The IGC : The Draft Amsterdam Treaty

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This paper analyses the text of the latest draft version of the proposed Amsterdam Treaty which is due to be finalised at the European Council meeting in Amsterdam on 16-17 June 1997. It is based on the consolidated draft text released by the Netherlands presidency on 31 May 1997. The history and background to the negotiations are summarized 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.*

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Introduction to terms used

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 are 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. The TEC is also known as the Treaty of Rome. It dates from 1957 but has been amended on several occasions. Articles beginning with 'J' in the TEU constitute Title V or the 'second pillar' of the Union and establish the mechanisms for a Common Foreign and Security Policy (CFSP). Articles beginning with 'K' constitute Title VI or the 'third pillar', currently known as Justice and Home Affairs (JHA).

Phrases such as 'Community Institutions' and 'Community competence' refer to the TEC, whereas as the CFSP and JHA have so far been mainly inter-governmental: they have not involved the Commission, European Parliament (EP) or European Court of Justice (ECJ) to a large extent.

The TEC is divided into 'Parts', 'Titles' and 'Chapters'. The TEU is divided into 'Titles'. One protocol and several declarations are attached to the TEU. The TEC has numerous appended protocols and declarations, including 16 protocols and 33 declarations added by the TEU. The protocols are separate 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.

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 proposed Amsterdam Treaty would include additions and amendments to both the TEU and the TEC. The current text of both is in Cm. 3151. Quotations from the draft Amsterdam Treaty are printed in italics in this paper. The latest draft is headed Consolidated Draft Treaty Texts, is dated 30 May 1997 and has the document number SN 600/97 (C101). Copies are available from the Vote Office.

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I AN AREA OF FREEDOM, SECURITY AND JUSTICE

A. 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.[1]

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

[1] TEU, Article K.9.

Commission and other 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 points 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.[2]

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.

B. The proposed changes

(1) a revised objective for the Union

The draft treaty which is now emerging from the final stages of the IGC 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 draft 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;*[3]

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[2] *Selected instruments taken from the Treaties*, 1993, Book 1, Volume 1, p764.

[3] SN 600/97 (C101) EN 12.

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

According to the draft treaty, the existing "third pillar" would be divided into two parts, one of which would enter the TEC as a sphere of fully-fledged community competence, while the other would remain predominantly inter-governmental.

The first of these would form a new "title" (major sub-section) of the TEC, which would be devoted to the free movement of persons, asylum and immigration and would be placed early in the treaty, following the section on citizenship.

The new title 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 eight articles, two protocols and five declarations.

Article A would establish a general obligation on the Council to adopt the necessary measures, using new and existing powers under the treaties. Article B 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*". In other words the differences of interpretation over Article 7a would be settled in favour of the Commission's interpretation. 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 rules for short-stay visitors from third countries.

Article C 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*".[4]

Article D limits the scope of co-operation in language similar to the 1986 declaration which was quoted earlier:

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[4] Proposed article C2.(b) at EN 16.

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 D 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 recent influx of Albanians to Italy. 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 E would provide for measures promoting greater co-operation in the cross-border workings of the civil law, eg 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, the fourth indent of which would be repealed.[5] 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 F 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.

Article G lays down the voting rules for all of the above measures, apart from two visa issues, the common list and uniform format, the first of which is already identified as being subject to QMV after 1 January 1996[6] and both of which will now be determined in that way. The general rule would be that for the first three years after the entry into force the measures would be taken by unanimity on the initiative of either the Commission or a Member State and after consultation with the European Parliament. If, by the end of three years, measures have not been adopted by this method, then most would fall to be decided on the initiative of the Commission only and by QMV. The role of the EP has yet to be decided: there will either be consultation or co-decision under Article 189(b). Some issues would remain subject to unanimity (ie a national veto) whenever decided: the balancing of the refugee burden, conditions of entry and residence for immigrants, including for the purpose of family reunion,

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[5] This indent merely calls on the Member States to negotiate with each other about reciprocal recognition and enforcement of judgements.

[6] Article 100c TEC, introduced at Maastricht.

free movement of legally resident aliens within the Union and all the matters covered by Article E (cross-border civil law cooperation).

Article H concerns the role of the ECJ. Being part of the TEC would automatically mean that the title would fall under the jurisdiction of the ECJ. This article, however, modifies the way in which 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 judgment to be given. The Commission and the Member States 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.

The provisions on asylum in Article C 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 is proposed 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.

It should be noted that the first of these exceptions 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.

Other protocols and declarations would establish that, despite its involvement in border issues, the Community has no power to determine their precise geographical locations, a matter which remains entirely within national control; that short-term visa 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. 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 pillar VI 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.

There would be a completely new "scene-setting" article K.1 which would list certain criminal phenomena to be addressed:

racism and xenophobia[7]
terrorism
organised crime
trafficking in persons
offences against children
illicit drug trafficking
illicit arms trafficking
corruption
fraud

and three methods of cooperation:

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

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[7] In the latest draft "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 - EN 22.

A new article K.2 would enlarge on the meaning of police cooperation and set a series of targets to be achieved to facilitate the work of Europol.

New article K.3 would similarly define the scope for common action on judicial cooperation 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. New article K.4 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.

References to the European Convention on Human Rights would disappear from TEU Title VI because, in the new draft treaty, they are applied to the whole of the Treaty by Article F.

Article K.6 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. The draft would 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. It has still to be established whether the normal voting rule would be unanimity, as at present, or QMV for common positions, framework decisions and other decisions. Conventions would continue to be subject to the ratification of the individual Member States, in accordance with their own constitutional requirements, but would be capable of entering into force once ratified by half the Member States.

Article K.7 would establish a much greater role for the ECJ than the optional jurisdiction over Conventions granted in the existing treaty. Under the new arrangements the Court would automatically have jurisdiction over conventions and measures implementing them and also over framework and other decisions. This would extend to giving preliminary rulings on questions referred by highest national courts except that the Court would have no jurisdiction to review 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. Disputes between the Member States concerning the action of the Council under new Article K.6 would only go to the Court if they could not be settled by the Council itself within 6 months.

New Article K.8 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 K.9, but a new declaration might underline the

importance of cooperation with Russia and Ukraine on the fight against organised crime.[8] New Article K.10 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 devoted to closer cooperation by a sub-group of member states (see separate section on **flexibility**).

Finally, there is a proposal to 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.

