Release, 5 May 1997.

It is widely accepted that many of the most sensitive and controversial issues will not be resolved until the very last stages of negotiations. These issues include:

- Institutional reform, including the composition of the Commission, reweighting of votes in the Council, etc. This is a matter for intense negotiation, and is likely to be resolved at the very last minute.

- Flexibility - British government has insisted on the "agreed by all" clause before enhanced cooperation can go ahead. Labelled as one of Britain's "show-stoppers", although the change of government may affect this.

- Location of the proposed new Title within the Treaty. Britain has been opposed to the 'communitisation' of asylum and immigration, but anxious to remain fully involved in these questions. On the other hand, the Labour Government, like its Conservative predecessor, does not want the UK to be tied to the 'Schengen' arrangements for the abolition of border controls.

- Extension of majority voting (therefore loss of national veto). The Conservative government rejected the extension of majority voting in all areas in principle. It was very much in a minority on this issue, although there is support for the maintenance of unanimity in the CFSP. National vetoes will remain on defence, taxation and constitutional changes. Labour has indicated that it would be prepared to accept majority voting in social and environmental policy, and industry and research.

- Defence capability for EU. The relationship between the EU and the Western European Union is a matter for much debate. Britain has been opposed to the merger of the WEU[17] and EU, although it supports close cooperation between the two.

- Employment, social provisions. Treaty provisions in this area were opposed by the Conservative government, both on the principle that these matters are most properly dealt with by national governments, and on substance, considering that these are measures likely to reduce labour market flexibility and increase labour costs unemployment.

II Proposed Treaty Changes

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17 Western European Union was chosen as the defence arm of the European Union at Maastricht, and is also the European pillar of the Atlantic Alliance. Austria, Ireland, Sweden, Denmark and Finland have observer status, all other EU members have full membership of WEU. For further information on WEU and European Defence, see Library Research Paper 95/45, "Towards the IGC: Developing a Common Defence Policy", 6 April 1995.

These are the areas on which sufficient progress has been made for draft treaty texts to be proposed. They are by no means binding, but represent areas where there has been some degree of consensus. The discussion is based on the Addendum issued by the Dutch Presidency on 20 March 1997,[18] supplemented by the earlier Dublin II Outline of 5 December 1996,[19] as well as various Presidency papers and summaries. The British Government's position has been indicated where possible on each issue. A more detailed analysis of the Dublin draft may be found in Library Research Paper 96/114, "IGC Issues: Progress and the Dublin Draft", 10 December 1996.

A. Fundamental Rights and Non-discrimination

This section is designed to provide strengthened fundamental rights for Union citizens, and proposes refinements to the draft published at Dublin. The commitment to fundamental rights as guaranteed by the European Convention on Human Rights is emphasised. The Addendum text could potentially make any EU action, under any EU pillar, subject to ECJ jurisdiction in respect of human rights. The new Article 6a on non-discrimination on the basis of "sex, racial or ethnic origin, religious belief, disability, age or sexual orientation" remains, despite objections from Britain that discrimination matters are best dealt with by national governments. There is provision for majority voting of a majority of four fifths of its members.

A new provision (an Article in EC "pillar") is proposed to fill the gap resulting from the fact that there are no rules on the protection of individuals with regard to the processing of personal data by the institutions. The proposed new draft Article would make existing Community law, which at present only applies to Member States, applicable to Community institutions and bodies as well. It would also create the legal basis for the setting up of an independent supervisory body responsible for monitoring the application of these provisions to the Community institutions.

B. Progressive Establishment of an area of freedom, security and justice

This is an important area where major differences of opinion remain. The Dutch draft refines and maintains Irish proposals for a new Title containing provisions on the free movement of persons, asylum and immigration. No presumption is made about the location of such a title within the treaty, and the Presidency has made it clear that this is a matter for further negotiation. Some of the matters within the proposed Title presently fall within Community competence (such as border controls for Community nationals and determining the list of third

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18 CONF 2500/96
19 CONF 2500/96

countries whose nationals require visas), but others presently fall under the scope of the third pillar (such as asylum and immigration policy). There is support amongst some Member States for locating this new Title within the first pillar, in other words, within the competence of the European Community institutions, including the Commission and the European Court of Justice. There is also a proposal for integrating the Schengen Agreement on the removal of internal borders into the Treaty.[20]

The Conservative Government has opposed the creation of a new Title, and strongly opposed the concept of integrating third pillar matters into the first pillar ('communitisation').[21] Britain also opposed the proposal for the Council to act by QMV.[22] Whilst in Opposition, the Labour Party also pledged to uphold national vetoes over the question of immigration. British objections have been based on the principle of intergovernmentalism, in other words these are areas which should either be decided on an intergovernmental basis, or (in the case of the non-discrimination clause) at a national rather than supra-national level. The British Government is often in agreement with some of the basic aims behind the proposal, but not the proposed means of achieving them. As David Davis made clear in his evidence to the Select Committee on European Legislation on 13 February 1997, there is a great deal of agreement between a large number of Member States on these issues, and the British Government is clearly in a minority, although there is some support for aspects of the British position, from Denmark in particular.[23] The UK was also determined to maintain frontier controls, a fact which seems to have been accepted by the Dutch Presidency, with the proposals for incorporating Schengen into the Treaty making provision for opt-outs by one or more Member States.[24] The British Government has strongly supported the setting of clear objectives for action on asylum, immigration, mutual customs assistance and combatting drugs, and timetables for completing that action, as long as the intergovernmental nature of cooperation in these areas is not undermined.[25]

The Presidency has provided a structured set of draft provisions covering the free movement of persons, asylum and immigration, as well as policy, customs and judicial cooperation, and the incorporation of the Schengen acquis into the Treaty. The proposals link the objective of ensuring free movement of persons within the Union with the need for clearly defined flanking measures deemed essential in order to achieve this. The text has the clear objective

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20 The Schengen Agreement was an agreement outside the EC Treaties signed between the Benelux countries, Germany and France in June 1985 which aimed at the gradual abolition of checks at common borders. All members of the EU are now members of Schengen apart from the UK and Ireland, although not all countries have fully implemented the agreement.

21 Cm 3181, pp.22-23.

22 Cm 3181, p.14.

23 David Davis, Minutes of Evidence to the Select Committee on European Legislation, 13 February 1997, p.13.

24 There has been a long-running argument as to whether or not a General Declaration adopted in parallel with the Single European Act of 1986 gave the UK the right to opt out of the declared intention of the Member States to create "an area without frontiers". See Research Paper 95/27, pp.32-37.