As before, the new treaty provides 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 draft Amsterdam Treaty this is transferred to TEC Article 209b where it would follow on from a strengthened 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

A new protocol would be added to the Treaty of Amsterdam to incorporate the Schengen agreement of 1985 into the treaty system. The protocol refers to the Schengen *acquis*, ie the entire body of rules and agreements achieved so far under the Schengen arrangements. 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. 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

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[8] This was in the 16 May draft, but is omitted from the consolidated draft of 30 May.

not be diminished. Article B.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.[9] Article C contains an option for the UK and Ireland to accept some or all of the Schengen acquis at a later date and an associated declaration looks forward to such acceptance.

Under Article E 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 G 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) A UK opt out?

While the non-involvement of the UK (and Ireland) in the new Schengen protocol is made explicit in the draft treaty, there is as yet no treaty text excluding the application of any part of the proposed new Title on free movement of persons, asylum and immigration to the UK. The new British government has made it clear that it cannot agree to the abolition of internal border controls, or to the dilution of national sovereignty over immigration.

These matters are likely to be the subject of intense negotiation in the final weeks before the Amsterdam Summit. The main difficulty in framing a possible UK opt-out from parts of the new Title is that it has been designed and presented as a single package which is defined in the objectives of the Union as an area of freedom, security and justice. The language used could make it difficult to justify derogations applying to only one or two states. The Netherlands presidency is currently suggesting that a solution might be found which gives treaty recognition to the single travel area between the UK and Ireland, but no treaty language about this has yet been included in the consolidated draft. The presidency states that:

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[9] 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.

> *the Amsterdam Treaty shall recognise the Travel Area common to Ireland and the United Kingdom; those countries shall accordingly be allowed to maintain or adapt their existing laws and regulations relating to the control of persons at their external borders;*[10]

The presidency also agrees that the states not participating in closer cooperation agreements (flexibility), including the Schengen arrangements, should be ring-fenced in the new treaty from the legal effects of these arrangements, including decisions of the ECJ.

An alternative approach might be to follow the European Convention on Human Rights in allowing certain limited derogations for states experiencing war or other public emergency. The UK has exercised its right to derogate under Article 15 of the ECHR because of the security situation in Northern Ireland. It would be possible to frame a similar derogation from the Amsterdam Treaty which would allow member states to derogate from the abolition of border controls on similar grounds. This would imply that the UK and Irish positions were temporary exceptions from a general regime and that the derogations could potentially be lifted or reimposed in the future, depending on the security situation.

As far as control over immigration rules is concerned, the proposals in the draft treaty are designed to bring about greater uniformity in the practice of the EU member states, rather than to remove national discretion over individual cases. The latest draft is significantly different from that of 16 May 1997 in that several of the most sensitive issues are now to be decided by unanimity at all stages and will not be subject to the five-year time-table which is established for most issues in the title. It remains to be seen whether this will be sufficient to meet the objections expressed by the British government.

In the case of the third pillar, now to be refocused on police and judicial cooperation, the current draft leaves open whether the general voting rule is to be unanimity or QMV and this will no doubt be subject to negotiation in the final stages. It remains to be seen whether or not this will satisfy the earlier UK objections.

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[10] EN 11.

II Changes to the Common Foreign and Security Policy

A. Introduction

The Common Foreign and Security Policy (CFSP) was established as the second pillar of the European Union under the Treaty of Maastricht. Under the 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".[11] 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[12].

The second pillar is an area in which the EU has failed to fulfil its expectations. The high hopes expressed for the CFSP during and immediately after the last IGC were quickly dashed over Bosnia. The disintegration of the Former Yugoslavia revealed that the CFSP was neither "common", as Member States were divided on approaches to the crisis, nor was it capable of generating security, nor, given the fragmented and blocked decision-making in the Union, might it even be said to constitute a coherent policy.

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.[13] Many of the changes proposed to the CFSP in the Amsterdam Draft 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 text also revises existing Treaty 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 preeminence of

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[11] TEU, Article B

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

[13] For a series of studies on various aspects and actions of the CFSP see M. Holland (ed), *Common Foreign and Security Policy: The Record and Reforms* (1997)

NATO in European security, and 'Continental' states, led by France, which supported the ideal of a European defence, which would be potentially capable of military actions independent of the USA.

In the past five years the nature of European security has been transformed. NATO has remodelled itself in a manner that many would have thought impossible. By changing itself 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.

Although the more ambitious plans for a European Common Defence have been abandoned, a whole 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 emerged. The EU has identified the need to pursue objectives in these spheres, known from a WEU declaration as "Petersberg tasks".[14] 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 will need to be 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.[15]

Whatever the new emphasis on practical measures to improve the effectiveness of the CFSP, the credibility of the second pillar has again been undermined by the EU's confused response to the crisis in Albania in early 1997. The EU found great difficulties in finding a common position on the crisis. Although some Member States favoured the introduction of a 'stabilization force', a minority of Members, led by Germany, opposed this plan. The UK proposed a compromise move of dispatching an advisory mission which in the end was taken forward. With the EU's reluctance to become directly involved, it is the Organization for Security and Co-operation in Europe (OSCE)[16] that has led the way in seeking to mediate between different factions and to support Albania's precarious institutions. Military

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

[15] 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.

[16] The OSCE is the successor to the CSCE, the 53-member pan-European organisation originally created by the Helsinki Final Act of 1975.

intervention has gone ahead to ensure the distribution of food aid and restoration of the country's infrastructure, but this has been undertaken by a multinational coalition led by Italy under OSCE auspices.[17] The EU has a role in providing and co-ordinating civilian assistance, but its only (indirect) military involvement has been through the WEU's decision to dispatch a police advisory and training team to Albania.[18] Through direct experience of attempting to respond to the Albanian crisis, the Dutch Presidency has once more been reminded of the problems facing the CFSP.

B. Political Solidarity

There is a general sentiment in the Union that the CFSP has been weakened by a lack of collective political will. There is some scepticism as to whether a sense of purpose can be inculcated by Treaty article. Despite this, the Amsterdam Draft suggests amendments to Title V which are aimed at instilling collective solidarity. These include simplifying but strengthening the existing clause relating to the EU's foreign policy objectives and mutual solidarity (Article J.1). In the new Article J.1(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 J.1(1). The latter is in part a reference to the desire of some Member States, such as Finland (in relation to Russia) and Greece (in relation to Turkey), to include an explicit reference to safeguarding the territorial integrity of the Union. On this point, the draft significantly fails to include a specific collective security guarantee within the body of the Treaty. However, the addition of the wording "*in conformity with the principles of the United Nations Charter*" in the new Article J.1(1) provides a reference to an implicit collective security understanding within the Union, as well as to the Petersberg tasks.

C. Direction and Tools of the CFSP

Like the Maastricht Treaty (Article J.8(1) and (2) first indent), the Amsterdam Draft defines the European Council as the ultimate arbiter of the CFSP and it will continue to provide the principles and general guidelines (text moved to new Article 3). However, 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 Draft moves the means by which the EU can pursue its foreign policy objectives from Article J.1(3) to a new Article J.2. The

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[17] See Library Research Paper 97/59, *Albania*, May 1997, pp.23-27

[18] The Multinational Advisory and Police Element (MAPE), see WEU Paris Declaration, Para 47

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 adopted by the European Council under Article J.3 when the Member States have important interests in common, could be an overall approach to a particular country or region or security issue. The Council of Ministers will then take CFSP decisions, (either Joint Actions, under Article J.4, or Common Positions, under Article J.5, or declarations) on the basis of "*general guidelines defined and Common Strategies adopted by the European Council*"[19]. The new Draft seeks to define the boundary between 'Joint Actions' and 'Common Positions' in a clearer way. Under the new Article J.L.4, a Joint Action will "*define the Union's objectives and the means to be made available to the Union to address specific situations where operational action is deemed to be required*". Joint Actions will also now "*lay down their scope, if necessary their duration and the conditions for their implementation*".[20] Under the new Article 5, a Common Position will define "*the approach of the Union to a particular matter of a geographical or thematic nature*". In a further reform, in Article 4(8) the Council of Ministers may ask individual states to undertake specific tasks within the framework of a Joint Action. The place of the Commission in supporting Joint Actions is enhanced by Article J.4(4) whereby the Council can ask the Commission to submit proposals which may ensure the implementation of a Joint Action. For example, 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 present Article J.3(6), moved to Article J.4(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 Article J.2(1) to a new Article 6.

D. Decision-making and Flexibility

The Dutch Presidency has drawn up 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

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[19] Draft Article J.3(2)

[20] Draft Article J.4(1)

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 course co-operation, a Common Position, to be adopted by unanimity.

The Amsterdam Draft moves the text on decision-making from Article J.3 to a new Article J.13. The majority of Member States have suggested that the consensual nature of CFSP decision-making is one of the main reasons for the Second Pillar's failure to fulfil the EU's external aspirations. The Amsterdam Draft therefore seeks a new balance between unanimity (possibility of national veto) and QMV, with the most important decisions of principle (common strategies) to be taken by unanimity in the European Council and most implementation to be decided in the council, if necessary by QMV. The council will also have the power to recommend common strategies to the European Council.

Article J.13(1) accepts that in practice the Council of Ministers seeks to reach decisions by consensus whenever possible. Under this Article, the general voting rule for CFSP in the Council of Ministers is to be unanimity. It should be remembered that under Article J.3(1), these decisions are based on guidelines defined or Common Strategies adopted by the European Council, also by unanimity. If a consensus cannot be reached in the Council of Ministers, then two separate courses of action could occur.

Firstly, under Article J.13(1) individual Members or small groups of Members could constructively abstain from applying the decision in order to allow the majority to go ahead. However, although exempted from implementation, the former States would have to accept that the decision commits the Union as a whole and could not oppose it. If the number of Members recording their abstention represented more than one third of the votes, weighted in accordance with Article 148 (2), then the decision would not be adopted. Importantly, national representatives to the Council would need to be present in Council chamber in order to record their dissension.

Secondly, under Article J.13(2) when faced with an impasse in the Council of Ministers, the Presidency could derogate from Article J.13(1) and put a decision to the vote.[21] Decisions would be taken by QMV subject to Article 148(2). Approval would require at least 62 votes

[21] The adoption of Joint Actions, Common Positions and other decisions and also the implementation of any of these decisions based on Common Strategies under Article J.3(1).

in favour from at least 10 Member States. However, this Article 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 authorized. 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 opposing groups 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 very 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 adopted 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 draft Article J.13.2 is that decisions having defence or military implications would never be taken by QMV. Thus, it could be said that the Amsterdam Treaty is unlikely to promote the greater use of QMV in any 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.

Although an element of flexibility is introduced into the CFSP by the draft Article J.13(1) (and could already be said to exist under the current Article J.4(5)), this is extended by a new Article J.18. With reference to general clause on flexibility to be included in the Common Provisions, this would allow groups of Member States to pursue closer foreign policy and defence co-operation, using the EU institutions, mechanisms and procedures under Articles J.1 to J.11. This could take place only if it respected the powers of the European Communities and the existing CFSP policies, and it would require the unanimous consent of all Members with possible advice from the Commission. The Council could attach conditions to any such consent. In an as yet unfinalized Article J.18(3), non-Member States may be able to participate in acts of closer co-operation under this Article. This may be aimed, in particular, at the WEU Associates, Iceland, Norway and Turkey. Iceland and Norway have also sought to associate themselves with the CFSP under the Declaration on Political Dialogue, annexed to the European Economic Area (EEA) Treaty of 1992.[22]

E. Leadership, Institutions and Cooperation

A weakness of the CFSP has been its dependence on the diplomatic resources of the country holding the Presidency. 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

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[22] Cm 2073, p.258

of the Presidency working together) was created to help remedy this deficiency but lacks coherence. In the Amsterdam Draft old Article J.5 has been revised to take account of this.

Under new Article J.8, 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".[23] 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 Secretary-General in contributing to decision-making and acting on behalf of the Council is further defined in a new Article J.15.

This reform is fairly conservative since the Secretary General already has a role, albeit a largely invisible one, within CFSP policy-making.[24] Since the administrative burden on the Secretary-General will be multiplied by the addition of new CFSP responsibilities, it is possible that the Council Secretariat may need to be strengthened in order to undertake some of his duties, but this may be done without Treaty amendment. The Amsterdam Draft 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*".[25] This is no more than a codification of existing practice. The EU has already appointed special representatives in relation to the Middle East peace process and Rwanda, for example.

Article J.9 is a consolidation of two separate sub-Articles from the existing Treaty. It includes, firstly, the text of the current 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 current 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*".

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[23] Draft Article J.8(3)

[24] More radical proposals 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.