25 Malcolm Rifkind, Secretary of State for the Foreign and Commonwealth Office, minutes of evidence to Foreign Affairs Select Committee, 25 February 1997, p.41.

of the removal of controls on persons when crossing internal borders, either citizens of the Union or nationals of third countries, and retains the commitment to common rules on visas for nationals of third countries and measures on crossing of external borders. Dutch Presidency proposals are based on the assumption that the *acquis* of Schengen will be incorporated into the EU. This acquis should remain "open to all", with possible transitional periods for non-Members, whilst there is a proposal for a "constructive" opt-out for those not parties to Schengen. The full integration of Schengen into the Treaty would provide a single political and institutional framework for acting on the free movement of persons and flanking measures. The Presidency also considers that the use of Community methods would ensure greater effectiveness in certain areas, but in recognition of the differences of opinion on this matter calls for a "pragmatic attitude" on the most sensitive issues. It is probable that a final agreement will not be hammered out until the final stages of the negotiations.

The Dutch Presidency notes the importance of providing the necessary flexibility to take account of particular situation of Member States which are not party to Schengen. This appears to refer to the position of the British government, which has made it clear that it will not accept the surrender of control over its borders. The new Labour Government has also made it clear that it will insist on the right to maintain frontier controls.[26] This seems to have been accepted, as can be seen by a speech made by Michiel Patijn, for the Dutch Presidency, on 11 February recognising that the British commitment to control of their own borders is something that the rest of the Union will have to accommodate.[27] Ireland is also likely to remain outside the new arrangements, due to the Common Travel Area between Ireland and the UK.

As well as the provisions on the free movement of persons, there are proposals on asylum and immigration, and measures to encourage and strengthen administrative cooperation, on judicial matters, and other measures in the field of police and judicial cooperation in criminal matters in accordance with Title VI. It also provides for concerted action on the security of external borders, visas, asylum, immigration, and the free movement of nationals of third countries. On measures on asylum, the Presidency notes it will submit concrete proposals to establish it as a clear principle that no citizen of a Member State of the Union may apply for asylum in another Member State. Provision is made for the adoption of emergency provisional measures, and there is a proposal to establish consultations with the United Nations High Commissioner for Refugees, on matters relating to asylum policy.
Decision-making procedures are fleshed out in Article G. This provides for an initial shared right of initiative between the Commission and the Member States for three years after the entry into force of the Treaty, after which time the Commission gains the right of initiative. The Council must act unanimously after consulting the European Parliament, but after three years the unanimity requirement will be phased out in favour of quality majority voting. This article's significance is its proposed phasing out of the shared right on initiative towards a sole

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26 Doug Henderson, "Britain and the EU - A Fresh Start", 5 May 1997.
27 *Agence Europe*, Wednesday 12 February 1997, No.6912.

right of initiative for Commission, and the phasing out of the unanimity requirement, in other words, the national veto. It also maintains a role for the European Parliament.

Although the detail remains to be filled in, it is clearly the case that this outline differs strongly from the Conservative Government's proposals for the third pillar, which would firmly entrench intergovernmentalism and avoid as much as possible the involvement of the Community institutions, particularly the European Parliament and the European Court of Justice.[28] The Conservative government also voiced its concern at the possibility of ECJ decisions taken in this area having unintended effects on Member States who may have opted out of certain policy areas and decisions. It will now fall to the Labour government to negotiate the details of a British opt-out in this field. The Irish government tabled a paper on this matter,[29] suggesting the use of constructive abstention to allow "differentiation" where necessary, whilst not excluding any Member State from discussion. This area is likely to be the subject of much further negotiation.

C. Third Pillar - Justice and Home Affairs

Proposals on the area of Justice and Home Affairs can be divided into two broad categories - a new Title on the free movement of persons, asylum, immigration (some of these issues are currently dealt with in the third pillar), which is dealt with above, and those other issues which would continue to be dealt with within the third pillar. If asylum, external border controls, immigration, customs cooperation and action on drugs were to move to the proposed new title, some issues in the existing Article K.1 would remain. These would be: combating fraud on an international scale, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation (including combating terrorism). The proposals also provide for increased cooperation between judicial and other competent authorities, and cooperation between police forces, customs authorities and other law enforcement authorities in the Member States, both directly and through Europol.[30] Cooperation on these matters is not particularly controversial, although there have been concerns about openness and accountability under the Third Pillar. There is also widespread agreement on the extension of third pillar matters to include the proposed new areas of combating trafficking in persons and offences against children, preventing and combating racism and xenophobia, illicit drug trafficking and illicit arms trafficking, corruption and fraud (new Article K.1). The

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28 White Paper, "A Partnership of Nations", Cm 3181, p.22-23.

29 CONF 3862/97, 7 April 1997.

30 Europol is the European Police Office proposed by Chancellor Kohl in 1991 and described in Article K.1(9) of the Treaty on European Union (TEU) as follows:

> police cooperation for the purposes of preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

The Europol Convention was concluded in 1995 and is still awaiting ratification by some Member States. The Convention and Protocol may be found in Cm 3050 and Cm 3465.

Conservative Government has not opposed the proposed addition of several new matters of common interest, but insisted this must take place on an intergovernmental basis.[31] The question of voting procedure (qualified majority voting versus unanimity) is still unresolved. The possibility is raised of the extension of the competence of the European Court of Justice, and again this was opposed by the Conservative Government.

The Dutch Addendum offers specific proposals and draft texts on these areas. JHA action is to be based on a commitment to inform and consult one another within the Council with a view to coordinating their action, and to establish collaboration between the relevant departments of their administrations. The right of initiative is to be shared between the Member States and the Commission, whilst the question of unanimity/ QMV is not specified, indicating that there is still substantial disagreement on this matter. Measures are to be taken by the Council, and include:

- adopting common positions defining the approach of the EU to a particular matter.

- adopting framework decisions - to be binding upon Member States. These would be similar to Directives under the first pillar in that they would be binding on Member States as to the result, but not as to the method of implementation.

- adopting decisions for any other purpose consistent with the objectives of this title - excluding any harmonization of laws and regulations of Member States. Decisions shall also be binding, with the Council acting by a qualified majority.

- establishing of conventions to be recommended to Member States. Once at least half the Member States have adopted them, conventions shall then enter into force for those Member States. Measures implementing conventions to be adopted within the Council by a qualified majority of two thirds.

This last point is an attempt to speed up the process of national ratification of third pillar conventions - there have been long delays in completing the process of national ratification of some of the existing third pillar conventions. The proposal is quite a common device in other international treaties and conventions, but has been avoided in EU practice because of the desirability of maintaining uniformity and a common legal area. This proposal is therefore closely linked with the continuing debate about "flexibility".

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31 Evidence to Select Committee on European Legislation, David Davis, p.14-16.

There are proposals regarding an increased role for Community institutions in these matters. A new right of consultation is suggested for the European Parliament on certain measures, and the proposal that the EP may deliver an opinion within a time limit, which shall not be less than three months. The present situation is that the European Parliament has only a general right to be consulted and to ask questions about the "principal aspects" of third pillar activity. There are also proposals to allow the European Parliament an annual debate on third pillar matters, as well as to allow the EP a say on the maximum amount of expenditure, and a right to regular information and consultation about Council decisions on specific financing.

The Dutch draft also offers proposals which would considerably expand the role of the European Court of Justice. Current third pillar provisions give the ECJ only a very small role. Article K.7 would now give the ECJ jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions, conventions, and on measures implementing them. The Court would also be able to review the legality of framework decisions in actions brought by a Member State, the Council or the Commission on various grounds, and given jurisdiction to rule on any dispute between Member States when such a dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Conservative Government was opposed to the extension of the powers of the Court in principle, and in particular on third pillar matters. It had previously insisted that arrangements for the Europol Convention must avoid ECJ jurisdiction as far as the UK is concerned.[32]

D. Second Pillar - Common Foreign and Security Policy

All Member States agree that increased cooperation and effectiveness in Second Pillar matters is desirable, particularly after the divisions over the Former Yugoslavia. Disagreement is focused mainly in the areas of decision-making (a possible extension of majority voting into certain areas of the CFSP), and defence.

The Dutch Addendum represents a refinement on texts contained in the Dublin draft. The CFSP remains outside the first pillar institutions (Council, Commission and Court), with the European Council[33] continuing to have a preeminent role, being responsible for defining the principles of and the general and strategic guidelines for the CFSP. The latest draft also contains a reinforced political solidarity clause, new definitions of purpose of common positions and joint actions and procedures for adopting them, and a Declaration on the

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32 The solution finally adopted was that all the other Member States opted to refer any disputes arising from the Europol Convention to the ECJ, but any dispute involving the UK would fall to be resolved by the Council of Ministers.

33 The European Council is not an institution of the European Community. It is the name given to the twice-yearly summit meetings of the Heads of State and Government which began in March 1975 and was formally recognised in the Single European Act of 1986. It consists of the Heads of State and Government of the Member States, assisted by their Ministers for Foreign Affairs, together with the President of the European Commission. It is not a legislative body, but is charged with providing overall political guidance to the Union.

establishment of a policy planning and early warning capability. The European Council is responsible for defining those areas where the Member States have "common interests", and common strategies are to be implemented through joint actions and common positions. On the implementation of the CFSP, there are proposals to make joint actions more effective. Initiatives would come from either the European Council or Council of Ministers, and decisions would be taken by the Council on the basis of guidelines from the European Council. There is no right of initiative for the Commission, and no mention at all of the European Parliament.

The Presidency draws a clear distinction between what is referred to as "fundamental foreign policy decisions", which would be taken at the highest level on the basis of unanimity, and those decisions necessary for implementation of that agreed policy, in which it is proposed to introduce qualified majority voting. Presidency proposals would result in all decisions within the framework of an agreed common strategy (except those with military or defence implications) being taken by qualified majority voting, whilst decisions on common positions and joint actions outside the framework of a common strategy would continue to be adopted by unanimity. This would be an change in the current situation in the Treaty on European Union, where implementation decisions may be taken by majority voting once the principle has been conceded on the basis of unanimity.

1. Security and Defence

Under the revised draft texts, the scope of the Union's objectives in security and defence would be extended. In addition, the new Dutch draft proposes a change in the relationship between the Western European Union (WEU) and the EU, explicitly mentioning the objective of gradual integration of the WEU into the Union. The question of a defence capability for the EU is highly contentious. There is general agreement that the WEU should provide the vehicle for the Union's new quasi-military objectives, but there is disagreement as to how the two bodies should be related. Britain has opposed any move towards ending the institutional and legal separation between the WEU and EU, whilst accepting that various practical measures could be taken outside the Treaty to improve Europe's ability to undertake limited military actions.[34] Other Member States have sought to give the EU authority over the WEU in the implementation of Petersberg tasks by using the word "instruct", and to specify a merger between the two bodies. This would also raise questions for traditionally neutral states within the EU, (Sweden, Austria, Finland and Ireland), as well as for Denmark which only has observer status in WEU.

The Conservative Government did not see a case for strengthening Article J.4 (now J.6) regarding Common Defence, pointing to the difference in membership between the two

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34 see Deposited paper 3S/2695 - UK Memorandum March 1995.

organisations, and the difference in obligations and rights between the organisations[35]. The UK considered that giving the EU responsibility for common defence would make enlargement more difficult.[36] The Conservative Government supported closer practical cooperation between the EU and the WEU, but opposed the merger of the WEU with the EU on the grounds that this would give neutral countries a voice in decisions about the armed forces of those countries bound together by mutual defence guarantees. The former Foreign Secretary, Malcolm Rifkind, stated that the UK considered that this could potentially jeopardise the arrangements agreed at the Berlin North Atlantic council in June 1996, which allows the WEU to draw on NATO assets, capabilities and planning for operations.[37]

The draft would bring closer the prospect of a Common Defence Policy with its revised texts on defence and security, although no timetable is offered for its introduction. The Maastricht treaty stated that the CFSP should include "the eventual framing of a common defence policy, which might in time lead to a common defence".[38] The text proposes changing the wording to the "progressive framing of a common defence policy (supported by a common armaments policy), in the perspective of a common defence".[39] This is the result of a compromise between views of the Conservative Government which saw no reason for altering the original wording, and the views of other states such as Germany and Italy, which favour a definite timetable for achieving both objectives. The revised draft also gives Treaty basis to the so-called Petersberg tasks - that is, humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.[40]

On the WEU, the Dutch text adds to the existing provisions, adding to "The Western European Union is an integral part of the development of the Union",[41] that the objective is "of gradual integration of the WEU into the Union".[42] The objective of a merger has previously been strongly resisted. The altered wording would allow all EU states, including the WEU observers, to participate in the planning and conduct of a WEU Petersberg operation if they chose to be involved in it. Decision-making would be made jointly with the WEU. The new proposals maintain the existing provisions which recognise the "specific character of the security and defence policy of certain Member States", and "respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework".[43] This covers NATO, as well as other defence arrangements (e.g. Eurocorps), neutrality, or UN Security Council status.