[25] Draft Article J.8(5)

Article J.10 in the Draft 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.[26]

The purely consultative role of the European Parliament in the Common Foreign and Security Policy is set out in the new Article J.11. 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 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.[27]

Article 12, a consolidation of the current Article J.8(3) and (4), concerns the right of initiative. As at present, the Dutch text 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 J.16, 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 Secretary-General and current and future holders of the Presidency. Separately, the role of the Commission in informing and providing instruments to the CFSP is stressed by a minor amendment to Article C of the Common Provisions. The second indent of Article C states that "The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency". To the latter sentence the Amsterdam Draft adds the wording "*and shall cooperate to this end*".

Article 14 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

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[26] 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; EU citizens are able to 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)

[27] 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 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.

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 Draft would also allow deputies of Political Directors to be able to represent their national governments at POCOM meetings.

F. 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 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 Draft would establish a new policy planning and early warning unit, placed within the Council Secretariat under the responsibility of the Secretary-General. 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. The unit could be intended to have an important role in informing the adoption of Common Strategies.

G. 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 has been J.4. Article J.4.(1) states 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". 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 contain important points. Firstly, in Article J4(1), direct EU involvement in defence tasks is "eventual" i.e. it is placed in the future and the formation of a collective security organization within the Union is even more distant and might not happen at all. Secondly, in Article J.4(2) the relationship between the EU and WEU is an informal one and the two remain 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 4 language but also underscored the WEU's role as the "means to strengthen the European pillar of the Atlantic Alliance".[28]

All the Member States are in accord that the WEU should provide the vehicle for the Union's new quasi-military Petersberg objectives, but there is disagreement as to exactly how the two bodies should be related. The UK[29], Denmark and the three EU neutrals, Austria, Ireland and Sweden, have favoured the strengthening of co-operation between the EU and WEU but without any legally binding link between them. The remaining ten Members have supported moves, at varying speeds, to integrate the WEU into the EU. These aspirations are not supported by the current Amsterdam draft, but the presidency notes that further reflection is required.[30]

Under successive WEU Presidencies since Maastricht working links between the WEU and EU have been created and the WEU has been prepared to lead limited military operations. The most recent development here was the establishment at the May 1997 WEU Council meeting in Paris of a WEU Military Committee, composed of military delegates to the WEU meeting in permanent session.[31] While the WEU has largely set out the modalities of a working political relationship with the EU, it has also resolved many of the complexities of a cooperative military relationship with NATO. For example, the Paris Council also approved the mechanisms for political control and strategic direction of WEU operations using NATO assets.[32] The WEU thus stands ready to respond to the EU's new directions in defence and security and a WEU Declaration to this end will be attached to the revised Treaty on European Union. [33]

In a revised version of old Article J.4, now to become Article J. 7 in the Draft, the Dutch Presidency has sought a compromise wording. In Article J.7(1), the Draft replaces the word "eventual" with "*progressive*" and "might in time lead to" with "*in the perspective of*". In effect, this brings a Common Defence Policy slightly nearer and accepts the principle of Common Defence but with no timetable given for its introduction. This point is reinforced in Article J.7(2) which speaks of "*the objective of gradual integration of the WEU into the Union. The Union shall accordingly foster closer institutional relations with it*". It remains to be seen whether this potentially controversial objective will be included in the final Amsterdam Treaty.

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[28] Declaration No.30 on Western European Union, Para 4 (Cm 3151, p34)

[29] This has been the policy of the Conservative Government and of the new Labour Government.

[30] EN 89

[31] WEU Paris Declaration, May 1997, Para 31

[32] WEU Paris Declaration, Paras 11-20. Parallel work within NATO on the support of its European defence pillar has been finalized and is due to be endorsed by the forthcoming NATO Summit in Madrid in July.

[33] WEU Paris Declaration, Para 6

In the meantime, the putative Common Defence Policy has been expanded, under the second indent of Art. J.7(1) to include Petersberg tasks. By using the wording "*humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacekeeping*", the Dutch Presidency has chosen the maximalist interpretation of Petersberg missions.[34] 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.

In the new Article 7(3) a closer linkage between the EU and WEU is further suggested by the replacement of "requests" in the former Article J.4(2) with the wording "*will avail itself*". In using the WEU as the EU's defence practitioner, a difficulty has arisen in that there is a disparity in membership between the Fifteen of the EU and the Ten of the WEU. The remaining five EU states (Austria, Denmark, Finland, Ireland and Sweden) are observers at WEU and all, with the exception of Denmark, adhere to varying forms of neutrality. The new Treaty language in the second indent of Article J.7(3) specifically states that the WEU Observers will be able to be fully involved in the planning, decision-making, elaboration and implementation of WEU operations initiated by the EU.[35] On this point, it should be remembered that the *Decision of the Heads of Government, meeting within the European Union, concerning certain problems raised by Denmark on the Treaty on European Unions*, agreed at Edinburgh in December 1992, states unequivocally that Denmark will not "participate in the elaboration or implementation of decisions and actions of the Union which have defence implications".[36]

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, Article 7(5) of the Amsterdam Draft includes the statement that the obligations of certain Member States to NATO are respected as are the specific defence characteristics of all of the Fifteen. 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 Treaty. To this end the language of Article J.4(5) is reproduced in Article J.7(6).

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[34] There is no consensus on exactly how these tasks should be defined, given that there are differing interpretations of what they consist of, and also of the term 'peacekeeping' in international law. 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 "the 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). Peacekeeping also has different meanings in the UN and NATO.

[35] The end of the Cold War and the transformation of NATO and, in particular, its prospective eastern enlargement have undermined many of the security reasons for European neutrality. The possibility of NATO and full WEU membership is the subject of debate in both Austria and Finland. The current disparity between EU membership and WEU membership could therefore narrow in the future.

[36] Cm 3151, p. 243

Article 7 also includes a commitment by Member States to co-operation in the armaments field.[37] 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 7(4) merely marks a recognition of existing practice.[38] Article 10 of the TEU, concerning the need to review the security provisions of the existing Article J.4, has been fulfilled by the 1996-7 IGC. Article 10 has therefore been deleted from the Amsterdam draft.

H. Finance of the CFSP

The Amsterdam Draft 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 TEU. This 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 EP would be involved, or be charged to the Member States themselves on a scale to be determined.[39] This procedure has created some dispute with the EP which has demanded budgetary control over all areas of CFSP expenditure.

The new wording 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 under Article 203 of the Treaty subject to EP procedures. 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. In a subsidiary note in the Draft the Dutch Presidency has stated that it wishes to define expenditure under the CFSP as being compulsory. Discussions are continuing with the EP over how swift disbursement could be secured from the Community budget when the Council reached specific financial decisions.

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[37] Draft Article J.7(4)

[38] 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.

[39] Article J.11 (2)

The consolidated draft of the Amsterdam Treaty contains a new draft text for an Inter-Institutional Agreement between the European Parliament, the Council and the Commission on these issues.

III 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. However, these matters have proved to be controversial, and the draft Treaty texts still require further work on the extension of qualified majority voting, the reweighting of votes in the Council as well as the composition and organisation of the Commission.

A. Legislative procedures

It is proposed to reduce the number of legislative procedures involving the European Parliament to three: assent, co-decision and consultation, abolishing the so-called "cooperation procedure". An exception is made for EMU provisions, where cooperation would remain as before. The draft Treaty proposes extending the scope of the co-decision process to cover a range of provisions, based on the approach that the matters in question are essentially legislative in character. Areas in which it is proposed to introduce the co-decision procedure include a number of new Treaty provisions, as well as a number of existing Treaty provisions currently subject to either the assent, cooperation or consultation procedure. In all cases where the cooperation procedure currently applies (except EMU provisions), the Presidency has proposed that these provisions should be subject to the co-decision procedure.

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. The procedure is designed to give the EP a stronger role than it enjoys under the "cooperation procedure" which is described in Article 189c, 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 extending its scope, it is proposed to amend Article 189b in order to simplify the procedure.

The new draft removes a number of stages from the existing co-decision procedure. The first difference is that, should the EP reject by an absolute majority of its constituent members the common position adopted by the Council, the act is not adopted. The original Article specified that the EP should first announce its intention to reject the common position, whereupon the proposal would go to the Conciliation Committee. This stage is now removed. Should the EP propose amendments to the common position, and these be rejected by the Council, the proposal then goes to the Conciliation Committee, which has six weeks to consider the common position and the proposed amendments. If the Committee approves a joint text, this law becomes adopted when both the Council, acting by QMV, and the EP, by an absolute majority, approve the text. This must occur within six weeks. If the Committee

fails to approve a joint text, then the act is not adopted. This is also a simplification of the original procedure, where an additional stage had been included to allow the Council to adopt the original text, possibly with amendments, unless the EP rejected it within six weeks by an absolute majority of its members. This stage would now be removed.

The Council would 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 would 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.[40]

The new procedure would give 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 in which it is proposed that the revised co-decision procedure should apply where co-decision does not currently apply are listed below.

New Treaty provisions:

Article (5)	Employment - Incentive measures.
Article 119	Social policy - Equal opportunities and treatment.
Article 129	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 191a	General principles for transparency.
Article 209a	Countering fraud affecting the financial interests of the Community.
Article 209b	Customs cooperation.

[40] Declaration to the Final Act on respect for time limits under co-decision procedure, EN 116.

Article 213a	Statistics.
Article 213b	Establishment of independent advisory authority on data protection.

Existing Treaty provisions:[41]

Article 6	Rules to prohibit discrimination on grounds of nationality (cooperation).
Article 8a(2)	Provisions for facilitating the exercise of citizens' right to move and reside freely within the territory of the Member States. (assent).
Article 51	Internal market (consultation) - rules on social security for Community immigrant workers.
Article 57	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 75(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 84	Transport policy (cooperation) - sea and air transport.
Social policy	Articles resulting from the transposition into the Treaty of the agreement on social policy (Article 2(2)), except for aspects of that Agreement which are currently subject to unanimity (Article 2(3)) (cooperation).
Article 125	Implementing decisions relating to the European Social Fund (cooperation).
Article 127(4)	Vocational training (cooperation) - measures to contribute to the achievement of the objectives of Article 127.
Article 129d 3rd subpara.	Other measures.
Article 130d	Structural and cohesion funds.
Article 130e	ERDF implementing decisions.
Article 130o 2nd subpara.	Adoption of measures referred in Articles 130k and l - research (cooperation).
Article 130s(1)	Environment (cooperation) - Action by the Community in order to achieve the objectives of Article

[41] Current procedure given in brackets.

	130r.
Article 130w	Development cooperation (cooperation).

The proposal to extend considerably the use of the co-decision procedure would clearly increase the powers of the EP. 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*.

B. Size of the European Parliament

The draft Treaty includes an amendment to article 137 of the TEC, which would introduce a limit on the size of the European Parliament, which shall not exceed 700 members. The EP currently has 626 members. The implication is that enlargement will eventually require a reduction in the allocation of seats to current Member States.

C. Qualified Majority Voting

The draft Treaty proposes a list of areas currently decided by unanimity where qualified majority voting (QMV) is envisaged in future. These include:

Article 8a	Right of movement and residence.
Article 45(3)	Compensatory aid for imports of raw materials.
Article 51	Measures in the field of social security necessary to provide freedom of movement.
Article 56(2)	Coordination of provisions laid down by law, regulation or administrative action for special treatment for foreign nationals (right of establishment).
Article 57(2)	Amendment of principles laid down by law governing the professions in a Member State.
Article 128	Culture.
Article 130	Industry.
Article 130i(1)	Adoption of the research framework programme.
Article 130i(2)	Adapting or supplementing the research framework programme.
Article 130o	Setting up of joint undertakings in R&T development.
Article 130s(2)	Environment.

A transitional period of three years is proposed for questions relating to the free movement of persons, which shall be governed initially by unanimity, but shall then move to qmv. The extension of the scope of Article 113 of the TEC (common commercial policy) also involves

an extension of the scope of qmv, as do the new provisions proposed in CFSP for the decision making process. A number of new Treaty provisions would also be subject to QMV, for example:

Article 209a	countering fraud.
Article 209b	customs cooperation.
Article 213a	statistics.
Article 213b	protection of individuals with regard to the processing and free movement of personal data.

D. Reweighting of Votes

This has been a sensitive and controversial issue in the IGC negotiations. Broadly speaking, the larger Member States (Germany, France, Britain, and Italy) have favoured a reweighting of votes in the Council to adjust the current imbalance between larger and smaller Member States. This is felt to be particular important in the context of further enlargement. The smaller Member States have resisted any proposals which would reduce their influence and voting strength. Reflecting this, the Presidency has retained two options in the draft Treaty. Option 1 would simply reweight the votes of the Member States, to ensure that a qualified majority would also represent 61% of the population of the EU.