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35 Library Research Paper, "IGC Issues: Progress and the Dublin Draft", 96/114, 10 December 1996, p.31.

36 Malcolm Rifkind, Minutes of Evidence to Foreign Affairs Select Committee, 25 February 1997, p.42. For example, the Russian Federation has so far appeared relaxed about the prospect of the Baltic States joining the EU, while it is extremely hostile to the suggestion that they might join NATO.

37 Foreign Secretary, Minutes of Evidence to Foreign Affairs Committee, 25 February 1997, p.42

38 Treaty on European Union, Article J.4.

39 Dutch Addendum, Article J.6 (former J.4), p.37.

40 Paragraph II.4, *WEU Petersberg Declaration*, June 1992.

41 Treaty on European Union, Article J.4(2).

42 Article J.6 (former J.4).

43 Treaty on European Union, Article J.4(4).

An additional article also proposes that closer cooperation between two or more Member States should not be blocked - presumably to allow for Eurocorps.

The European Parliament is mentioned, and the draft maintains the EP's right to be kept regularly informed by the Presidency and the Commission. The Presidency should consult the EP on the main aspects and basic choices of the CFSP and ensure that its views are taken into consideration. Under the new proposals, the European Parliament would also be entitled to ask questions of the Council or make recommendations to it, and to hold an annual debate on progress in implementing the CFSP. A change to the existing situation is proposed whereby the right of initiative would be shared between the Member States and the Commission, both of which would be able to submit questions and proposals to the Council, and proposals for emergency procedures to convene an extraordinary Council meeting.

2. Decision-making

A majority of Member States have suggested that the unanimity requirement in CFSP is one of the main reasons for the failure of the CFSP to fulfil expectations. There is still a wide range of opinions on the extent to which the relaxation of the national veto is acceptable, with the UK categorically opposed to extension of majority voting into CFSP matters.[44] One solution has been to propose the introduction of "constructive abstention" (Article J.12). This would maintain the general principle of unanimity whilst accepting the concept of constructive abstention. It is proposed that abstentions may be qualified by making a formal declaration, whereby the Member State(s) concerned shall not then be bound to apply the decision, but will accept that the decision commits the Union and shall refrain from any action likely to conflict with or impede Union action based on that position. If those qualifying abstention represent more than one third of weighted votes, then the decision shall not be adopted.

The proposals also suggest that all decisions taken in the framework of common strategies, including decisions to issue declarations or undertake demarches, shall be adopted by the Council acting by a qualified majority, as should decisions implementing common positions or joint actions, the qualified majority to be at least 62 (weighted) votes in favour, comprising at least 10 Member States. This does not apply to issues with military or defence implications, which would continue to be taken on the basis of unanimity. Procedural matters would require a majority of members of the Council.

3. Representation of the Union

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44 Malcolm Rifkind, Foreign Secretary, Minutes of Evidence to Foreign Affairs Committee, 25 February 1997, p.42 Hc 148.

The Irish Presidency draft rejected proposals which had been made for the creation of a "Mr/ Mrs CFSP", outside the existing structures, to represent the CFSP. The Presidency also rejected the proposal for a person of Secretary General rank within the Secretariat to work alongside the current Secretary General (this was the British position). The draft instead proposes that the Union continue to be represented by the Presidency on CFSP matters, and to express the position of the Union in international organisations and international conferences, and nominates the Secretary General of the Council to fulfil the role of "enhancing the effectiveness, continuity and visibility of the CFSP". The Dutch draft maintains this approach - the Secretary General, appointed by the Council (acting by QMV) for 5 years, to assist the Council re the CFSP, shall contribute to the formulation, preparation and implementation of policy decisions, and may conduct political dialogue with third parties (acting on behalf of the Council at the request of the Presidency). Consistency should be ensured through continued full association of the Commission.

The Secretary General of the Council is an official, rather than a politician, therefore implying a rather less high-profile role than many delegations had originally envisaged. The appointment of a prominent person as a "Mr or Mrs CFSP" would have potentially undermined the position of the Presidency (and therefore the primacy of the Member States) in representing the Union. A possible result of the current proposals would be the creation of a new post of Deputy Secretary General to undertake some of the duties of the current Secretary General.[45] Article J.7 would allow the Council to appoint a special representative with a mandate to deal with particular policy issues - although in practice this power already exists. Special representatives have been appointed to deal with crises in the former Yugoslavia and Central Africa.

4. Financing of CFSP

There has been some dispute on the question of financing the CFSP - Article J.11 of the TEU states 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 European Parliament would be involved, or be charged to the Member States themselves on a scale to be determined. This has created some dispute with the EP which has demanded budgetary control over all areas of CFSP expenditure.

The new draft proposes that, as well as administrative spending, operational expenditure for the implementation of CFSP decisions should be charged to the EC budget, other than in those areas having military or defence implications and cases where the Council unanimously decides otherwise. This replaces the Irish draft text where it envisaged qualified majority voting in this area. The Dutch draft follows the Irish text, whereby expenditure not charged

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45 Research Paper 96/114.

to the budget of the European Communities will be charged to the Member States on the basis on national shares of EU GNP, unless the Council acting unanimously decides otherwise. Again, this differs from the Irish text which envisaged the Council acting on a proposal from the Commission.

5. Draft declaration to the Final Act

Essentially identical to the earlier Irish draft, this declaration proposes the establishment of a new policy planning and early warning cell, placed within the Council Secretariat under the responsibility of the Secretary-General, which would be charged with establishing "appropriate cooperation with the Commission" to ensure full coherence with Union's external economic and development policies. This would include personnel from the General Secretariat, the Member States, the Commission and the WEU. The declaration includes a commitment by Member States and the Commission to provide information, including confidential information, to the unit.[46]

E. Legal Personality of the Union

The question of legal personality for the European Union is contentious. The Dutch draft endorses the view that the Union should have legal personality, while noting that some Member States dissent from this and regard it as unnecessary. The current situation is that the Treaty does not provide for the European Union, as distinct from the European Community, to conclude international agreements. It is argued that European representatives, when negotiating with third countries or international organisations, need to deal with the whole range of issues covered by the Treaty on European Union. Legal personality would allow the EU to conclude its own legally binding agreements with third countries and other international organisations, and potentially to send and receive legations. The three separate Communities which make up the first pillar and which have largely common institutions (ECSC, EEC, EAEC) have three distinct legal personalities, but there is no legal personality for the EU as a whole, or when acting on second or third pillar matters.