The "re-weighting" option would be achieved by increasing the total number of votes from the current 87 to 199. With a larger pool of votes it would be possible to reflect the relative populations of the Member States a little more accurately. For example the number of votes allocated to Luxembourg would increase only from 2 to 3, whereas the number of votes allocated to each of the four most populous states would increase from 10 to 25. Under the present system the UK (along with Germany, France and Italy) has 10 votes out of 87, ie 11.5% of the total. Under the proposed new system the UK, Germany, France and Italy would have 25 votes each out of 199, ie 12.6% of the total. This would still fall short of true proportionality based on population which would give Germany approximately 22% and the UK 16%.[42]

Option 2 would maintain the current weighting as set out in Article 148(2) of the TEC, with the current threshold being maintained at 71.2%, but requiring a verification that this majority must represent at least 60% of the total population of the Union. This is the so-called "double-majority" option.

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[42] See Annex.

E. Commission

An amendment to Article 158(2) of the TEC on the appointment of Members of the Commission would give the European Parliament the right to approve the nomination for President of the Commission. This increases the power of the European Parliament in this area, because at present the EP is consulted about the Presidency of the Commission but has to approve (or reject) the Commission as whole.[43] A second amendment would require that the Member States nominate the other Members of the Commission "by common accord" with the nominee for President. This would strengthen 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, could veto other nominations for the Commission. A new insertion into Article 163 of the TEC would provide that the Commission should work under the political guidance of the President. Again, this would strengthen the role of the President within the Commission.

No draft texts are presented on the composition and organisation of the Commission. This has been highly controversial. There is broad agreement that the present situation of appointing one Commissioner from each Member State and two from the larger Member States will be untenable after further enlargement. However, there is little agreement on a new system. Smaller states in particular have resisted any suggestion of removing the automatic right for a national Commissioner, particularly in the light of proposals to reduce their voting weights in the Council.

F. Economic and Social Committee

The draft Treaty proposes extending 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.

An amendment to Article 198 of the TEC would also allow the Economic and Social Committee to be consulted by the European Parliament.

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[43] Article 158 of the TEC.

G. Committee of the Regions

A number of provisions are included to give greater autonomy to the Committee of the Regions(COR). Protocol number 16, which currently provides that the Economic and Social Committee and the Committee of the Regions should have a common organisational structure, would be deleted. It adds to article 198a 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 draft proposes widening the scope of areas in which the COR should be consulted, to include guidelines and incentive measures in employment, legislation on social matters, and public health.

IV ROLE OF NATIONAL PARLIAMENTS[44]

The draft Protocol[45] on National Parliaments 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).

Difficulties in obtaining documents - attributable to translation, transmission and organisational delays - have been long 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 present 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;[46]

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[44] Section contributed by Robert Rogers, Clerk to the European Legislation Select Committee.

[45] EN 131-132

[46] The definition of legislation in this section of the draft Protocol is based on a proposed addition to Article 151(3) on openness, which requires the Council to define the cases in which it is to be regarded as acting in its legislative capacity.

- a six week period (lengthened from four weeks in the Dublin text) shall elapse between a legislative proposal 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 inter-governmental proposals under the Third Pillar 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 Select Committee on European Legislation reported on the Dublin text in February 1997.[47] 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 the "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.

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

V Employment and the Social Chapter

A. Employment

It is proposed to insert a new Title on Employment after Title VI (Economic and Monetary Policy) of the TEC. This would mean that this Title forms part of the first pillar of the EU, where Community institutions and procedures would apply.

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 1 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 3 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 would 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.[48]

Article 5 of the new Title would allow the adoption of *"incentive measures in relation to employment"* on the basis of Article 189b, the co-decision procedure (involving the European Parliament and qualified majority voting).[49] 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"*.[50]

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[48] Employment Title, Article 2(2), EN 46.

[49] For details on the co-decision procedure, see the section on institutional issues.

[50] Article 5, EN 48.

New Article 6 provides for the establishment of an Employment Committee, to monitor the employment situation and policies in Member States and to provide opinions. This Committee would *"consult social partners"*, meaning the organisations representing the national employers organisations and trades unions, UNICE and ETUC. Its main significance is that it provides an institutionalised voice to ensure that employment matters are taken into consideration.

B. Social Policy

The draft Treaty proposes replacing Chapter 1 of Title VIII of the TEC, the current Social Provisions Chapter, with the existing Protocol 14 of the Maastricht Treaty, known as the Social Chapter or Social Agreement. Thus the terms of this agreement would be applied in future to the UK which "opted out" at Maastricht. The Social Chapter would remain essentially the same as Protocol 14, the main difference being that those areas currently subject to Article 189c, the cooperation procedure, would become subject to Article 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. (See institutional matters).[51]

A new paragraph is inserted into Article 118(2), (formerly Article 2 of the Social Chapter), which allows the Council, acting again according to Article 189b, 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 or in favour of elderly or disabled persons."*[52] This explicitly introduces a reference to elderly and disabled persons into to the Social Chapter for the first time. It ties in with the new clause on non-discrimination which also specifies these categories. However, this does not indicate any new legislative powers for the Community, but concentrates on cooperation between Member States.

Article 119 (Article 6 of Protocol 14) adds to existing provisions on equality between men and women. The Council, again acting according to Article 189b (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

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[51] See *Legislative Procedures* above

[52] Article 118(2), EN 50.

responsible for ensuring this, whereas the new Article provides for Community legislation on the basis of co-decision.

The draft retains a clause allowing for positive discrimination, but replaces "women" with *"the underrepresented sex"*.[53] This is intended to reflect the fact that it is not always women who 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.

[53] Article 119, EN 54.

VI Human Rights

A. Fundamental Rights

The draft Treaty proposes to strengthen the European Union's commitment to what it calls "fundamental rights", and proposes to amend Article 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."*

The existing commitment to respect the European Convention on Human Rights would remain, but this paragraph would in future fall under the jurisdiction of the ECJ.[54]

In addition, the draft 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."*[55]

This commitment was previously included in the preamble to Protocol 14, the Social Chapter, which it is now proposed to integrate into the Treaty.

The draft also proposes a new Article Fa 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 F, and allows for a partial suspension of the rights of a Member State found to be in breach of these principles.

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*

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[54] On the possible implications of this, see Library Research Paper 97/68, *The European Convention on Human Rights.*

[55] Draft Treaty, EN 3.

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 F(1).[56]

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 F. 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.

The draft also contains a corresponding Article in the TEC, which also 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"*.[57]

Amendments to Article O of the TEU would introduce specific conditions for membership of the EU. These are the principles specified in new Article F, giving a Treaty basis to the existing situation. Article O as amended would seem 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.

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 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.

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[56] Ibid., EN 5.

[57] New Article 236 in the TEC, EN 6.