The proposed new Article A takes up and expands on the Irish Presidency's suggestion of explicitly conferring legal personality on the EU, and merging the existing legal personalities of the three Communities and that of the Union into a single legal entity.[47] The draft emphasises that this proposal is made on the assumption that the pillar structure of the Treaty on European Union would remain unchanged and that the institutions of the Union shall

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46 The Conservative Government submitted proposals for a planning capability for the CFSP which can be found in Annexe C of the White Paper on the IGC, Cm 3181, pp.31-32.

47 This article, with minimal changes, is also to be found as a Presidency paper (CONF 3875/97, 17 April 1997).

exercise their powers under the conditions, for the purposes and in accordance with the procedures as specified for the pillars in the Treaty. As the Second and Third pillars are governed by distinct procedures, an additional amendment is proposed to Article J.7(1) (former J.5(1)) of the TEU to stress that the "Presidency shall represent the Union in matters coming within the common foreign and security policy, including with regards to the conclusion of agreements between the Union and one or more States or international organisations". It does not alter in any way the respective features of the Community, the CFSP and JHA, and remains to be complemented by appropriate provisions on concluding international agreements in the CFSP and JHA areas.

The Conservative Government has been hostile to the idea of legal personality for the Union, considering that it is "not an appropriate change for the Union".[48] In evidence to the Select Committee on European Legislation, David Davis stated that the British Government considered that the acquisition of legal personality for the Union would represent a fundamental change to the legal structures of the Treaties, and undermine the intergovernmental nature of the Second and Third Pillars. The British Government did not accept that a lack of legal personality hampered the Union's ability to act effectively on the international scene, and considered that legal personality for the Union would constrain national Governments' freedom to conclude Treaties - representing an unacceptable transfer of competence.[49] This issue is clearly still a matter for negotiation.[50]

F. Closer Cooperation/ Flexibility

The question of "flexibility" or closer cooperation, is one of the major areas still to be resolved in negotiations. This refers to the arrangements for a limited number of Member States to cooperate more closely in specific areas using the institutional framework of the Union. Although most Member States agree on the necessity of flexibility, it is with differing degrees of enthusiasm. It represents a significant departure from the practice and spirit of the Treaty of Rome, which had enshrined the principle of progress as a convoy. However, the Schengen Agreement and the British opt-outs from the Social Chapter, and from the Single Currency, have established precedents, and it is widely considered that some institutionalisation of the principle of flexibility is necessary both within the existing Union, and to avoid paralysis in a future enlarged Union of potentially 20 or more Members. The question of which flexibility mechanisms are considered necessary will depend to a great extent on progress in some of the substantive areas before the IGC, and is therefore a matter likely to be resolved at a late stage of the negotiations. The former Foreign Secretary, in his evidence to the Foreign Affairs Committee on 25 February 1997, stated that this matter

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48 David Davis, Evidence to Select Committee on European Legislation, p.14.

49 Malcolm Rifkind, Foreign Secretary, Minutes of Evidence to Foreign Affairs Committee, 25 February 1997, p.42.

50 The issues are also discussed in Library Research Paper, 96/114, pp.32-34.

depended on "how much further integration in the areas that we would not be able to support, other countries might think to be essential".[51]

Some degree of flexibility has already been achieved. The Maastricht EMU provisions recognise that not all of the Member States will move to the third stage of currency union at the same time, or at all; the Social Protocol facilitates a 14-state arrangement for social policy legislation which does not apply to the UK but makes use of the EU institutions; the third pillar refers to the possibility of closer cooperation in justice and home affairs between two or more of the Member States providing that it does not conflict with or impede 15-state cooperation. The latter provision gives a shadowy EU legitimacy to the Schengen Agreement, which has otherwise been completely outside the Treaty. Although flexibility has occurred in practice, proposals to institutionalise "closer cooperation" within the Union, with ground rules for its implementation, raise important political and legal questions which have not been fully met. In particular, concern has been raised about the jurisdiction of the ECJ in areas of closer cooperation, and about how to prevent the undermining of the *acquis communautaire*.

The Dutch draft follows the Dublin draft in identifying the flexibility issue as being one of the most important before the IGC, and moves it forward by proposing specific draft texts. These include a general clause applicable to the three pillars, setting out the general conditions and institutional arrangements for closer cooperation; this is designed to establish a clear framework for using such cooperation, while preserving the basic principles of the Treaties and safeguarding the interests of any Member States which might not participate in such closer cooperation from the outset. There are also specific enabling clauses applicable to each pillar, setting out the conditions for closer cooperation in each of those areas; a particular role is conferred upon the Commission to control the compatibility of any request for closer cooperation with the conditions set out in the Treaty, particularly where concerning the first pillar. There are in fact already two concrete proposals for flexibility: constructive abstention in second pillar matters (CFSP), and the idea of conventions under the third pillar (JHA) entering into force for some Member States before they have been ratified by all.

The Conservative Government articulated a very clear position on the matter of flexibility. A detailed account of the Government's position on flexibility is given in David Davis' evidence to the Select Committee on European Legislation.[52] This emphasises the requirement for the "agreed by all" condition, meaning that there has to be agreement from all 15 Member States before closer cooperation could take place, not just amongst the proposed participants. This is one of the most contentious areas, and although it is clear that the UK has been in a minority in this area, there is support from Denmark, intermittently also from Sweden. Mr Davis also refers to a Portuguese proposal to avoid what he calls the "Franco-German veto bypass" option. The second condition which the Conservative

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51 Malcolm Rifkind, Foreign Secretary, Foreign Affairs Committee Report, 19 March 1997, p.xxii.
52 Select Committee on European Legislation, 5 February 1997, pp.17-21.

Government insisted upon is the "open to all" clause, which means no financial or other penalties for non-participants and no barriers to late joiners. The "open to all" condition was contained in the Dublin Outline,and would discourage the formation of regionally-based sub-groups. Thirdly, any flexibility provisions should make no presumption that there is a common goal in all areas, and should permit permanent opt-outs where necessary. Lastly, there should be a clear legal distinction between obligations undertaken by a "flexible" group and the Community *acquis*, to ensure that non-participants are not affected by "flexible" jurisprudence. The Conservative Government voiced concerns regarding the possibility of knock-on consequences for the Member States that were not participating, in particular the possibility of the ECJ indirectly being given jurisdiction over the UK in such matters.

The Labour Government has stated that it would not object to the use of "constructive abstention" in CFSP matters, or to "some degree of differentiation in Justice and Home Affairs", in other words in areas of intergovernmental cooperation. On first pillar matters, the new Government is cautious towards a process which may entrench the practice of opt-outs, and has indicated that it is concerned to preserve the principle of Community law applying equally to all Member States.[53]

The "agreed by all" condition is likely to be central to the negotiations on flexibility. The main Franco-German proposal is that the Council should decide on issues of closer cooperation but that no Member State should have a right of veto. The British position has been strongly that "closer cooperation" should have the approval of all Member States, not just those wishing to go ahead, in other words retaining a national veto over flexibility proposals. This question of whether a group of countries wishing to go ahead should have access to EU institutions even if a minority of countries are strongly opposed, is likely to be one of the most contentious. The Conservative Government made clear its position, that this would be unacceptable, and that closer cooperation should only go ahead if all 15 countries were prepared to allow a group to go forward. The former Foreign Secretary told the Foreign Affairs Committee on 25 February 1997 that the Franco-German position was unacceptable "because the institutions of the European Union belong to all 15 countries", and argues that the concern that countries in the minority would block others proceeding is misfounded, pointing to the UK position on the Social Chapter, and the UK and Denmark's position on EMU. The new Labour Government has also indicated that it would be opposed to "flexibility" proposals leading to a "hard-core" of countries based on those countries which join EMU, and that flexibility should only apply where all 15 states agreed and more than half, or perhaps 10, agree to take part.[54]

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53 Doug Henderson, "Britain and the EU -A Fresh Start", 5 May 1997.

54 *The Independent*, Friday 9 May 1997, p.20.

The draft also makes very brief mention of financial provisions. Expenditure from implementation would be borne by the participating Member States, apart from administrative costs for the institutions - presumably to be borne from the EC budget.

Other institutional questions resulting from flexibility are not raised by the draft texts. The Commission would have to retain its collegiate role, that is Commissioners of states not participating in an area of enhanced cooperation would need to retain full rights in recognition of their functional rather than representational role. Regarding the European Parliament, the question of whether only MEPS of participating states would be able to comment and vote on implementing legislation is unanswered. This clearly could cause organisational problems and undermine the collegiality of the EP.

G. Role of National Parliaments

The British Government tabled a Treaty Protocol on the involvement of National Parliaments on the basis of a recommendation from the Select Committee on European Legislation.[55] It appears to garner general acceptance, and makes an appearance in the Dublin Draft.[56] This Protocol is designed to allow a minimum notice period for national parliaments to consider any text with legislative implications, to allow analysis, debate and influence at national level before decisions are taken at European level. A Treaty Protocol, such as the one proposed, has the binding force of a Treaty provision and is fully justiciable, meaning that the validity of Community acts can be challenged before the European Court of Justice. This Protocol would apply to first pillar matters, although the Select Committee notes that in their opinion there is a strong democratic case for applying minimum notice requirements to matters under the Second and Third Pillars. The Select Committee notes that the Dublin draft falls some way short of their original proposal and argues that it needs "substantial revision if it is to play an effective part in securing the rights of National Parliaments and their electors".[57]

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55 Select Committee on European Legislation, Session 1996-96, HC 36-xiii, 5 February 1997.
56 Dublin Draft, Part C, pp.124-5.
57 Select Committee on European Legislation, p.xx.

III Other areas under discussion

A. Institutions

Although the Dutch Addendum of March 1997 refers in its introduction to a separate paper on institutions, so far this has not appeared. Instead, there have been a number of separate proposals and discussion papers submitted on the various institutions of the EU.

1. Qualified Majority Voting

All agree on the need to rationalise criteria for any extension of majority voting. Broad agreement has emerged that provisions of a constitutional or quasi-constitutional nature, or which constitute derogations to the internal market, as well as those which have a direct impact on expenditure or revenue of Member States' budgets should continue to be subject to unanimity. All remaining provisions are therefore potential candidates for QMV, which could be justified on the basis that they are, for the most part, directly or indirectly related to the functioning of the internal market, which was made subject to QMV by the Single European Act of 1986.

The impetus behind the support for the extension of QMV appears to arise from two distinct factors: the perceived lack of progress in some areas at present subject to unanimity, and fears that, without QMV, Community decision-making in areas subject to unanimity will be paralysed with enlargement. The Conservative Government was firmly opposed to the extension of QMV. In reply to a question from the Foreign Affairs Committee, the Foreign Secretary confirmed that he would oppose any extension of QMV in each and every one of the 18 areas listed in the Irish Presidency paper for possible relaxation of unanimity.[58] As already stated, the Labour Party while in opposition indicated that it would be prepared to see a limited extension of majority voting in the areas of social and environmental policy, and industry and research, whilst insisting on the preservation of the veto on matters such as taxation, defence and security, immigration and decision over the budget and treaty change.

2. Legislative procedures

There is broad agreement that the rationalisation of the EU's legislative procedures is desirable. There is overall agreement to reduce the number of procedures to three - assent, co-decision and consultation. There is general agreement that there needs to be a more

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58 Evidence, p.58

logical relationship between the character of EC legislation and the procedures used to adopt it. Work is continuing on the Presidency's proposed list of provisions which would appear to warrant using the co-decision procedure. There is broad support to simplify the procedure.

The co-decision procedure, which was introduced by the Treaty on European Union (TEU) to enhance the powers of the EP in the EC legislative process, has been used 68 times as at September 1996.[59] Of these, only two co-decision cases resulted in failure to adopt a proposal and one of these has since been remedied. There is some pressure for an increase in the involvement of the European Parliament in Union decision-making, to counter the criticism that the Union is insufficiently democratically accountable. The Dublin draft did not specify which areas might become subject to co-decision, but the proposed elimination of the co-operation procedure implies that all legislative decisions currently subject to cooperation might shift to co-decision.

Whilst agreeing that "the co-decision procedure is cumbersome", the Conservative Government opposed any extension of the co-decision procedure, on the grounds that it would transfer further power to the European Parliament, and stated that it would only consider simplification if this did not involve changing the institutional balance.[60] In its White Paper on the IGC, the Conservative Government stated that it did not feel that the EP needed new powers.[61] The Labour Government has indicated that it would be willing to consider the extension of co-decision procedures in those areas where majority voting applies.[62]

3. Weighting of Votes

The prospect of enlargement in the near future requires that consideration be given to the weighting of votes within the Council. The objective is to ensure that the qualified majority in future represents a minimum in terms of population approximately equivalent to the present figure of around 60%. This can be achieved in two ways - either a dual majority in terms of votes and population, or by adjusting the weighting of Member State's votes. Britain does support a reweighting of votes in the Council on the grounds of "democratic legitimacy", along with most of the other larger states. Smaller states can be expected to resist any reweighting of votes in favour of large states. At present, there is a bias towards the smaller Member States, which is likely to be exacerbated with enlargement.[63] Government proposals

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59 European Parliament Committee on Institutional Affairs, *Initial Working Document on Legislative Procedures and on Council Voting Weights and Procedures*, Konrad Schwaiger (suiveur), 17 September 1996.