B. Non-discrimination

A new Article 6a in the TEC on non-discrimination would give the EC new powers to act in specified areas. Article 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. This article would entitle 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 new proposal would 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.

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.

C. Data Protection

A new Article is introduced to the TEC on the protection of individuals with regard to the processing and free movement of personal data. The Data Protection Directive[58] 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.

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[58] 95/46/EC

VII Other Changes

A. Animal Welfare[59]

A new draft protocol to the TEC would require that the Community and Member States "*shall pay full regard to the welfare requirements of animals*" while respecting national provisions relating to "*religious rites and cultural traditions*".

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 (in TEC Article 36) strictly limiting the circumstances in which freedom of trade within the Union can be curtailed. Many people suggested that the Treaty should recognise animals as "sentient beings" but British ministers in the Conservative Government objected that the meaning was obscure even in one language, let alone a dozen. In the light of the new protocol, it would be for the European Court of Justice to decide whether the new text would allow a Member State 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 part might mean that bullfighting and the treatment of animals in Spanish festivals would not be affected.

B. Consumer Protection

A brief title consisting of a single article (129a) on consumer protection was added to the TEC at Maastricht. The Amsterdam draft would revise and somewhat expand this article 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 defend 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*".

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[59] Note provided by Christopher Barclay, Science and Environment Section.

C. Environmental Issues[60]

New Article 3d in the TEC

Article 3 lists the main objectives and policies for the Community and this amendment requires that environmental protection be integrated into them, with a view to promoting sustainable development.

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. This Declaration 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."

Amend Article 100(a) (3) of the TEC

The draft states that in harmonisation of health, safety, environmental protection and consumer protection, which are already achieved by majority voting, the Commission will take as a base the high level of protection. It reflects 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.

Amend Article 100a(4) of the TEC

The draft allows for a Member State wishing to apply stricter measures than those agreed for harmonisation. If it wishes to use Article 36 of the Treaty of Rome to prevent imports or exports within the Union, it must notify the Commission. The Commission then has six months within which to verify that the provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. 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

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[60] Note provided by Christopher Barclay, Science and Environment Section

Union. Environmentalists in the USA were critical of the Uruguay Round of the GATT (see page 47) for failing to include provisions of this type.

QMV for more environment decisions

Under the Maastricht Treaty (Article 130r and 130s) QMV was to be the voting rule in the Council for many areas of environmental policy, but 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 were reserved for voting by unanimity. It is now proposed that QMV should apply in these matters too.

D. EU negotiations with other states and international organisations

The draft Amsterdam Treaty proposes some amendments to Article 113 TEC on external trade negotiations, together with two new Protocols and a Declaration concerning the future operation of this article. The amendments to the treaty article would transfer the general procedure for trade negotiations with third countries and international organisations to a new protocol and provide for the definition of trade in services and intellectual property to be dealt with in a second protocol.

Under the first new protocol the basic procedure whereby the Council authorises the Commission to conduct the negotiations would remain, but there would be greater supervision by the Council: the Council presidency would be entitled to accompany the Commission to negotiations where appropriate and the Council would have the power to issue (by QMV) amended directives to the Commission at any point in the negotiation. The Commission would be obliged to furnish the Council with full information and documentation on the progress of the negotiations. The new arrangements would apply, for example, to future GATT/WTO negotiations.

The same arrangements would apply to negotiations on services and intellectual property rights, but the definition of these would be made in the second new protocol. There has been some disagreement in the past as to whether services and intellectual property rights fall properly within the common commercial policy as defined by Article 113. The new protocol would provide broad definitions based on the annexes to the GATT and WTO agreements and a list of exceptions where national governments would permanently retain competence. For example, provided that they remained within the general international obligations of the Community, the Member States would retain the right to regulate trade in services which would affect public morals or public order, or which affect "the health and life of humans, animals or plants". Similarly, as long as matters remain temporarily outside the scope of the

protocol, the Member States will remain competent for making and amending their own national laws and regulations.

The second protocol would be unusual among protocols to the EU treaties in that it will be amendable by unanimous decision of the Council after consultation with the EP, without the normal treaty ratification procedures. The proposed Declaration makes clear that the Council intends to use this element of flexibility in order to establish clear negotiating procedures on a range of issues which are due to be decided in the course of future GATT/WTO discussions.

Amendments are also proposed to TEC Article 228, the article which covers the negotiation of EU agreements with third countries and international organisations in general. These would: (1) confirm that reciprocal trade agreements with other international organisations are decided by QMV rather than unanimity; (2) give an explicit treaty base for the provisional application of agreements pending their entry into force[61]; and (3) provide that the European Parliament is informed, but not consulted about 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 cases the assent of the EP would be required.

E. Flexibility ("closer cooperation")

Flexibility has been one of the buzzwords of the 1996-97 IGC, just as subsidiarity was for the 1991 IGC. Known more formally as "closer cooperation"[62] 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 sanctified 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.[63] 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?

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[61] 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.

[62] "Enhanced cooperation" in earlier drafts.

[63] 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.

Proposals in the draft treaty

The proposal is to insert a new title in the TEU establishing general principles for "closer cooperation" projects and specific new articles about it in each of the three "pillars".

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 are in favour. They must not fragment the EU institutions or affect the 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 consolidated draft of 30 May 1997 contains two possible versions of a new article (5a) specific to the TEC which would create even tighter conditions for any "closer cooperation" projects falling within the Community sphere. In both versions such cooperation would be possible only in areas not subject to exclusive Community competence (eg external trade), but there are differences in the limitations as to action in areas of mixed competence. One version would exclude measures affecting citizenship. In both versions measures 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, but the current draft Treaty leaves open whether this would be done by QMV or unanimity. Unanimity would provide each Member State with a veto.

A new article (K.11) would apply the "closer cooperation" idea to the third pillar, which, if other articles in the draft Amsterdam Treaty are adopted, will in future deal only with police and judicial cooperation. 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, but not veto a suggestion. Authorization would be by the Council and, again, it is not yet established whether the voting would be by QMV or unanimity.

Closer cooperation would be applied to the "second pillar" (Common Foreign and Security Policy) by means of new article J.18 which is discussed in the section of this paper concerned with the CFSP.

It is not clear how much use would actually be made in future of any 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.

F. International Legal Personality

Important changes are proposed to the legal structure of the EU. 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 legal personality for the European Union as a whole, or when it is acting on second or third pillar matters.

The changes begin in TEU Article A. The phrase "The Union shall be founded on the European Communities...' would become "*The Union shall replace and succeeds to the European Community*".