60 Government Response to Select Committee on European Legislation, Twenty-Eight Report on the role of National Parliaments in the European Union, Cm 3440, 1995-6, p.7.

61 Cm 3181, p.16.

62 Doug Henderson, "Britain and the EU - A Fresh Start", 5 May 1997.

63 Library Research Paper, "Qualified Majority Voting: the Argument and the Agreement", 94/51, 31 March 1994.

that the QMV structure should be such that the major net contributors as a group should not be capable of being out-voted have not been picked up in the various draft texts. Some countries explicitly link their position on the extension of QMV with the reweighting of votes. The Conservative Government was unable to do that.

The Dutch Presidency has produced a text which outlines the main options for reform of the voting weights.[64] This issue is one of a number of institutional issues likely to be resolved at a relatively late stage.

4. Commission

There is general recognition of the need to maintain an effective Commission, requiring some restructuring of the Commission's internal organisation. The current situation is that each Member State appoints one Commissioner, with two from the larger Member States (UK, Germany, France, Italy, Spain), resulting in a total of 20 Commissioners.[65] While it is widely agreed that there are barely enough substantial portfolios to go around 20, let alone a possible 25 or more after enlargement, the Presidency proposals note that for many Member States the presence in the Commission of a national from each of the Member States is important for public acceptability of the Commission.[66] While there has been some convergence of views, the details of reform of the Commission are still likely to be resolved towards the end of the negotiations. In particular, there is no clear agreement on the final size of the Commission. The issue is one of balancing national representation and legitimacy with efficiency in an expanding Union. It is envisaged that the smaller states will strongly resist any solutions which propose shared Commission representation or a rota system of representation.

The main areas under discussion are:

- the role of the President of the Commission
- coordination within the Commission
- number of portfolios
- size of the Commission

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64 CONF/3815/97

65 There are currently two Commissioner for the UK: Sir Leon Brittan, who is a Vice-President of the Commission and responsible for External Relations with North America, Australia, New Zealand, Japan, China, Korea, Hong Kong, Macau and Taiwan, Common commercial policy, and Relations with OECD and WTO, and Neil Kinnock, who is responsible for transport policy.

66 See Presidency Note on Commission, CONF 3856/97, 3 April 1997.

There are proposals to strengthen the powers of the President, through giving him/her authority to select the members of the Commission (possibly from a shortlist drawn up by the Member States), to allocate and reshuffle portfolios, and to exercise policy leadership (without prejudice to the principle of collective responsibility), including taking measures regarding organisation and conduct of Commission's work.

It is suggested that coordination within the Commission may be improved by giving Vice-Presidents a coordinating role for a range of activities, for example appointing a Vice-President for external relations, and one for internal economic policy coordination.

A major question is that of the number of portfolios. There is some agreement that the principal tasks of Commission could be most effectively conducted if they were divided into 10-12 portfolios. The Presidency proposes that the possibility of special tasks or missions (e.g. enlargement) can be envisaged for Commissioners not responsible for a certain portfolio. Related to this is the question of the size of the Commission. It is widely recognised that there would be insufficient portfolios for Commissioners if the present system of appointing one Commissioner for each Member State (two from the larger States) continued after further enlargement. The problem therefore is to achieve the objective of an efficient and strengthened Commission, without removing the legitimate expectation that no Member State would be "excluded" from the College. Three main options have been suggested.

i. Commission composed of one member from each Member State, with a procedure for reviewing the Commission's membership when the Union grows to more than 20 states. This would not deal with concerns regarding the membership and representation of very small states such as Cyprus and Malta.

ii. Commission composed of a smaller number of members than the number of Member States, with a rotation of membership among Member States on a strictly equal footing;

iii Commission composed of one Member per Member State, whatever the future number of Member States in the Union.

None of these three alternatives are currently likely to receive unanimous support. Larger states in particular fear a relative increase in the representation of smaller states, whilst smaller states will resist any proposals whereby they would be less automatically entitled to a national Commissioner than a larger state.

B. European Court of Justice

Proposals on the ECJ fall into two categories: those intended to extend the role of the Court, and those related to its operations. Each proposal to extend Community competence would automatically bring further areas under ECJ control. The proposed 'communitisation' of an area of free movement of persons, asylum and immigration in a new Title would materially extend the role of the ECJ. The proposed article on non-discrimination might also provide a basis for cases being brought at the ECJ against Member States. A large extension of requests made to the Court for preliminary rulings might make a review of procedures necessary.

A proposal in the Dublin draft regarding judicial control of fundamental rights has been dropped from the Dutch draft, with the Presidency noting that there were strong differences of opinion on this matter.

The proposals to enhance the role of the ECJ in the Third Pillar replace the current situation, whereby there is merely an option to give the Court jurisdiction to interpret the provisions and to rule on any disputes regarding the application of such conventions. The new Dutch draft would expand the role of the Court in this area substantially. New Article K.7 would give the Court jurisdiction regarding the validity and interpretation of framework decisions, on the interpretation of conventions and on the validity and interpretation of the measures implementing them.[67] The Conservative Government has also put forward some proposals designed to enhance the effective working of the ECJ, which are still under consideration.

C. Subsidiarity

This was the catchword of the British Maastricht debates, and the British Government claimed the credit for the inclusion of a subsidiarity Article in the Treaty on European Union. This stated that,

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far s the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community

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67 New Article K.7, Dutch Addendum.

> Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.[68]

This provision was rather vague and unspecific, and gave rise to criticism that there were insufficiently clear guidelines to the application and monitoring of the principle. A draft text on a new Protocol on the application of the subsidiarity principle was circulated in April 1997.[69] It states its determination to define more precisely the criteria for applying the subsidiarity principle. Each institution is to be made responsible for ensuring it complies with the principle of subsidiarity (self-regulation). The underlying principle should be not to affect the primacy of Community law, the *acquis communautaire*, the institutional balance, or to affect the powers of the Community as interpreted by the ECJ. The proposed text falls far short of a clear and specific definition or explanation of the subsidiarity principle in practice, however it is still an important concept in both the British and Continental debates.