A completely new Article (as yet unnumbered) would then establish that "*The Union shall have legal personality*". The assertion and definition of legal personality currently contained in TEC Articles 210 and 211 would transfer verbatim to the new TEU Article. This would include the provision that legal representation of the Union within the Member States is by the Commission. This might appear odd, but the alternative of responsibility for legal representation being shared between the Council and the Commission might be impractical. It would be difficult for the Council, as the body representing the Member State Governments, to be involved in legal disputes will those Governments, for example about premises and property.

The new article would also confer legal capacity upon the EU in its international relations, "*to the extent necessary for the exercise of its functions and the fulfilment of its purposes*". This would include the capacity to conclude legally binding agreements with third countries and international organisations. TEC Article 228 (as amended elsewhere in the Amsterdam draft) would apply to matters falling within the TEC. It would not apply to the second or third pillars. Negotiations on these matters would be conducted by the Presidency rather than by the Commission. The exclusion of military matters from the potential scope of legally binding EU agreements (an exclusion inserted into the earlier Dublin draft by the Irish presidency) has been dropped from the Amsterdam draft treaty. However the same draft makes military matters explicitly subject to unanimous agreement, so any Member State objecting to this form of commitment would have the power of veto.

The debate about legal personality for the EU is 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 strong and established legal identity as an international organisation in its own right.

The conferral of legal personality does not in itself create a super-state. The legal personality of an international organisation is delineated by the functions set out in its founding documents and the UK already belongs to many such organisations, each with in its own legal personality for specialised purposes. However, the proposed changes in the Amsterdam Draft could go 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.

G. Island Regions

This adds island regions to Article 130a, regarding the aim of *"reducing disparities between the level of development of the various regions and the backwardness of the least favoured regions or islands."* A Draft 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.[64]

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[64] Draft Declaration to the Final Act on island regions, EN 67.

H. Outermost regions

The draft proposes a replacement for existing Article 227(2), which provided for the phasing in of the application of the provisions of the TEC in French overseas departments. 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. There is also a draft declaration on island regions, again recognising that specific difficulties exist in these areas and that special measures may be taken.

A new Protocol on Article 227(2) specifies the areas which should be taken into consideration when adopting relevant measures. These include customs and trade policies, fiscal policy, agriculture and fisheries policies, State aids, access conditions to structural funds and to horizontal Community programmes.[65]

I. Public health[66]

The draft treaty includes proposed amendments to Article 129 on Public Health. 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 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.

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 article 129.

J. Subsidiarity

Subsidiarity, introduced in the TEU, was a subject of much debate.[67] It was included in the Treaty in Article 3b, but this Article has been criticised for being vague, and for not laying down clear guidelines for when and how it was to apply. The draft Amsterdam Treaty includes a new, legally binding protocol to the TEC laying out the principles of subsidiarity and proportionality.

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[65] Protocol to the TEC on Article 227(2).

[66] Note by Alex Sleator, Science and Environment Section.

[67] See various other Research Papers.

This Protocol would oblige 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 would also be required to submit annual reports to the European Council, the Council and the European Parliament on the application of Article 3b. 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 would require the reasons for concluding that a Community objective can be better achieved by the Community to be substantiated by qualititative or, wherever possible, quantitative indicators.[68]

The draft 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 the new proposal on subsidiarity is that the checking and justifying process might lengthen the legislative process.

K. 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.

According to the consolidated draft Amsterdam Treaty, proposals for simplification of the treaties will form the second part of the Treaty. A Declaration attached to the Final Act of the IGC would express the intention of the Member States to complete the codification process as soon as possible following signature.

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[68] Protocol on the application of the principles of subsidiarity and proportionality, EN 75.

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

The draft treaty contains a proposed new Article 7d concerning "services of general interest". 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 proposed 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".

A separate new protocol would affirm the competence of the Member States to fund public service broadcasting.[69]

M. Transparency

The EU has been the subject of much criticism for the lack of transparency in its legislation and operation. It 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."*

This section in the draft Treaty is in part an attempt to answer criticism of opaque decision-making practices. New Article 191a of the TEC would provide 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. Each institution is to lay down the rules of procedure regarding access to its documents.

Article 151(3) specifies procedure for the Council. 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 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.

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[69] EN 70.

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.

VIII CONCLUSION

The IGC which began at Turin in March 1996 is approaching its culmination at Amsterdam in June 1997. Unless there are last-minute delays or deadlocks the leaders of the 15 EU Member States will conclude a treaty which, if ratified later by all of their parliaments, will mark another major 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 many respects Amsterdam will complete business left unfinished at Maastricht where, at the European Council of December 1991, 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.

The Maastricht Treaty was described by Helen Wallace as "a document negotiated in a room without windows".[70] The Amsterdam Treaty will have 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.

The process is not quite finished and some important parts of the draft text still require clarification and decision, but it is already possible to identify 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 the difference will be eroded because some matters will transfer to community competence and, even in the remaining intergovernmental pillars (Common Foreign and Security Policy; Police and Judicial Cooperation) the "community" element will be increased.

- 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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[70] H Wallace, "European Governance in Turbulent Times", *Journal of Common Market Studies*, vol 31, no 3, p296.

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 fundamental rights, free movement issues, including asylum, immigration, 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 in the treaties, is likely to begin. The general principle that some states will 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 extended use of qualified majority voting will make it more difficult for any single state to exercise a veto. Other reforms, for example to the size of the Commission may now be 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.

- the process of turning the "community" into a "union" will be advanced -in particular by conferring legal personality on the union as an international organisation.

There may still be some surprises to come at Amsterdam, but the general outline of the treaty is fairly clear. Once the heads of government have completed the process at Amsterdam there will be a brief lull while the lawyers and translators produce a clean text in all the relevant languages. Then it will be for the parliaments of all the Member States to decide whether they are prepared to approve the treaty or not.

Appendix 1 Possible reweighting of votes in Council

Option 1

MEMBER STATES	Reweighted votes
Germany	25
United Kingdom	25
France	25
Italy	25
Spain	20
Netherlands	12
Greece	10
Belgium	10
Portugal	10
Sweden	8
Austria	8
Denmark	6
Finland	6
Ireland	6
Luxembourg	3
TOTAL	199
QMV	142
Block. min.	58
QMV % pop.	61%

Option 2

The current weighted majority as set out in Article 148(2) of the TEC including the maintaining of the threshold at its current level (71.2%) and the verification that this majority represents at least 60% of the total population of the Union.

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