D. Employment and the social dimension

The Dublin draft included a text which acknowledged that while "competence for employment must remain essentially at Member State level, the importance of addressing the employment issue at European level also, in support of action taken at national level, is widely accepted".[70] It is highly controversial, and little progress has been made in negotiations since Dublin. The issue is not included in the Dutch Addendum, although a draft paper was released by the Presidency in April 1997.[71] The position of the Conservative Government was that employment policy is rightly a matter for Member States, who are best placed to take decisions about employment policy in the light of their own particular circumstances and priorities. The Conservative Government opposed any Treaty changes, whether that be a new chapter or new language, stating that the Irish Presidency proposals would not create a single job but would generate pressure for more Community spending. The Conservative Government has also made it clear that proposals for the Council to adopt incentive measures by majority voting and co-decision were unacceptable, and that it remained opposed to any extension of majority voting or co-decision.[72]

The Labour Party made a manifesto commitment to sign the Social Chapter, thus reversing Britain's opt-out, however it has emphasised that matters relating to social security and tax legislation operate on a basis of unanimity, and this will not be surrendered. In Opposition, the Labour Party stated that it had no objection in principle to an employment objective being written into the Treaties, and on a visit to Bonn on 7 May 1997, it was reported that the new

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68 Treaty on European Union, Article 3b.
69 Presidency note: Subsidiarity, CONF 3877/97, 16 April 1997.
70 Dublin draft, p.40.
71 Non-paper: employment and the social dimension, CONF 3857/97, 3 April 1997.
72 Malcolm Rifkind, Foreign Secretary, Minutes of Evidence to the Foreign Affairs Committee, 25 February 1997.

Foreign Secretary had indicated that the UK would be willing to sign up to an Employment Chapter, although specific details have not yet been given.[73]

E. "Other issues"

Many other miscellaneous issues were mentioned briefly in the Dublin draft, but were not carried forward in the Dutch Addendum. A Presidency Note[74] covering various draft texts offers possible suggestions for consideration on:

- Outermost regions;
- Island areas;
- Animal welfare;
- Public Services;
- Overseas countries and territories.

F. Quota-hopping

The issue of quota hopping dates back to the entry of Spain into the EU in 1986, after the EU States had agreed on a system of quotas for the main commercial varieties of fish. The Spanish was not granted such quotas, and therefore found it attractive to buy up the licences from British owners who were leaving the industry. They were then allowed to fish against the British quota. At first, the British Government saw this as an anomaly in view of the system of national quotas, and introduced the *Merchant Shipping Act 1988* to require that vessels registered as British satisfied various conditions, including 75% British crew. This Act was ruled to be against the Treaty of Rome by the so-called Factortame decision. The practice of selling quotas to those in other countries has increased (with Holland a considerable buyer) until quota hoppers now account for 20% of the tonnage of the UK offshore fleet and 10% of the whitefish quota, most of which is landed abroad. In 1996 a further European Court judgement allowed Spanish fishermen to claim damages from the British Government in the British Courts for losses caused by having been illegally excluded from fishing against the British quota in the period before the *Merchant Shipping Act* was suspended.[75]

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73 *The Independent*, Thursday 8 May 1997, p.12
74 CONF 3875/97
75 Christopher Barclay, Science and Environment Section, House of Commons Library.

This has been a major issue for the British Government, although not formally on the Amsterdam agenda. The Foreign Secretary (Mr Cook) is reported as having stated the Government position on quota hopping.[76]

> Britain would also insist on concrete measures to address the quota-hopping issue disrupting the Common Fisheries Policy. But in a break with his Tory predecessors, he backed away from suggestions that the UK would allow the impasse to scupper agreement at Amsterdam, saying he saw no merits in obstruction for its own sake.

The Conservative Government had previously stated that this was an issue on which the British government demanded a satisfactory solution before conclusion of the IGC, and on which the Government was willing to "go all the way to the wire".[77]

IV Conclusion

Whilst the Conservative Government originally claimed that the IGC would be little more than a 3,000 mile service of the Maastricht Treaty", many of the submissions and proposals now undergoing serious discussion would entail major changes. Although the pillar structure of the European Union is likely to be preserved, with CFSP and JHA remaining intergovernmental, the final location of the proposed new Title on the Progressive establishment of an area of freedom, security and justice is likely to remain the subject of intense discussion until the final stages of the negotiation. The scope and nature of any UK opt-out from these arrangements is bound to be a crucial issue for the UK.

Many of the institutional issues under discussion, including the size of the Commission and weighting of votes within the Council, are intended to increase effectiveness and prepare the Union for enlargement, but questions relating to the extension of majority voting, to the competence of the Court of Justice, and increases in the role of the European Parliament also have implications for the sovereignty of the Member States. If flexibility provisions are incorporated into the First Pillar, this would be a significant departure from previous practice within the EC, but important questions still remain to be resolved regarding the role of the EU's institutions, including the Court of Justice, for Member States who do not participate in closer cooperation.

Clearly much remains to be resolved, and there is likely to be intense negotiation on the most sensitive issues before there can be unanimous agreement on a final treaty within the proposed

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76 *Financial Times*, 8 May 1997, p.1.
77 Evidence to Select Committee on European Legislation, p.21.

timetable. An unknown factor is the extent to which the outcome of the impending French elections has an effect on the final negotiations. While the new British Government has now indicated the outlines of its position at the negotiations, the details still remain to be filled in. The Treaty would not come into effect until ratified by all the Member States, a process which could be problematic. It has not been forgotten that in 1992 the Danish electorate rejected the Maastricht Treaty in a referendum. Danish ratification took place only after a special agreement had been reached and a second referendum held. The Member States have tried to learn from the Maastricht experience, but public opinion, troubled by the preparations for a single currency, remains unpredictable in several Member States. The conclusion and signature of a new treaty, whether at Amsterdam or later, may not therefore be the end of the story.

AW/JML

Glossary of terms and abbreviations

CFSP	Common Foreign and Security Policy ("second pillar")
CEECs	Central and Eastern European Countries
EC	European Community, the "first pillar" of the European Union. The umbrella for the three Treaty-based Communities, which are: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC).
ECJ	European Court of Justice
EP	European Parliament
EU	European Union: The institutional framework established by the Maastricht Treaty in 1992
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs ("third pillar")
MEP	Member of the European Parliament
QMV	Qualified Majority Voting
TEU	Treaty on European Union, otherwise known as the Maastricht Treaty
WEU	Western European Union